



May 30, 2023

Federal Trade Commission

Consumer Financial Protection Bureau

Via <https://www.regulations.gov/docket/FTC-2023-0024>

Re: FTC-2023-0024 Tenant Screening Request for Information

Dear FTC and CFPB:

Please accept these comments in response to your request for information regarding background screening issues affecting individuals who seek rental housing in the United States. These comments are authored by the National Housing Law Project (NHLP) and extensively informed by information provided by the Housing Justice Network (HJN). The comments are presented on behalf of both NHLP and HJN, as well as sixteen partner organizations: Louisiana Fair Housing Action Center, Eviction Defense Collaborative of San Francisco, Washington Lawyers' Committee for Civil Rights and Urban Affairs, Law Center for Better Housing of Chicago, Housing Opportunities Program for Equity (HOPE) at The Foundation for Delaware County, Justice in Aging, Shriver Center on Poverty Law, Housing and Economic Rights Advocates (HERA) of Oakland, Washington Low Income Housing Alliance, National Low Income Housing Coalition, Housing Justice Center of St. Paul, Western Center on Law & Poverty, Public Justice Center of Baltimore, William E. Morris Institute for Justice of Phoenix, PolicyLink, and the Michigan Poverty Law Program.

The National Housing Law Project advances housing justice for poor people and communities. We achieve this by strengthening and enforcing the rights of tenants, increasing housing opportunities for underserved communities, and preserving and expanding the nation's supply of safe and affordable homes. Founded in 1968 as part of the War on Poverty to support legal aid organizations and to bolster their capacity on housing law, NHLP works at the crossroads of housing and community development advocacy, legal services for the poor, and civil rights. Our work is grounded in the everyday experiences of low-income tenants and housing advocates, and carry their perspectives into the policy conversation.

A significant aspect of NHLP's work is coordinating and supporting the Housing Justice Network, a nationwide constellation of legal aid attorneys, community organizers, policy advocates, researchers, and other housing professionals who advocate for housing rights and access in their communities, states, and across the country. Founded more than 40 years ago, the HJN has an active national list-serve to share ideas, answer questions, and educate members, and holds national conferences every 18-24 months. Now over 2,000 members strong, HJN advocates interact with low-income tenants and homeowners on a daily basis and have deep insight into current issues and realities for individuals and families in U.S. housing markets.

Rental housing admissions advocacy is central to NHLP's and HJN members' work and an area in which some NHLP staff have concentrated significant professional efforts and an issue of increasing importance to HJN member advocates. NHLP staff and HJN advocates have been at the forefront of efforts throughout the U.S. to reduce and eliminate the scourge of rental application fees, to reduce the use of erroneous, arbitrary, and non-predictive information in rental admissions, to dismantle rental

admissions practices that contribute to residential segregation and counteract racial justice priorities, to combat fraud and consumer abuses connected with rental housing searches and admissions processes, and otherwise to combat discrimination and inequitable treatment in rental housing admissions and make rental housing more accessible to those with low-incomes or adverse background information.

These comments are divided into seven sections:

- I. Pre-application considerations
- II. Application procedures
- III. Algorithms and automated screening tools
- IV. Procedures upon denial
- V. General fair housing considerations
- VI. Criminal history screening
- VII. Eviction records screening.

We have organized these comments in an effort to best concentrate information where it can be most succinctly responsive to specific questions from the Request for Information. Nevertheless we hope you will consider any information that is responsive to any RFI question, regardless of where that information may appear in these comments.

Section I: Pre-application considerations

2. How and to what extent are landlords and property managers informing tenants and prospective tenants about their tenant screening criteria? What are the potential harms and benefits from the current level of disclosure?

...

4. What (if any) information should landlords and property managers be required to provide to prospective tenants in advance of collecting rental applications and fees?

Inadequate disclosure of rental admission criteria and lack of access to detailed rental screening policies is a multifaceted problem that affects rental applicants differently, depending on their objectives and stage in the rental admissions process, yet three common themes arise: (i) impairs consumer thrift in housing searches, as applicants are less able to avoid applying for housing they will not qualify for; (ii) prevents error detection, thus increasing the risk of applicants being denied admission for factual inaccuracies; and (iii) obscures the reasoning behind housing denials, which frequently allows for arbitrary and discriminatory outcomes.

One important reason renters seek access to landlords' admission criteria is to avoid wasting time and resources applying to dwelling units where they are highly unlikely or certain to be rejected. To fulfill this purpose, ideally landlords would disclose their admission policies in sufficient detail for renters to compare their qualifications with the necessary criteria and reliably determine whether they are likely to be admitted. But rental admission policies are seldom made available to applicants in such detail.

Some residential landlords do not provide prospective applicants with admission criteria at all. Others provide only vain statements of little value to applicants, such as warnings that admission may be denied for unsatisfactory credit, rental history, or criminal history—information that landlords are commonly known to consider and reject admission for. Still others provide lengthier descriptions of their rental admission processes and information types considered, but nonetheless avoid disclosing meaningful details that enable a prospective applicant to evaluate her chances. Consider the following

example from MAA, one of the largest residential property management firms in the U.S.:

“Your credit history will be screened through a third-party service provider for approval recommendation. The recommendation will be determined by a mathematical analysis of information found in Your consumer credit report, Your Application, and Your previous rental history. The consumer credit report may include account payment history, number and type of accounts, collection activity, outstanding debt, and other inquiries. In addition, the analysis may consider information such as income-to-rent ratio. . . We have the right to review Your prior rental history, including but not limited to, failure to pay rent timely, eviction history, unpaid rent balance or damages, and any history of disturbances at Your previous residence(s).”¹

Nothing in the text of this policy would enable a housing seeker to assess their chances of qualifying for the housing based on such objective factors as the number of negative trade lines on the person’s credit report, total amount of outstanding debt, the presence of a single dismissed eviction lawsuit, etc. Verbose rental admission policies such as this, which contain little information meaningful to potential applicants, are quite common among multifamily landlords at present.

Note: the above example appears on a rental admission criteria page that a website user may access when applying to an MAA apartment complex, a common place to find such descriptions of landlord admission criteria these days. Note that with many property management websites, a user may need to register as an applicant or even submit a completed application before accessing the admission criteria. Other times, such criteria may be given in paper form, such as when a tenant visits a property management office in person to tour and apply for a unit.

Residential landlords could better assist housing seekers in making wise decisions about where to focus their time and resources were they to make their admission criteria available in enough detail to allow the kinds of comparisons detailed above. Such disclosures enable consumers to identify properties where the particular admission barriers they may have are not disqualifying (or are less likely to be), and to potentially also take steps to meet the relevant criteria before applying (such as by bringing past-due accounts current, paying off or reducing balances on debts, or closing accounts). At the very least, access to sufficiently detailed information could enable renters to avoid spending time and money applying to properties where they stand no realistic chance of admission.

While providing detailed rental admission policies may be helpful *before* a renter applies to a property, knowledge of such criteria is often essential for applicants to determine *afterward* whether a denial (or other adverse action) was based either on inaccurate or improper background information or because of a misapplication of the landlord’s criteria. The lack of access to this information can potentially deter or prevent applicants from detecting possible violations of their credit reporting rights, and ultimately keep incorrectly-denied applicants from gaining admission.

For example, common credit-based admission criteria include limits on the number or percentage of delinquent accounts an applicant may have and limits on the overall amount of delinquent debt, while other credit policies focus on the severity of delinquency (e.g., treating applicants more unfavorably once debts reach 60 or 90 days past due). Such policies often exclude consideration of certain types of accounts, such as medical bills or student loans. With a copy of the screening report and access to the landlord’s detailed screening policy, a rejected applicant with limited resources can, by selectively paying on adverse items and closing the appropriate accounts, potentially come within the relevant

¹ From MAA residency selection criteria, <https://www.maac.com/about-us/faqs/how-to-apply/>.

admission parameters and secure access to housing.² As a Louisiana advocate explains:

“We have been able to overcome denials when it was over a specific eviction record and we can provide more information, also able to overcome denials due to alleged unpaid balances either by disputing the balance or getting prior landlord to forgive the balance or paying the balance.”

Similarly, a Minnesota HJN member gave an example where access to the housing provider’s detailed screening policy enabled advocacy to overturn a rejection:

“A nonprofit landlord used a very complex criminal screening standard with ten categories of crimes each with a different lookback period. When they applied this to an applicant with an extensive but old criminal history, they miscalculated. So we were able to point out all the client’s criminal convictions fell outside the relevant lookback period.”

This is much more difficult without the detailed admission policy, however. Without knowledge of the applicable admission criteria, a housing seeker (or advocate) can only guess at what, if any, additional steps might enable the application to pass the screening a second time around.

An emerging problem is for landlords to impose large application fees and other up-front charges on applicants before ever presenting a copy of the lease agreement—which then deters those applicants from being able to negotiate or walk away from the housing if they object to any provisions of the lease. A Washington, D.C., advocate gave an example of an elderly renter who reported paying a landlord “\$150 for tenant insurance and \$550 for a credit check in order to move into the apartment.” A Georgia advocate stated that large up-front fees, which trap applicants in housing with hidden terms and charges, are also a major problem in the Atlanta area.

Accordingly, residential landlords should be obligated to reduce their rental admission policies to writing and make those policies fully available to applicants—especially applicants who have applied and been rejected or subjected to other adverse action (such as an increased security deposit or co-signer requirement). Prospective applicants should at minimum be provided a description of the landlord’s admission criteria in sufficient detail to make a meaningful evaluation of their individual prospects for admission. Any fees collected before the tenant is shown the proposed lease should be fully refundable if the tenant declines the housing or is denied admission.

10. To what extent do landlords and property managers tailor their criteria for how they assess prospective tenants to their locality?

a. Do landlords and property managers consider the attributes of the potential tenants in their community, such as the prevalence of applicants with criminal or eviction records?

b. How do landlords and property managers ensure they are aware of local laws restricting the use of prospective tenants’ criminal and eviction records in making housing eligibility decisions? How do landlords and property managers ensure they comply with such laws?

c. To what extent are landlords and property managers familiar with regional courts’

² Note that legal representation or other skilled assistance is typically necessary for rejected applicants to secure admission through methods such as this.

practices with respect to civil and criminal records, such as whether courts customarily add attorney's fees or damage multipliers to unpaid rent or what different charge categories and conviction statuses mean in criminal records, and do they consider that when reviewing tenant screening reports?

In the observations of HJN members, most residential landlords form a sense of where their properties fit within a local rental market and will calibrate their admission criteria to attract the “best” tenants they can realistically compete for given the location and quality of the facilities and amenities offered. Publicly, landlords relate screening criteria to such considerations as “minimizing risk,” though often admission criteria appear targeted to other objectives as well. For example, some landlords appear to believe that tighter criminal history screening criteria will better enable them to attract tenants concerned about personal security (or, perhaps, bearing prejudices against those with past involvement in the criminal-legal system). Some landlords may seek a certain profile of tenant so as to market their properties as “upscale” or appeal to students or certain other niche populations, and their screening policies may be designed to favor applicants consistent with that image and disfavor others.

Tailoring based on geographic regions or local conditions appears to be less common among large multistate or national property management firms, however; one reason is because automated screening criteria tend to be adopted at high levels of management for entire portfolios of dozens or even hundreds of multifamily properties. Companies differ in the extent of local discretion that lower-level staff have to adjust or override the standard criteria.

Such tailoring, where it does exist, has both positive and negative aspects for renters with admission barriers. On the one hand, having more properties lower their admission requirements around credit, rental history, and criminal records tends to open up greater opportunities for low-income households and those seeking new opportunities after an eviction or criminal conviction. On the other hand, such tailoring can result in increased admission standards as well, thus reducing such access. And typically, the properties where admission standards are lowered will be the properties in lower-quality conditions and in areas that present environmental hazards (such as crime, unreliable public services, poor air or water quality, etc.) or lesser economic opportunity, whereas the higher-quality properties with superior schools, parks, libraries, and job opportunities are more likely to be the ones more difficult to access.

Given the close connection between typical rental admission barriers (i.e., damaged credit, evictions or housing debts, and criminal history) and membership in certain protected classes (especially, being Black or Latino), the local tailoring of admission policies can be a strong driver of residential racial segregation. This was highly evident in Matthew Desmond's first book, *Evicted*, and reverberates in the observations of HJN members. As a California advocate stated, “the risk of ‘tailoring’ company standards perhaps resulting in even stricter requirements, seems like a considerable risk of that is also the substitution of personal bias or arbitrariness.”

This impact is potentially even worse when admission standards are set at highly exclusive levels across entire portfolios of rental housing, as dwelling units may simply remain unoccupied in some locations rather than made more accessible based on local conditions. And renters with specific admission barriers may find themselves effectively locked out of all housing options altogether. As discussed below, this dynamic is already present for renters with debts claimed by past landlords and is a serious problem for renters with eviction history as well. Such convergence in rental admission criteria is also of increasing concern with respect to criminal history screening, as landlords peg their own criminal history screening criteria to those of fellow landlords.

Landlords and property management companies do not generally demonstrate familiarity with court procedures or judicial records, whether civil or criminal. Indeed, many landlords and property management firms contract with third-party tenant screening companies in part because they trust those companies to better interpret and understand court records than the landlord's own staff could be trained to do (whether at-all or cost-effectively). Even so, the personnel who interpret court records for tenant-screening companies are not necessarily any better prepared to perform this function. For example, Eric Dunn of NHLP learned through discovery in litigation against a major criminal history screening provider that the manager overseeing the team in charge of categorizing particular criminal offense descriptions for use by the company's automated screening tool had a four-year college degree in hospitality management and, other than a single year as a clerical employee with a court, had previously worked entirely in hotel and rental property management. The other members of her team similarly lacked relevant qualifications, and the team frequently coded the same offenses differently.

Some, mostly small, rental property owners routinely search public records sources directly for civil case records or possibly other types of public records matching a rental applicant. They do so because searching directly enables such landlords to obtain records that may be too old to appear in a tenant-screening report or that may be sealed or excluded for other reasons. This highly fraught practice can often lead landlords to incorrectly mismatch a public record to a rental applicant or uncover the existence of a sealed record or some other record that may be objectively unfair to consider (for example, at least one HJN member reported that direct public record searches in that advocate's service area had revealed records of applicants petitions for domestic violence protection orders).

Especially problematic for persons seeking rental housing are debts claimed by prior landlords. Many HJN members recognized landlord-tenant debts, whether legitimate or not, as the number-one barrier to rental housing admissions, with landlords almost universally denying admission to applicants against whom landlord-tenant debts are asserted and substantially never making exceptions. As a Louisiana advocate explained this issue:

“So one of, I would say maybe the biggest bar we're seeing to applicants gaining admission, is an alleged debt to a prior landlord. It has become the stickiest sticking point that we see with applicants, where it essentially freezes their ability to get in anywhere. And it's problematic on a lot of levels, but mostly because it means that whatever the debt prior landlord reported, the landlord can sort of report anything and it's extremely difficult to resolve in any way besides just paying it because, short of suing them, it's really hard to get them to agree to remove anything from the balance. And basically it puts the tenant in the position to either pay it off as quickly as possible or lose their access to housing.”

A Minneapolis advocate echoed these comments, adding “virtually all LLs deny applications when these debts remain outstanding.” Advocates from several other jurisdictions, including from Oregon, multiple parts of California, Georgia, and Boston, all agreed.

This practice has its harshest effects on those tenants whose debts are bogus, or who owe some amount but are billed for inflated balances. But even where such debts are legitimately owed, the practice has adverse public policy implications by forcing persons enduring homelessness or uninhabitable living conditions to prioritize the payment of old debts over their immediate need for decent and secure housing. As the Minnesota advocate added: “The landlord or the collection agency typically wants repayment on terms that are unrealistic for a tenant struggling to gather resources for a deposit and

first and last months rent.”

Eric Dunn of NHLP has similarly observed the virtual unanimity of landlords refusing to accept applicants who owe alleged debts to past landlords; Dunn said that many of the debt collection firms who collect landlord-tenant debts now refuse to negotiate payment plans with past tenants in the belief that the tenant will stop making payments once they secure housing—in other words, that such debt collectors leverage homelessness as a means of collecting their debts. Yet at the same time, Dunn also observed that even having a payment plan and being current on that payment plan is often insufficient to secure admission. As the Louisiana advocate summarized, “it’s like a debt collection cartel.”

Dunn recently observed, in connection with an investigation in Chicago, that some rental landlords will now even deny admission to applicants who have owed landlord-tenant debts within the year preceding the application—even if those debts have since been paid.

A Minnesota advocate further expanded on this problem:

“We have had cases where due to the unique circumstances of the case, a prior debt had no relevance to future fitness as a tenant, but the landlord still insisted on denying on that basis. In our view when a landlord is denying on this basis even in the face of facts demonstrating the debt’s irrelevance to future fitness, the denial criteria is not acting as a legitimate screening criterion but instead as part of an informal industry wide debt collection device. An example where this happened: client shared an apartment with a boyfriend. they split up and client moved out, though for reasons that are in dispute, her name was not removed from the lease. Boyfriend later defaulted on the rent leading to his eviction and a claimed debt by landlord against both boyfriend and client, even though client never defaulted on her rent at prior place or her current place.”

Section II: Application procedures

6. Are landlords or property managers requesting that prospective tenants disclose their credit, criminal, eviction, or other housing court histories in applications (i.e., prior to a tenant screening report being prepared)? Why, and how prevalent is this practice?

Landlords frequently do require applicants to disclose certain background information when applying to rental housing—especially criminal and eviction records, bankruptcies, and sometimes other rental history information such as “ever moved out owing money?” or “ever break a lease.” Typically these disclosures are requested either on a paper application form or an electronic application portal the applicant must fill out. The disclosure requirements may appear in the form of check-boxes or mandatory electronic fields where the applicant must indicate the presence of any such history—and then may be asked to provide an explanation in the margins or on the back of the application form or in an accompanying electronic field. Application materials of this kind ordinarily state that omissions or misrepresentation in these disclosure forms is a separate ground for denial of admission.

Requiring disclosure forms of this kind raises a number of challenges for rental applicants. The first is that filling out such materials can be time-consuming and burdensome for those with eviction records, criminal history, or other items to explain. This may deter them from applying, especially where applicants are asked for details such as court case numbers or contact information for other parties to

events that may have occurred many years in the past.

Second, landlords commonly obtain information about applicant criminal history, eviction records, and other such information through third-party background checks even if the applicant has disclosed matters on the application form. This means the applicant's disclosures have little practical value to the landlord. Yet if any discrepancies are found between the disclosures an applicant made on the application form and the contents of the background check, the landlord may contend that the application omitted information or stated false information on the application form and, if asked to justify the denial, attribute it to the supposed misrepresentation or nondisclosure of adverse background information. This practice essentially turns the application form into a "gotcha" that landlords will use to avoid scrutiny of the genuine reasons for denying an applicant. "We've definitely had this problem," said a Louisiana advocate, recalling a client who lost their spot on a public housing waiting list for failing to disclose an eviction record.

Commonly, when applicants fail to disclose background information on application forms, that failure is not malicious but instead related to a lack of knowledge or genuine misunderstandings. As an HJN member from Massachusetts observed:

"The other problem we see is oftentimes those questions get asked of, 'was it a felony?' or 'was it a conviction?' And people don't know the answer to that question, and it's quite complex. And because of that they may give the wrong answer to that, and end up having a 'gotcha' happen for that reason."

Eric Dunn of NHLP reported having brought litigation on behalf of a rental housing applicant who was denied admission to a HUD-subsidized project-based Section 8 property for having falsely answered "no" to an application form question asking if she had ever been convicted of a crime:

Some years earlier the woman had been cited for the possession of marijuana and paid a small fine. The matter was handled in much the same way as a traffic ticket, so she did not understand that by accepting and paying the fine she had effectively pleaded guilty and been convicted of a misdemeanor. The offense did not disqualify her under the property's admission criteria and the landlord admitted she had been denied only for the false statement on the application, which the landlord discovered through a third-party background check. The landlord acknowledged the false statement had occurred due to the applicant's misunderstanding, not with purposeful intent to deceive, but refused to deviate from the strict policy of denying admission for any false statement on the application until litigation was filed. Though that case favorably settled, with the applicant restored to the top of the landlord's waiting list, the applicant still endured a significant wait before another unit became available and it remains uncertain how that claim would have fared were it to have been decided in court.

By contrast, an Atlanta advocate stated she "was worried about bringing a [Fair Housing Act] complaint against the landlord in that exact situation because the client failed to disclose the criminal record, even though it would not have been disqualifying."

Other applicants could potentially avoid such denials were the FTC or CFPB to recognize that denying admission to rental housing for the omission or inaccurate disclosure of information on a rental application is an unfair trade practice where the information requested is immaterial under the landlord's admission criteria, especially when the nondisclosure or false statement was made without

malicious intent.

Application forms often ask applicants to disclose information such as sealed court records, old landlord-tenant cases (i.e., beyond the seven-year time limit for reporting civil cases under the Fair Credit Reporting Act³), and other information that may have been judicially sealed or become improper to consider as a matter of law. Ambiguous terminology in the disclosure questions often exacerbates this problem for applicants.

For example, a form that asks applicants to disclose if they “have ever been evicted” is ambiguous; does “evicted” mean the applicant was given an eviction notice or that a lease was not renewed? Does it require that an eviction lawsuit was filed? Does it require that a judicial eviction judgment was entered against the applicant? Or does it even require that the applicant was physically evicted from a property by a sheriff’s deputy? None of this is clear, to say nothing of whether the disclosure might apply to a tenant who prevailed in an eviction case, or a tenant against whom an eviction judgment was entered but then paid off in time to reinstate the tenancy. Applicants presented with such questions face the difficult choice of disclosing a matter that might well result in denial, versus failing to disclose it and risk being denied admission for having withheld information.

A Southern California advocate stated that, in his observations, applicants usually err on the side of disclosing information: “I tend to hear more about things going the other way,” he said, “vague questions leading tenants to disclose that they’ve received an eviction notice, etc., even if it was rescinded or they weren’t technically evicted so wouldn’t show up on a screening report.” But, as an HJN member from Minnesota remarked, advising clients with sealed records or expunged information on how to respond to such questions is complex and the best course of action may depend highly on the specific circumstances. Putting a rental applicant into a position where they must either disclose sealed or expunged records or information beyond legal lookback periods is fundamentally unfair and abusive, but remains a circumstance many applicants must navigate as they strive to access housing.

The FTC and CFPB should recognize that landlords have no legitimate interest in asking applicants to disclose sealed or expunged records or other such protected information. Application forms that ask about matters such as past evictions or criminal history should make clear that applicants need not disclose sealed or expunged records, information too old to report under the Fair Credit Reporting Act, and other such protected information. And application forms should define terms carefully so that applicants are not prompted to unnecessarily disclose damaging information by vague and ambiguous questions.

Particularly in the employment screening context but sometimes also in rental housing, many jurisdictions have adopted so-called “ban-the-box” schemes whereby employers or landlords may not inquire into or consider criminal history information in regard to an applicant until a decision has been reached on the basis of all other criteria. The goal of “ban-the-box” is to prevent employers and landlords from disqualifying applicants solely for having disclosed a criminal record without ever proceeding to further stages of the screening process. Though the fundamental nature and mechanics of rental screening (where applicants are generally presumed suitable unless determined not to be based on certain adverse credit or background information) tend to make this approach less effective in rental housing than in employment (where applicants must usually demonstrate aptitude and willingness to perform a particular job well), ban-the-box does no harm and could potentially also mitigate the

³ See 15 U.S.C. § 1681c(a)(2).

problematic use of written application forms as “gotchas” when applicants fail to disclose adverse information fully and with high accuracy. A ban-the-box policy in rental housing could produce some similar benefits with respect to eviction records as well as criminal records.

Furthermore, landlords who do make inquiries about such matters as criminal history, evictions, or other forms of adverse information on application forms should not deny applicants simply for omitting or failing to accurately disclose information that is immaterial or where the applicant had no intent to mislead.

11. What types of application and screening fees do landlords and property managers charge prospective tenants and what do these fees cover (e.g., expenses related to processing applications, overhead for staff to review screening reports, etc.)?

a. How, when and to what extent do landlords and property managers disclose the purpose(s) of these fees?

b. What are the costs landlords and property managers incur in handling the rental application (for example, fees to a screening company, labor costs, other administrative overhead, etc.)?

c. Do landlords and property managers charge application fees that exceed their costs in handling the rental application? If so, how are these fees used; to whom do these excess fees accrue; and what are the potential harms associated with these excess fees?

d. Should there be limitations imposed on landlords and property managers regarding the collection of application and screening fees from prospective and current tenants? For example, limitations on types of fees, amounts of fees, or the frequency with which a landlord or property manager could charge a fee to a particular prospective or current tenant applying more than once to the same landlord or property manager?

e. How would such limitations affect prospective tenants, landlords/property managers, current tenants, and other industry participants?

12. Should landlords and property managers be required to return prospective tenants’ application-related fees if the prospective tenant is not considered for the housing (e.g., because the landlord chose another applicant before considering the prospective tenant’s application)?

Tenant screening is a cost of doing business for landlords who choose to engage in tenant screening. Such screening does not benefit rental applicants and therefore landlords, not applicants, should pay the costs. Requiring applicants to pay screening fees is anti-competitive because landlords have a diminished incentive to avoid or reduce the costs when they themselves do not pay for screening.

Few landlords who charge rental application fees waive those fees for applicants who have portable screening reports available. This practice forces some rental applicants to pay screening fees over and over again when they are denied admission and still need housing. This dynamic, through which applicants pay repeatedly for largely duplicative screening reports, is also anti-competitive and stifles innovation because it depresses the market for more efficient portable screening reports.

There is significant fraud and overreaching in application fees because applicants have little or no insight into the actual costs. Landlords commonly mark-up the cost of admission screening, generating a profit by charging applicants more than landlords pay to receive screening reports. Some states have laws expressly prohibiting that practice, but those laws are very seldom enforced because tenants seldom

have any way of knowing they were overcharged.

A common fraudulent practice in admission screening is for landlords to collect screening fees from multiple applicants, actually screen just one or two, and retain the remaining application fees. Again, this form of abuse is very difficult to detect. Since few jurisdictions require landlords to give a reason for denying admission, applicants often have no way of knowing whether their application was ever actually considered—let alone proving it was not considered.

Research by Zillow has shown that Black and Latino applicants are nearly twice as likely (38% vs. 21%) as white and Asian applicants to pay five or more screening fees during a housing search.⁴ The fear of paying screening fees yet being denied admission likely also has chilling effects on applicants with significant rental admission barriers, such as criminal records or past evictions. A tenant organizer from Southern California stated, “in my experience, if the tenants know they have something in their record then they don’t even try to apply for housing.” As such barriers tend to be disproportionately more common among BIPOC households, this dynamic likely contributes to residential segregation by race.

The main reason landlords charge screening fees is to deter persons unlikely to meet the admission criteria from applying. But since the most significant admission barriers (diminished credit, eviction records, criminal history) tend to be disproportionately more common among BIPOC renters, application fees tend to amplify the exclusionary effects of such admission criteria—i.e., some such applicants will actually apply and be denied, but many others will be deterred from applying by the fear of forfeiting the fees. Hence the fair housing implications and other adverse public policy consequences of screening fees (such as barriers to leaving homelessness and impacts on social service agencies) greatly outweigh any meaningful societal value in allowing landlords to continue imposing and collecting them.

Landlords sometimes also claim that screening fees are necessary to deter frivolous applications from people who are not genuinely interested in the housing they apply for. However, this is unlikely as applying for rental housing typically requires laborious application forms, submission to credit and criminal background checks, payment of apartment holding deposits, and other steps that few applicants would take unless truly interested in the housing opportunity. There is no data suggesting that applications from semi-serious prospective tenants is a serious problem for landlords in the states that prohibit application fees already.

Rental application fees should be prohibited outright. Failing that, landlords should not be allowed to charge applicants who they did not actually consider, and the fees should never exceed a landlord’s actual costs of screening.

Furthermore, the FTC and CFPB should recognize that charging a screening fee to an applicant who offers the landlord free access to a portable screening report is an unfair trade practice. Since portable screening products provide all the information a landlord reasonably needs to make an informed decision not to accept an applicant, any amounts the landlord charges to obtain that (substantially duplicative) information from the screening source of its choice is gratuitous.

13. How and to what extent are landlords, property managers, and other industry participants

⁴ Manny Garcia, “Renters of Color Pay Higher Security Deposits, More Application Fees,” Zillow (Apr. 6, 2022), <https://www.zillow.com/research/renters-of-color-higher-fees-30922/>.

currently using portable tenant screening report products (i.e., a tenant screening report that the prospective tenant purchases from a consumer reporting agency that is designed to be shared with multiple prospective landlords and property managers)?

a. How are portable tenant screening reports distributed by screening companies (e.g., does the screening company provide the report directly to the landlord or property manager, or do they provide it to the prospective tenant who provides it to landlords and property managers)? Where the distribution is directly to the landlord or property manager, are prospective tenants provided with a copy of the portable tenant screening report as well? If so, at what point in the application process?

b. How does the availability of portable tenant screening reports affect prospective tenants, landlords, property managers, and other industry participants?

c. Should the use of portable tenant screening reports be further regulated (e.g., by requiring their acceptance or by prohibiting background screening charges where the prospective tenant provides a portable tenant screening report)? Why or why not?

d. What, if any, competitive issues are raised by further regulating the use of portable tenant screening reports?

Some tenant-screening companies now offer “semi-portable” reports, whereby the company will make successive reports on the same applicant without additional charge if the personal applies to other landlords who use the same screening company. And multiple companies now offer truly portable tenant-screening reports that can be instantly shared with any landlord.

Nevertheless, landlords, by and large, have ignored portable screening products. As a Minneapolis advocate stated, “a couple years ago a local group announced an effort to promote portable reports with a big splash. Nothing came of it.” Eric Dunn of NHLP observed similar dynamics around efforts to promote portable tenant-screening in Washington state.

For this reason, advocates who work with people searching for housing do not often recommend applicants purchase portable screening reports because applicants are unlikely to be able to use them. Usually when applicants do purchase portable reports, they do so with the intention of applying to a specific landlord who requests the portable report or whom the applicant already knows will accept it. If the reports are then re-used to apply at other properties, it is only because the applicant was not accepted at the initial property.

One reason landlords commonly give for refusing portable screening reports is a persistent belief that portable reports are amenable to tampering or manipulation by applicants. However, portable tenant screening reports are provided directly by the screening company to the landlord. All of the portable screening products with which HJN members are familiar are provided electronically. Applicants have no ability to modify or otherwise tamper with the reports.

Traditional, one-use screening products are anti-competitive because landlords choose the product and benefit from it, yet applicants pay the cost. Hence landlords have a diminished incentive to choose lower-cost products, such as portable reports. The consequence is that applicants must often pay multiple fees for the creation of serial reports containing largely duplicative information. Shifting the costs of tenant-screening reports to the landlords who use them would give landlords an incentive to use the lower costs option. This would likely lead to an expanded market for portable screening report producers. Yet currently, the unwillingness of most landlords to accept (or at least waive screening fees for people with) portable tenant-screening reports diminishes the market and frustrates innovation, as

housing seekers do not find portable reports worthwhile to purchase.

Another reason landlords are resistant to using portable screening reports is because portable reports generally do not contain applicant scores or automated decisions based on a landlord's chosen criteria. Though any portable screening report should easily contain adequate information from which to apply the landlord's admission criteria manually, landlords appear reluctant to perform this task themselves. Many landlords prefer to follow the automated scores and decision recommendations they receive from screening companies rather than make their own decisions on applicants in the belief that following such computer-generated decisions protects them from housing discrimination liability. Whatever the merits of this as a risk management strategy, rental applicants should not have to bear these costs. Even if a rental applicant can fairly be charged the cost of obtaining background information on that applicant, the applicant cannot fairly be charged costs of preemptively bolstering the landlord's defenses to housing discrimination claims.

Applicants are generally able to view the contents of a portable tenant screening report either at the time the report is transmitted to the landlord or sometimes even before. This early access can provide an additional incidental benefit of portable reports, because if the applicant spots an error on the report it can potentially be disputed and corrected before rental applications are submitted. This too advances the purpose of the Fair Credit Reporting Act in promoting accuracy and transparency in consumer transactions.

Note that, even if a landlord waives the screening fee for an applicant with a portable report, nothing would require the landlord to actually use that report or prevent that landlord from still accessing a preferred screening report at the landlord's own expense.

Section III: Algorithms and automated screening tools

- 31. How are algorithms, automated decision-making, artificial intelligence, or similar technology (collectively referred to below as "algorithms") being used in the tenant screening process?*
- a. In particular, how are consumer reporting agencies using algorithms to (1) facilitate compliance with the Fair Credit Reporting Act; (2) match credit, criminal, and eviction records to particular consumers for inclusion on credit and tenant screening reports; or (3) evaluate, grade, score, pre-screen or make predictions about prospective tenants?*
 - b. How common are these uses of algorithms by consumer reporting agencies?*
 - c. For each of these uses (and any other common uses):*
 - i. What are the inputs (i.e., types of data) that the algorithms process, analyze, or use?*
 - ii. What are the outputs of the algorithms (e.g., tenant screening reports, scores, recommendations, or predictions)?*
 - iii. What tasks are the algorithms performing?*
 - d. How are algorithmically-generated scores, recommendations, and predictions being advertised to landlords and property managers?*
 - e. To what extent do landlords and property managers select consumer reporting agencies (including tenant screening companies) based on the companies' offering of recommendation or scoring products to evaluate prospective tenants, as opposed to such services being offered as an add-on product by such companies that the landlord or property manager selected for other reasons?*

35. *What information about applicants is relayed by consumer reporting agencies to landlords and property managers?*

- a. What types of recommendations, scores, predictions, or other outputs are consumer reporting agencies providing to landlords and property managers?*
- b. How are recommendations or scores derived or produced?*
- c. What factors, data points, or characteristics do algorithms rely on in producing recommendations, scores, or predictions that are provided to landlords and property managers?*
- d. Do landlords and property managers have an opportunity to opt into or out of the consideration of particular factors in a recommendation or scoring product?*

The types of algorithmic decision models used in rental admission screening may be roughly grouped into two different types:

- Automated filtering tools, which produce decisions based on predetermined rules; and
- Probabilistic models, which attempt to assess an applicant’s likelihood of fulfilling a lease agreement based on statistical information related to large numbers of persons with certain data points in common with the applicant.

Either model can produce automated decisions either in the form of “yes/no” results, or in the form of scores—which are then translated into decisions based on minimum score requirements established by the landlord or screening company.

Filtering tools

Perhaps the simplest algorithmic models used in tenant-screening are those that attempt to automate the process of filtering out information irrelevant to the rental application, or identify disqualifying (or potentially disqualifying) records. Typically, these systems will provide landlords with a menu of options for screening criteria, such as in this example:

Individuals	Factor	Importance
Ability to Pay Rent		
Minimum Monthly gross income-to-rent ratio	2.4	Extremely ▼
Monthly minimum net income (after rent and debt obligations)	a fixed amount: \$750.00	Extremely ▼
Credit History		
Maximum percentage of past due negative accounts	number of derogatory accounts: 25.0%	Moderately ▼
<input checked="" type="checkbox"/> Do not consider foreclosures, but cap the overall score. Score Cap: 6.9 <input type="checkbox"/> Do not consider mortgages in default, but cap the overall score. <input type="checkbox"/> Do not consider warnings, but cap the overall score.		
Maximum balance of unpaid collections (includes past due accounts)	\$500.00	Moderately ▼
Bankruptcy permitted	If Cleared ▼	Pass/Fail ▼
Residency History		
No landlord tenant court records or unpaid landlord collections	Any number ▼ Ever ▼	Pass/Fail ▼
<input checked="" type="checkbox"/> Ignore dismissed or satisfied records.		
Criminal History		
May not have had a misdemeanor conviction (Specify Exceptions)	Any number ▼ In the last 3 years ▼	Pass/Fail ▼
<input type="checkbox"/> Consider pending cases as well as convictions. (Not applicable in KY, CA, NM, NY, and WA)		
May not have had a felony conviction (Specify Exceptions)	Any number ▼ Maximum allowable by law ▼	Pass/Fail ▼
<input type="checkbox"/> Consider pending cases as well as convictions. (Not applicable in KY, CA, NM, NY, and WA)		
May not be a registered sex offender		Pass/Fail ▼

The automated tool will attempt to filter the contents of an applicant's background check according to the selected parameters. In this example, the tool would first need to make the following determinations regarding the applicant:

- Whether the applicant's gross income was at least 2.4 times the monthly rent;
- Whether the applicant's monthly net income would leave at least \$750 after paying rent and debt obligations;
- Whether more than 25% of the applicant's accounts were "derogatory;"
- Whether the applicant had a foreclosure record;
- Whether the applicant had more than \$500 in past due accounts or collections;
- Whether the applicant had a bankruptcy record and, if so, whether the bankruptcy was "cleared;"
- Whether the applicant had a "landlord tenant court record" and, if so, whether that record was "dismissed or satisfied;"
- Whether the applicant had an unpaid landlord collection and, if so, whether that record was "dismissed or satisfied;"

- Whether the applicant had a misdemeanor conviction and, if so, whether it occurred within the preceding three years;
- Whether the applicant had a felony conviction and, if so, whether it occurred within the maximum time period allowed by law to be considered; and
- Whether the applicant is a registered sex offender.

Once these determinations are made, the tool will then calculate a score regarding the applicant. If the score is above the landlord's threshold for admission, then the tool will report an "accept" decision. If the score is below the threshold, then the tool will report a "decline" decision. Note the applicant's score will automatically fall below the admission threshold should any of the "pass/fail" criteria be determined unfavorably for the applicant. Exactly what impact the other criteria have on an applicant's score is unclear—but presumably failing an "extremely" important criterion has a greater negative effect than failing a "moderately" important criterion.

The various processes by which automated systems make determinations such as these is unclear and likely varies from one company to the next. But the potential for errors arises in these categorizing, filtering, and aging processes—and yet consumers have practically no insight into those processes and thus very little ability to detect such errors. Potential errors are further obscured when the ultimate output of the algorithm is just a numerical score or a "yes/no" decision.

Multiple advocates described recurring problems in the way housing voucher applicants are evaluated through automated screening programs. An Atlanta advocate reported:

"The landlord said they would take the voucher. But when [the applicant's] income versus the monthly rent were reported on the Saferent background check, it looked like she couldn't meet the rent requirement, much less three-times the rent. So even though her portion [of rent] is going to be thirty percent of her income under the voucher program and the landlord has said 'yes, we'll take it,' I think it denied her based on that. But because the Saferent algorithm and their whole calculation is so opaque, you really can't tell why they denied it. But that's my best guess: they just didn't take into account that she had this voucher."

Criminal history screening provides perhaps the clearest illustration of this issue. There are thousands of different unique descriptions for crimes that a person might possibly be convicted for, and landlords cannot feasibly establish a policy for each specific crime. Rental screening companies must therefore lump many different crimes together and create categories of offenses, which give landlords a manageable number of crime categories to screen for. Within each such category, the screener might ask landlords to specify whether they will deny admission for an arrest or conviction (for that type of crime), or for more than a certain number records (e.g., three or more misdemeanors), or for crimes within a certain "lookback period" (e.g., crimes within five years, ten years, or other duration). Some screening systems may assign a "point value" to records falling within particular categories or employ some other algorithmic methodology that may enable the record to produce a denial in conjunction with other information, but not on its own.

For example, here is the first page of a computer screening configuration grid for one criminal history product, which sorts criminal history into more than 30 different crime categories and four different "severity" levels, and allows landlords to enter a different lookback period for each combination of offense type and severity level (only the first page is shown):

Instructions: Enter number of years counting backwards from today that will cause an application decline. Felony Convictions Only cannot be set at a value (number of years) that is less than Any Felony Charges and Other Convictions. Other Criminal Charges cannot be set at a value greater than Other Convictions. All "number of years" fields must be completed.					
Categories		Felony Convictions Only (0-99 years)*	Other Felony Charges (0-7 years)*	Other Convictions (0-99 years)*	Other Criminal Charges (0-7 years)*
Crimes Against Persons	Assault-Related Offenses General Definition: An unlawful attack by one person upon another.	99 yrs.	7 yrs.	5 yrs.	2 yrs.
	Family-Related Offenses, Nonviolent General Definition: Unlawful, nonviolent acts by a family member (or legal guardian) that threaten the physical, mental, or economic well-being or morals of another family member and that are not classifiable as other offenses, such as Assault, Incest and Statutory Rape, etc.	10 yrs.	7 yrs.	1 yrs.	1 yrs.
	Homicide-Related Offenses General Definition: The killing of one human being by another.	99 yrs.	7 yrs.	99 yrs.	7 yrs.
	Kidnapping/Abduction-Related Offenses General Definition: The unlawful seizure, transportation, and/or detention of a person against his/her will or of a minor without the consent of his/her custodial parent(s) or legal guardian.	99 yrs.	7 yrs.	99 yrs.	7 yrs.
	Sex-Related Offenses, Forcible General Definition: Any sexual act directed against another person, forcibly and/or against that person's will, or not forcibly or against the person's will in instances where the victim is incapable of giving consent.	99 yrs.	7 yrs.	99 yrs.	7 yrs.
	Sex-Related Offenses, Nonforcible General Definition: Unlawful, nonforcible sexual intercourse, excluding prostitution offenses.	99 yrs.	7 yrs.	99 yrs.	7 yrs.
	All other Person-Related Offenses General Definition: Any offense committed against another person which causes harm to a person which does not meet specific categories previously outlined as person-related offenses.	10 yrs.	7 yrs.	1 yrs.	1 yrs.

To apply this screening tool to a specific applicant, the screening company must (i) locate any criminal records belonging to that applicant, (ii) sort those records into the proper crime categories, (iii) accurately determine the outcome from each record found (e.g., charge only, or conviction), (iv) correctly assign an age to each record, and then (v) report decision result (which, for this product, is limited to either admit or decline) by comparing the application date to the applicable lookback period.

The opportunity for errors to occur within this process is massive, even assuming the records found actually belong to the relevant applicant. Crimes might be sorted into improper categories—thus potentially resulting in denials when, had they been assigned to the correct categories, would not have. Improper dates may be assigned to criminal records (for example, Eric Dunn of NHLP recalls having a former client who was denied housing in 2014 based on a 2005 prostitution conviction because she had paid a financial obligation related to that charge in 2013, which caused the screening company to improperly apply the lookback period as if the offense had occurred in 2013). Dispositions might be misinterpreted or mis-assigned, especially where a person pleads guilty to a different crime than the charged offense or where charges are still pending (such as in plea arrangements through which charges are to be dismissed at a future date).

And yet, these types of errors are often impossible for rental applicants to detect. An applicant who requests a copy of the screening report will receive only a print-out of the underlying criminal records used to screen the application—but will not be told or shown which crime categories those records were classified into, the dates or ages that were assigned each record, or how the records were filtered through the landlord's admission criteria. The applicant will also not have access to the full list of crime categories or the landlord's detailed lookback periods, which would be necessary to determine whether another category existed that better fits a crime or whether a miscategorization caused a longer lookback period to be applied than appropriate. Without insight into these processes, a rental applicant has little possibility of figuring out that an error even occurred, let alone identifying what that error specifically was.

Beyond the great potential for hidden inaccuracies, algorithmic decision tools for criminal history screening are flawed on an even more fundamental level in that the decision rules those algorithms apply are seldom, if ever, based on meaningful predictive data. Landlords and tenant-screening entities commonly assert that past criminal history suggests an applicant poses some heightened risk of engaging in criminal, dangerous, destructive, or otherwise anti-social behaviors at or near the rental premises. Yet no landlord or screening company has presented any actual evidence to support this belief—let alone any study quantifying the nature and extent of any such risks.

The main study that has been performed on the link between criminal history and *housing outcomes* found that “[o]f 15 categories of criminal offenses, 11 show no evidence of a significant link to negative housing outcomes,” that having a conviction for an offense in the remaining four categories “increases the probability of a negative housing outcome by 3 to 9 percentage points at most,” and that “[c]riminal offenses that occurred more than 5 years prior to move-in have no significant effect on housing outcomes.”⁵ Note that hardly any of the negative “housing outcomes” in the study involved new criminal activity. Yet even despite these findings, landlords seldom limit criminal history screening to the four potentially relevant categories or to crimes occurring within the preceding five years.

Rather, many housing providers establish their own criminal history screening policies by emulating those of nearby landlords, based on marketing considerations (i.e., calculating that renters in certain target markets may be more attracted to properties with strict criminal screening policies), or on a purely arbitrary basis (such as distaste for persons with certain criminal records or generalized fear or mistrust). Landlords routinely fail to limit their criminal history screening in evidence-based manners even though HUD stated in 2016 that the disparate impacts associated with criminal to justify a criminal history screening practice that has a disparate racial and ethnic impacts of criminal history screening cannot be justified unless the landlord is “able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property.”⁶

36. How are consumer reporting agencies deciding what criteria should be included in their tenant screening recommendation or scoring products?

a. To the extent consumer reporting agencies use amounts owed by tenants in their recommendations or scoring products – such as amounts in collection on a credit report or amounts a court has ordered a tenant to pay in an eviction proceeding – do recommendation or scoring products consider the amount of the original balance or unpaid rent only, or do they also take into account fees, damage multipliers, or other additional charges?

⁵ Cael Warren, “Success in Housing: How Much Does Criminal Background Matter?” Wilder Research (Jan. 2019), https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground_Report_1-19.pdf. The study defined a negative housing outcome as one in which the “resident does not maintain housing stability.” Only about 8% of these negative housing outcomes resulted from lease violations for behavior. Hence, even among the renters who had negative housing outcomes, very few committed criminal acts associated with the rental premises.

⁶ HUD, 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 (Apr. 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF

b. To the extent that public records are included in scoring models, how are they weighed? Are records treated differently based on their recency or the type of charge (e.g., misdemeanor, felony or juvenile record)?

Tenant screening companies typically allow landlords to configure the admission recommendation settings within certain parameters, largely based on the technological capabilities of the screening company's platform. Hence, landlords ultimately determine what the minimum credit or rental score required for admission will be, which criminal records will be disqualifying, which eviction records will be considered, and so on. Screening companies differ in the extent to which they enable such information to be weighted. For example, the Saferent Solutions screening model will recommend denial of any applicant for whom a single criminal record is found that falls within certain crime category and age parameters a landlord sets. Other screening companies enable landlords to require multiple relevant misdemeanor convictions before recommending denial. Some screening companies enable landlords to distinguish between eviction records that result in judgments, others treat all eviction filings the same.

HJN members have yet to see a tenant-screening model that makes any distinction in scoring or recommendations based on the particular components of a civil judgment (e.g., for rent, late fees, attorney fees, etc.).

39. How are landlords and property managers using recommendations or scores from consumer reporting agencies in deciding whether to rent to prospective tenants?

a. How often do landlords or property managers receive a recommendation or score when considering a prospective tenant?

b. To what extent do landlords or property managers know or understand the basis of recommendations, scores, or predictions provided by consumer reporting agencies? What guidance or information do landlords and property managers receive?

c. To what extent do landlords or property managers review and consider the underlying data (including credit, eviction, and criminal records) before using a recommendation or score in evaluating a prospective tenant?

d. Are landlords and property managers able to access algorithmically-generated scores, recommendations, and predictions about prospective tenants without accessing an underlying credit report or tenant screening background report? Are there benefits to using those products instead of or in addition to more traditional credit reports and tenant screening background reports?

Tenant screening companies' recommendations and scores almost always serve functionally as leasing decisions. The underlying data is seldom reviewed, and typically only when applicants have legal representation or are applying to certain publicly-supported landlords that have due process-type obligations to reconsider denied applications. Concealing the underlying data from the leasing staff is an actual objective behind the use of these products, as denying access to that information is believed to deter certain forms of disparate treatment.

Screening companies will likely characterize their reports as consisting only of "suggestions" that landlords are free to follow or disregard as they wish, and that full details of an applicant's background check are made available to the landlords in every instance. But that is neither how such scores and lease recommendations are used—or are intended to be used—in practice.

One reason is because tenant screening companies market automated decision models to landlords on the claims that the use of such products enables landlords to treat rental applicants consistently and saves landlords the time and effort of evaluating applicants individually. Here, one screening company that touts its “simple thumbs up, thumbs down recommendation and rental score,” which means landlord staff with “no raw data [to] decipher.” Another company’s marketing brochure promises similar benefits from the use of its automated criminal history screening product:

<p>Review the rental report.</p> <p>Rental reports include detailed credit, criminal and civil records, but there's no raw data for your team to decipher. You get a simple thumbs up, thumbs down recommendation and rental score with scoring breakdown highlighting any areas where applicants may fall short.</p>	<p>Benefits</p> <ul style="list-style-type: none"> ▶ Maintains a safer community for residents, guests, and staff ▶ Reduces potential liability from criminal acts ▶ Improves Fair Housing compliance by helping you screen applicants consistently ▶ Saves time for leasing staff
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Landlords only realize benefits such as “consistency” and reduced administrative burden *if they actually follow* the automated decisions.

Rental admissions screening software is often integrated with other leasing software so that a property manager cannot print a lease or set up a new tenant account unless and until the screening software shows an “accept” recommendation. This makes the automated recommendation tantamount to the admission decision. Property management staff are not typically permitted to override the automated recommendations and may not have the technical ability to do so, and seeking supervisory review may be cumbersome, time consuming, or otherwise impractical.

Screening companies may make background details on applicants accessible to landlord staff—but again, potentially only higher-level managerial staff may have the necessary user privileges, and may need to take affirmative steps to search for, locate, and access those data. This is all because landlords intend to rely on the automated decisions. If landlords intended to review applicant data individually, they would have no need for the automated recommendations.

40. To what extent are landlords and property managers involved in setting the recommendation or scoring criteria? To what extent does that vary by consumer reporting agency?

Landlords ultimately choose their admission criteria—albeit typically within parameters offered by their preferred tenant screening company (analogous to the way a restaurant patron chooses what to eat, but is limited to the options listed on the menu). However, typically admission criteria are set by high-level management personnel, often for entire portfolios that may have dozens or hundreds of rental communities with thousands or tens of thousands of dwelling units. Local property staff seldom have any control or influence in the criteria such providers establish. Indeed, the local property staff may not even know or have access to the specific settings the landlord company has entered into the screening system, or other detailed list of admission criteria.

43. Are there steps that regulators should take with respect to the use of algorithms in the tenant screening process?

Regulators should approach automated screening models from the perspective that such tools ought only be used as only a “first pass” by which to evaluate applicants. That is, applicants who do not qualify for admission based on the automated model should have prompt and easy access to meaningful human review. Article 22 of the European Union’s General Data Protection Regulation provides an excellent example for this concept, stating in relevant portions: “The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her” and that “the data controller shall implement suitable measures to safeguard the data subject’s rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.”

Automated systems may be more consistent in producing a pre-ordained result based on a delineated set of admission criteria, but this comes at the cost of being generally incapable of assessing or evaluating unique characteristics or circumstances of particular applicants. Only human beings can make reasoned judgments about whether such specific unanticipated facts and circumstances related to a particular rental applicant suggest a likelihood of success for failure in a new tenancy.

Housing providers must give rejected applicants a reasonable opportunity to appeal or otherwise seek reconsideration of their application before leasing the premises to another tenant. Such “individualized review” is already strongly encouraged (if not required) in connection with the denial of admission based on criminal history screening under 2016 guidance from the U.S. Department of Housing & Urban Development. There is no reason not to expand the individualized review concept to all aspects of automated rental history screening.

Require landlords who deny admission to provide rejected applicants with a plain-language, written statement of the reason(s) for denial, as well as access (presumably on-line) to the landlord’s detailed rental admissions policy, and enough information about the screening system used to enable a meaningful evaluation of whether the screening tool faithfully applied the criteria to the relevant applicant background information. These disclosures are necessary to enable denied rental applicants to determine, in conjunction with their file disclosures from screening companies, whether they qualified for the housing under the landlord’s admission policy and, if not, whether the correction or deletion of particular information on from the tenant’s screening report would result in an approval recommendation. And of course, landlords must have a meaningful and accessible review procedure at which applicants can dispute not only the factual correctness of the information used in reaching the denial recommendation and the accuracy with which the landlord’s admission criteria were applied, but also present additional information bearing on the applicant’s prospective fitness for the tenancy.

Section IV: Procedures upon denial

8. Do landlords and property managers have procedures by which tenants can explain and the housing provider can consider personal hardship or other circumstances (such as a natural disaster) that may have affected the tenant’s prior income, credit, criminal, or rental history?

a. Do consumer reporting agencies take such information into account in preparing credit or other tenant screening reports for landlords and property managers, and

do they provide such information to landlords and property managers to the extent they are aware of it?

Review policies of this kind are common in most subsidized and affordable housing programs. Applicants denied admission to public housing are entitled to the most elaborate procedure, an “informal hearing” at which to contest the denial. See 24 C.F.R. § 960.208. Though HUD has not further elaborated on the procedures for such informal hearings, they are presumed to include the core due process requirements such as reasonable notice of the procedure, a chance to see the grounds and evidence on which the applicant was denied, an opportunity to present arguments and evidence orally, and a neutral decisionmaker. Applicants denied admission to Rural Development Section 515 housing have the right to a similar hearing under 7 C.F.R. § 3560.160.

In other subsidized and affordable housing programs, applicants denied admission are generally entitled to some in-person opportunity to dispute the grounds for rejection. In most HUD-subsidized multifamily properties, for example, an owner who “is not selecting the applicant” must “promptly notify the applicant in writing of the determination and its reasons, and that the applicant has the right to meet with the owner or managing agent in accordance with HUD requirements. Where the owner is a PHA, the applicant may request an informal hearing.” 24 CFR § 880.603(b)(2).

Outside of subsidized housing, however, formal review procedures of this kind have traditionally been rare. When such reviews do take place, they are typically ad hoc and not according to any established policies or procedures. Legal representation or other advocacy has often been necessary to persuade a landlord even to reconsider an application in light of additional information the applicant might provide.

For example, a Northern California advocate described a common scenario in which an applicant would have been improperly denied housing but for legal advocacy: “a client with Section 8 was denied because her income wasn’t three-times the monthly rent. But I resolved that with a demand letter explaining that she only needed to have three times her *share* of the rent. Her application, after that, was approved.”

This aversion to reconsidering rejected applicants has been especially pronounced among the larger management companies that use automated decisionmaking programs. Typically those companies prohibit property staff from overriding automated rejections, and their admission screening software is often integrated with other property management systems so that a property manager cannot, for instance, print a lease contract or set up a new tenant account unless the admission screening program has accepted the applicant. Property management staff are also regularly denied access to the background information on which an automated decision is based, which makes them ill-suited to reconsider applicants in light of mitigating circumstances or other such information anyway.

In recent years, more housing providers have begun establishing policies to enable review of applications denied for criminal history. This is likely a response to the April 4, 2016, HUD guidance on the use of criminal records use in housing transactions, which explained that “individualized assessment of relevant mitigating information beyond that contained in an individual’s criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account.”⁷ Even so, these review policies tend to be rudimentary, invisible, and seldom used. As a

⁷ HUD, 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 (Apr. 4, 2016),

Minneapolis advocate reported: “Appeals must be rare because managers don’t always know how to respond and their responses take forever.”

Tenant screening companies do not take individual facts and circumstances regarding personal hardships into account in preparing tenant-screening reports, especially in the form of scores or recommendations. Tenant screening companies maintain this is the prerogative of landlords, even though rental scores and leasing recommendations are marketed as de facto admission decisions and screeners urge landlords to follow those scores and recommendations so as to achieve consistent results.

9. How and to what extent do landlords and property managers communicate with applicants for rental housing about their applications when the landlord or property manager has determined not to accept the applicant?

a. How do landlords and property managers provide adverse action notices (e.g., orally or in writing)? If orally, how do landlords and property managers ensure their adverse action notices comply with the requirements of the Fair Credit Reporting Act?

b. How and to what extent do landlords and property managers currently disclose to an applicant for rental housing the reason(s) for the applicant not being accepted to rent the unit?

c. Do landlords and property managers currently provide to the applicant a copy of any credit reports, screening reports, scores, or recommendations they received about the applicant? If not, what are the barriers to landlords and property managers providing that information to the applicant?

d. What are the benefits and harms associated with the current level of disclosure?

e. Are there steps regulators can and should take to mandate additional disclosures?

A residential landlord that chooses to reject an applicant should provide the applicant with a written adverse action notice that complies with 15 U.S.C. § 1681m. This notice should be provided as soon as practicable, though notably the statute does not prescribe a specific deadline.

The provision of the FCRA adverse action notice is mandatory whenever a housing provider denies admission based wholly or in part on the contents of a consumer report. See 15 U.S.C. § 1681m(a). Yet compliance with this requirement is spotty.⁸ Larger, corporate landlords tend to more reliably issue

https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF

⁸ Violations of 15 U.S.C. § 1681m are difficult to enforce, in part because of a scrivener’s error in the Fair and Accurate Transactions Act by which the word “section” was used in place of “subsection” in the text at 15 U.S.C. § 1681m(h)(8). See *Barnette v. Brook Rd., Inc.*, 429 F. Supp. 2d 741, 749 (E.D. Va. 2006) (“Considering these three circumstances alongside the clear expression of intent in § 312(f), the Court must conclude that the use of ‘section’ instead of ‘subsection’ in § 1681m(h)(8) was a drafting error.”). Had the word “subsection” been properly used instead, private enforcement would have been denied only as to violations of 15 U.S.C. § 1681m(h), which governs adverse action notices in connection with the use of consumer reports for “a grant, extension, or other provision of, credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person[.]” 15 U.S.C. § 1681m(h)(1). Because of that error, however, the provision now states that 15 U.S.C. §§ 1681n and 1681o, the provisions of the FCRA authorizing private lawsuits, “shall not apply to any failure by any person to comply with this section.” As “section” refers to the entirety of 15 U.S.C. § 1681m, most courts no longer recognize a violation of 15 U.S.C. § 1681m as privately actionable. See *Perry v. First Nat. Bank*, 459 F.3d 816, 822 (7th Cir. 2006) (“So far as we are aware, every district court considering this issue—save one—has found that 15 U.S.C. § 1681m(h)(8) bars private enforcement

adverse action notices than do smaller owners, but noncompliance with the requirement is common regardless. As a Missouri advocate reported:

“What happens is, our clients don’t know—they apply, then they’re told by the prospective landlord ‘sorry, can’t rent to you because you have an eviction on your record.’ And usually this information is given to the applicant verbally over the phone. So they’re not receiving any information from what particular company it is that has given this [report].”

A New Jersey advocate had similar remarks: “No notice. Maybe name of screening agency. When denied due to prior eviction, I have had clients who were given the docket numbers.”

Similarly, an Atlanta-area advocate stated: “even though Atlanta is basically run by corporate landlords, I almost never see an adverse action notice when my client is denied.” She added that “landlords will almost always refuse to give a copy of the screening report. My clients can usually get the landlord to reveal the name of the screening company, but that’s it.” A Louisiana advocate added “same - almost none of our clients receive adverse action notices.” A New Mexico advocate reported seeing this problem in her area as well.

When landlords do provide adverse action notices, the notices are given in writing, either in paper or electronic format. The information required to appear in adverse action notices is sufficiently lengthy and detailed that oral notice will seldom be practical. Landlords who reliably give adverse action notices tend to use pre-printed forms that contain the minimal information required by 15 U.S.C. § 1681m. Often these forms are prepared by tenant-screening companies. Sometimes the tenant-screening companies actually prepare and send the adverse action notices for the landlords.

One common problem arises when adverse action notices are sent by mail. Rental housing applicants—many of whom are between residences and may be living with relatives, staying in hotels or shelters, or homeless—often have difficulties with the reliable receipt of mail. Ideally, applicants who wish to receive the notices electronically should be given that option. Applicants who prefer to receive paper notices should either be given the notice in-person, where practical, or at a mailing address confirmed with the applicant prior to sending the notice.

Even when an applicant receives the adverse action notice or is otherwise aware of which company performed the background check, actually obtaining disclosure of the screening report under 15 U.S.C. § 1681g is often a challenge. Tenant screening companies have increasingly demanded that applicants produce gratuitous identification materials before disclosing a consumer file. Eric Dunn of NHLP recalls seeing tenant-screening companies ask consumers to provide as many as five separate pieces of identification, to sign multi-page affidavits (under penalty of perjury) confirming various personal details, or to provide specific items that particular consumers may not have (such as utility bills for persons who have been homeless) or burdensome to reproduce (such as documents with impressed seals). Often screening companies do not provide a way to submit identity verification materials on-line, meaning applicants who seek to obtain consumer disclosures must make paper copies and send them by mail, with the accompanying delays and challenges. As a Louisiana advocate stated:

of § 1681m in its entirety” and collecting cases).

“the request process for tenants is challenging. It depends on the company but often requires providing copies of ID, etc., and is hard to do online. Some companies require that you include the name of the place you applied and the date you applied to obtain the report.”

A Georgia advocate added: “I had a tenant screening company make my client verify their identity three times before they would record the dispute.”

Some background check companies will not send a physical report to a consumer without a home address, which can be a significant barrier for those without stable housing—a circumstance in which many denied rental applicants find themselves. Some agencies do not cooperate with third-parties attempting to assist consumers in obtaining their reports.

Rejected applicants are commonly encouraged to accept oral disclosures of their consumer information. Oral notice can be helpful in facilitating quick disputes of mismatched records or other wild inaccuracies. But more subtle and errors are easily overlooked with oral disclosures, and denied applicants generally need copies of their screening reports to benefit from legal counsel or other third-party assistance.

A residential landlord that rejects admission should provide the applicant with a plain-language, written statement of the reason(s) for the denial. This may be incorporated into the FCRA adverse action notice or appear in a separate document. But it should be written. As advocates from Louisiana, California, and Washington observed, landlords who report grounds for denial orally often come up with new or different reasons to sustain a housing denial when the reason(s) originally given are shown to have been specious or inappropriate. Requiring a written disclosure of the reasons for denial deters this practice and ultimately reduces the likelihood of housing discrimination (i.e., a written notice enables the applicant to hold a landlord to the original reason given, thus making it more difficult to conceal a discriminatory reason for denial by giving no reason or giving a false reason orally).

The adverse action notice required under 15 U.S.C. § 1681m does not require landlords to disclose the reason(s) for rejecting a rental application. A few states and localities, including Washington State, Virginia, and the City of Philadelphia, and have separately required disclosure of the reasons for denial. But where not required by law, landlords usually do not disclose such reasons to rejected applicants.

A rental housing scenario in which an applicant pays a fee to be considered for admission is comparable to a contract whereby one party undertakes to perform a duty to the satisfaction of the other—i.e., the applicant’s background check must “satisfy” the landlord. Courts have traditionally used two common law frameworks by which to evaluate such contracts: “(1) the party may make a purely subjective decision but it must be made in good faith; or (2) the party must make the decision in accordance with an objective standard of reasonableness.” *Storek & Storek, Inc. v. Citicorp Real Est., Inc.*, 100 Cal. App. 4th 44, 59, 122 Cal. Rptr. 2d 267, 279 (2002). Typically, the objective reasonableness test is preferred unless the parties stipulate to the subjective good faith test. *Id.* at 59-60. Hence a landlord who denies admission on an objectively unreasonable basis, or at least on a subjective basis that does not amount to good faith, violates its express or implied promise to properly consider the applicant for admission.

A rejected applicant cannot determine whether a landlord lived up to the objective reasonableness or even the minimal good faith standard unless the reason(s) for denial are disclosed. Therefore, a landlord’s practice of denying admission without disclosing the reason(s) to rejected applicants should likewise be characterized as an unfair trade practice—as should actual housing denials made arbitrarily or in bad faith.

Those landlords who do disclose the reasons for denial typically do so with only terse, high-level statements of the reasons, such as “unsatisfactory credit” or “disqualifying criminal history.” Even such minimal disclosures of the reasons for denial are helpful. Rejected applicants often have more than one kind of negative information on their background checks, and being told which specific type(s) of information caused the denial may help the applicant best formulate a challenge to the denial. Also, landlords who do not put the reasons for denial in writing often change the grounds for denial after an original reason the landlord may have stated orally is disproven—requiring a written statement of the reasons enables an applicant to hold the landlord to the reasons given.

Still, it remains problematic that few landlords provide rejected applicants with access to the landlord’s detailed admission policy. With access to those disclosures, an applicant might—upon obtaining a copy of the screening report—determine if the denial was in accordance with that policy or whether any achievable changes to the screening report might enable admission.

As a New Mexico advocate explained:

“This has become a very large issue in Albuquerque for folks with Section 8 vouchers. If they aren’t immediately blocked from even applying, then this kind of obscure application process blocks them and then they are not able to figure out why they were blocked even though Albuquerque has a mythical ordinance for source-of-income discrimination.”

Particularly in larger multifamily rental properties that utilize automated tenant-screening and decision algorithms, the on-site leasing staff are frequently unaware of the reasons why particular applicants may have been rejected. A property manager may simply receive a “decline” recommendation or a “red flag” may appear on a computer screen, and the property manager will deny admission in accordance with the company’s policies. Such property staff may or may not have access to any further details about the reasons for an applicant’s denial. Even if the property staff have access, they may or may not be willing to share such information with applicants—and are commonly prohibited by company policies from doing so. Very few landlords provide copies of screening reports or other such materials to applicants.

Applicants denied through such automated procedures may be directed to contact the screening company to obtain more information and receive a copy of their screening files. Though 15 U.S.C. § 1681m requires an adverse action to state “that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken,” rejected applicants commonly draw the opposite impression as they are not told the reason for denial by property management staff and are instead steered toward screening companies. Moreover, commonly the screening company will practically have made the rental decision, as its computers will have retrieved the applicant’s background information, sorted and filtered the contents, run an algorithm designed to apply the landlord’s admission criteria, and then reported the outcome in the form of a “recommendation” to the leasing staff—yet little, if any, of this information will be shared with a rejected applicant.

The net effect of these secrets and contradictions can be very frustrating and confusing both to rental applicants and their advocates. Even for legal advocates, determining whether improper information in a background report or the erroneous application of an admission policy caused or contributed to a housing denial tends to be very difficult when the relevant screening criteria are not available and no reason(s) for denial is given. The lack of such information also makes unlawful discrimination more

difficult to detect. Numerous HJN members reported difficulty in determining the reasons why particular clients had been denied housing based on third-party screening reports:

A Louisiana advocate stated that figuring out the reason for a denial is “constantly” a challenge, adding: “it adds days, weeks, months to the process of getting the person housed to just get a clear answer on WHY the person was denied and whether we can get the denial reversed.”

An Atlanta advocate added: “When companies like SafeRent provide a report, they use an opaque algorithm that makes it very hard for a tenant to challenge the conclusion/recommendation. One client (with a SafeRent report) I recently advised could not tell why she was denied or what she’d need to do to get approved.”

A Washington, D.C. advocate said: “We’ve seen the same with respect to an individual client that received denials of housing, and we couldn’t distinguish whether the denial was credit- or conviction-related until we got into discovery.”

This lack of access to such basic information as the reason for denial is often exacerbated by the inability to effectively dispute or challenge much of the information applicants are able to obtain. For instance, a rental applicant denied because of criminal record may learn from the screening company what criminal records appear on his screening report and what details accompany those records—such as the name of the person arrested, charged, or convicted, what the charge was, various dates relevant to the matter, the disposition of the case, and the sentence imposed. The applicant may be able to dispute the inclusion of that record in the screening report if the record belongs to a different person or is too old to include, or seek corrections in the record if it states an incorrect date or outcome. But a tenant-screening company will not accept a dispute by an applicant who simply challenges the relevance of that criminal record to her fitness for tenancy, or who suggests that evidence of rehabilitation should be considered, even if the tenant-screening company effectively made the rental admission decision through an automated process. For a dispute of that nature, the applicant may be directed back to the landlord—who denies knowledge of the grounds for denial and is unable to meaningfully consider any mitigating evidence the tenant may present anyway.

A training presentation slide from a major residential tenant screening service reflects this kind of arrangement:

Adverse Action Letters:

- Adverse Action Letters must be provided to any applicant that has an Accept with Conditions or Decline decision.
- If the applicant questions the decision, suggest they contact Consumer Relations to review a copy of their reports. Please do not suggest they call CR to find out why they were declined.
- The applicant must contact Consumer Relations. Property staff should not contact Consumer Relations for the resident or be involved in the call.

Typically the only way out of this conundrum is for a rejected applicant to seek assistance from a lawyer or other advocate able to command a response from a relevant decisionmaker, whether with the landlord company or the screening provider. But this shell game of obscuring who the actual decisionmaker was and withholding the reasons for denial has the effect of cooling out and demoralizing rejected applicants, especially those without access to counsel. Most will simply give up and move on.

Landlords should also offer applicants an opportunity to contest the denial of admission, ideally through some form of hearing, meeting, or videoconference. The landlord should have an established procedure for reviewing rejected applications, which at minimum should provide the applicant (i) sufficient time to gather documents and prepare for the proceeding, (ii) the ability to have a lawyer or other representative to assist in presenting the appeal, (iii) access to the landlord's full screening policy and the background report, application, and any other materials relied on in declining admission, and (iv) a decisionmaker with sufficient independence from the person responsible for the initial denial and who has the authority to overturn the rejection. The landlord should keep the property open for a reasonable time to allow for this review to take place.

Formal appeal or reconsideration mechanisms for rejected applicants have become more common since the 2016 issuance of HUD's guidance on the use of criminal records in housing decisions. This is certainly a step in the right direction, even though such policies vary widely in terms of the notice applicants are given, the procedures are available to present evidence, the independence of the decisionmaker, and the status of the dwelling unit pending the outcome. Commonly these policies fail to provide a genuine opportunity to dispute a denial, either because the mechanism is not disclosed to applicants, extremely short deadlines are imposed that make it impractical for applicants to utilize the procedure, applicants do not have access to the information necessary to formulate an appeal responsive to the grounds for denial, the decisionmaker is not sufficiently independent or free of bias—or a combination of these factors. Note also that these review procedures, where they do exist, are commonly limited to denials based on criminal history only.

FTC and CFPB could take a number of measures responsive to these problems. First, the agencies could outline the extensive list of circumstances in which a landlord's failure to disclose its reasons for rejecting a rental application amounts to an unfair or deceptive trade practice. This might include, for example, (i) where the reason for denial would not be readily apparent (to a reasonable person) from the contents of the consumer file available from the consumer reporting agency identified in the adverse action notice; (ii) where the applicant has paid a screening fee and thus has acquired a contractual right not to be rejected without good faith consideration; (iii) where disclosure of the reason for denial is pertinent to the applicant's exercise of any appeal right or review mechanism; and (iv) where the disclosure is necessary to ascertain whether an inaccuracy existed on a third-party background report or whether an inaccuracy was material to the outcome of the application.

Where the denial is based on an automated score or recommendation from a screening company, the landlord should make available (to a rejected applicant) the score or screening report it received and the landlord's detailed admission policy—sufficient for the applicant to determine whether the contents of the screening report ought to have resulted in the adverse decision, if the admission criteria were faithfully applied.

The agencies could highlight the drafting error in 15 U.S.C. § 1681m(h)(8) and study the impact of that error in terms of fostering noncompliance with the basic duty of consumer report users, especially residential landlords, to notify rejected applicants of their right to obtain a copy of their consumer

files—the first step toward disputing incomplete or inaccurate contents.

The agencies could lay out practical steps and best practices for appeal or reconsideration mechanisms that landlords may make available to rejected rental applicants, perhaps taking into account the size and sophistication of the landlord and the nature of the housing available. For instance, keeping a specific rental unit open may be less important with respect to a large, multifamily complex where there are frequent vacancies and the dwelling units are all substantially similar, as compared with a company that specializes in leasing units in smaller or more unique properties or even single-family homes. And a higher degree of independence and impartiality may be possible for review procedures in larger property management firms. But all landlords can provide prompt and clear notice of what processes they have available, cooperate with applicants' counsel or other representatives, and be transparent with admission policies, grounds for denial, and evidence considered.

15. How do landlords and property managers handle applications from prospective tenants who dispute information on their credit or tenant screening reports while their application is pending?

- a. To what extent do landlords and property managers communicate directly with the consumer reporting agency regarding the dispute?
- b. To what extent do landlords and property managers take into account the initiation of a dispute when making a decision about a prospective tenant?
- c. To what extent do landlords and property managers wait for a dispute to be resolved before making a decision about a prospective tenant?
- d. To what extent do landlords and property managers ask consumer reporting agencies to prioritize dispute investigations for prospective tenants with pending applications? How does that process work?

Landlords who receive automated decisions generally follow those decisions. If an applicant is rejected, the property manager will refer the applicant to the screening company. This is true even when the applicant's dispute does not relate to the accuracy or completeness of a report—such as contentions that a denial based on a criminal or eviction record is unwarranted due to mitigating evidence or changed circumstances. But applicants are rarely given any other person or entity to whom such objections may be presented.

Property management staff generally do not participate in communications between applicants and screening company personnel. At least some tenant-screening companies are known to instruct landlords not to allow their staff to participate in communications between applicants and screening company personnel. Tenant-screening companies claim such policies are necessary to protect the privacy of applicants' personal data. However, this is a specious concern as property management staff inclined to misuse applicant's personal data have ample access to it anyway, and because most rejected applicants would gladly allow such property staff to participate in calls with screening company personnel if doing so would better enable the reason for denial to be discovered or disputes to be lodged with a person capable of acting on them.

Forcing rejected applicants to constantly deal separately with either the property management staff or the screening company enables the two entities to “cool out” denied applicants. Many will simply give up on a rental application after having to deal alternately with multiple entities, both of which deny such basic information as knowledge of the reason for a denial or to whom a dispute might properly be presented, and enduring wait times for customer service lines, responses to telephone messages, and

other delays.

Few landlords will await the outcome of an FCRA dispute before leasing a property. The FCRA allows up to 30 days for reinvestigation and 5 additional days to report the outcome—and these timelines in practice can be even longer when resellers and furnishers are involved as disputes must be relayed to other entities. Landlords do not often find these timelines practical when trying to fill vacant rental units. In larger properties with regular vacancies, an applicant who successfully disputes a denial or secures a favorable revision to a credit report can more realistically be expected to be offered the next available dwelling unit of the appropriate size, rather than the specific unit to which the applicant originally applied. In smaller properties without regular vacancies, often there is simply not sufficient time to complete the FCRA dispute process before the only available unit is rented to another tenant.

As an Atlanta advocate reported: “I had that happen once. Where the landlord actually agreed to hold the home and not rent it to somebody else while I cleaned up this inaccuracy in my client’s record. But her credit check was otherwise clear, there was only one thing on it, so we knew exactly what it was. We cleared it up and he gave her the housing. But this was a small, mom-and-pop kind of landlord. The corporate landlords don’t hold their houses or rental units.”

In some circumstances, the practical benefit of disputing erroneous information on a tenant-screening report will simply be to ensure the same error does not occur a second time when the applicant applies somewhere else. Depending on the nature of the error, however, even this benefit may not be realized. Unlike with consumer credit reporting, there are too many tenant screening companies for an applicant to have the practical ability to notify all of them about a particular form of inaccurate or misleading information, and a renter will not likely know which screening company the next landlord (to whom that person applies) will use.

Requiring landlords to publicly disclose the names of the screening service providers they use can mitigate this somewhat, as housing seekers who have already corrected a report with one company could potentially look to apply at other properties using the same screening service. Fostering the use of portable screening reports, such as by prohibiting screening fees to applicants with portable reports available, also mitigates this problem.

41. To what extent are landlords, property managers, or consumer reporting agencies sharing the recommendations or scores with prospective tenants? What steps, if any, are they taking to explain to prospective tenants the basis for a recommendation or score?

a. How commonly do adverse action notices explain the criteria that the recommendation or scoring product considered or the reason(s) the algorithm rejected the prospective tenant?

Rental applicants are typically not informed of the reason(s) for denial of admission. They may sometimes be given adverse action notices or other disclosures with high-level statements of the reasons, such as “unsatisfactory credit” or “unacceptable rental history.” Some tenant-screening companies that calculate rental scores may report the key factors that negatively affected a score, as required with financial credit scores, but this is uncommon.

When rejected applicants have only a single adverse item on their screening report, such as an eviction record or criminal record, obtaining a copy of their consumer file is usually sufficient to discern the basis

for denial. But when applicants have multiple adverse items—as is frequently the case—there is seldom any way to distinguish information items that contributed to the denial from information items that did not, or to assess the weight that particular items carried in the adverse decision.

There is also no way for consumers to verify that their background data was used accurately in executing an automated model. For example, a consumer file may show a criminal record with an offense date, an arrest date, a conviction date, a sentencing date, a date of release from incarceration, and the dates of various subsequent matters such as the payment of legal-financial obligations, parole proceedings, and so forth. Though landlord admission policies may apply look-back periods from earlier dates, such as offense dates or disposition dates, applicants do not receive disclosures sufficient to verify that a computer model used the correct date to assess whether a criminal record was disqualifying.

42. To what extent do consumer reporting agencies allow tenants the opportunity to dispute, seek review of, or seek a non-automated alternative to the use of a recommendation, prediction, or score produced by an algorithm? To what extent do landlords or property managers re-assess housing applications following a tenant's dispute or correction of scoring criteria or underlying data?

The tenant-screening company personnel who receive computer disputes are typically not given access to the recommendation settings a particular landlord has entered, so they have no way of ascertaining from the contents of a consumer file what information may have triggered a denial recommendation or lower score.

Landlords who use automated screening products do not typically review or reevaluate applications from rejected applicants unless the applicant has retained counsel, filed an administrative fair housing complaint, or taken some other spontaneous action to which the landlord feels compelled to respond.

That automated rental admissions screening relies on suspect information that cannot easily or consistently be overseen by consumers and advocates is troubling. But incomplete and inaccurate data is only one aspect of a more significant problem emanating from the increasingly widespread use of rigid, monolithic scoring algorithms to approve or deny housing applications from unique applicants.

Historically, rental housing providers would not only obtain records about applicants' credit, criminal history, and eviction litigation through electronic sources, but would seek comprehensive tenant-screening reports that typically included more in-depth version of this information (whether from electronic or paper sources) as well as sometimes information drawn from interviews with an applicant's past landlords, employers, or other personal references. While some landlords would compile these reports themselves, many purchased them from a third-party screening services, which would gather the relevant information about the applicant and merge the material into a single document for the landlord to review. In some instances, however, the third-party screening reports went beyond simply gathering, filtering, organizing, and transmitting the applicant background information to the landlords. The screening agency would often additionally provide analytical information—whether in the form of numerical scores, determinations of whether applicants met specific criteria under the housing provider's admission policy, or overall recommendations as to whether particular applicants should be accepted or rejected.

As this method of screening grew in popularity with housing providers, rental admissions shifted over

time into a process whereby third-party screeners, rather than create reports designed to help landlords decide for themselves whether to accept or reject particular applicants, often make those decisions for landlords and report only the result.

One practical effect of these processes is to render housing admissions processes truly inscrutable and unaccountable to tenants. When a new prospective tenant applies for rental housing, the application is screened by a third-party company, which simply reports back to the landlord whether to admit or deny the application. In most cases, these reports are generated instantaneously through automated systems, which apply decision-making algorithms to the contents of applicants' background reports. The leasing agent with whom the applicant interacts will seldom know or even have access to the full report or the reason(s) for the denial. If the applicant inquires into the reason or states any objection to the denial, there is often nothing the leasing agent can do to help. Indeed, the screening systems are often integrated with other rental management software, such that a leasing agent may not print lease documents or otherwise proceed with the leasing process unless and until the screening company has reported an approval. Thus, leasing agents will typically just refer rejected applicants to the screening company (from which applicants may request disclosure of their consumer files, but probably obtain no further relief except the possible correction of factually erroneous material that factored into the decision algorithm). In this way, third-party screening mechanisms function as a means of diverting and cooling out rejected applicants, even further deterring them from challenging illogical, unnecessary or possibly unlawful denials. But few rejected applicants have any real idea just how illogical, unnecessary, or even unlawful their rejection likely was.

Section V: General fair housing considerations

3. To what extent do landlords and property managers address barriers for tenants and prospective tenants with limited English proficiency or disabilities?

Among public housing agencies, subsidized owners, and others subject to Title VI-driven language access requirements, compliance is spotty and inconsistent. PHAs tend to have websites and application forms available in the major local languages and to provide oral interpretation for meetings, phone calls, and hearings. Beyond that, language access tends to drop off. Applicants denied admission are seldom given denial notices or hearing-related materials in their languages and PHAs are inconsistent about informing applicants of their right to oral interpretation at hearings or providing adequate interpreters.

Subsidized multifamily owners tend to provide language access services even less consistently than PHAs; some provide translated documents only in one other language (typically Spanish), while others do not provide translated materials at all. A Georgia advocate stated: "We have a subsidized owner up in Gwinnett County where most of the residents are Korean-speaking. Even that landlord won't give notices in their language."

As a general rule, private market landlords do not provide interpreted application forms or other documents and do not provide oral interpretation for applicants and prospective tenants. Some landlords may provide some language access services, most commonly through hiring bilingual staff, and this is most common in communities with significant concentrations of particular language groups.

Efforts to enable people who are deaf or have other communication-related disabilities to apply are also inconsistent. When such applicants are denied admission, legal representation is frequently necessary to

ensure such persons have a meaningful chance to seek a hearing or other review of the decision or obtain consumer disclosures and dispute inaccurate background information that may have contributed to a denial.

Multiple advocates have reported that limited English proficient tenants are often face discrimination outside the landlord’s formal application procedure. As one Southern California tenant organizer described:

“Actually what we’re mostly finding is that most of the tenants don’t even meet the initial requirements to even be able to apply and then subsequently receive a rejection, especially with undocumented tenants, disabled tenants, tenants with children. They’re just being blocked from even applying in the first place.”

While that organizer was unsure whether persons blocked from applying were still charged application fees, a New Mexico advocate reported seeing similar practices of landlords blocking applicants from even submitting formal applications yet still collecting fees from those seeking to apply.

Another advocate reported on her own experience of being denied admission to rental housing because of a sealed eviction record. “In 2018, I was evicted but my record was sealed, so I didn’t disclose it . . . English is not my first language, right, so if I read ‘sealed record’ it means to me like nobody can see it. But that was not the case.”

5. Are there mechanisms that could make the tenant selection process more objective? For example, such mechanisms might require landlords and property managers to accept qualified tenants in the order they apply, rather than selecting a preferred tenant from a group of applicants. Should more objectivity in the tenant selection process be a regulatory goal? What are the costs and benefits of that approach?

Objectivity may be a useful objective in rental admissions in the broad sense—i.e., in that the critical question should be whether a particular rental applicant does, or does not, appear sufficiently likely to fulfill the terms of a potential lease contract as opposed to such considerations as whether the landlord “wants the applicant as a tenant.”

However, few landlords or tenant-screening companies grapple directly with this central question of whether an applicant is, or is not, objectively likely to fulfill the lease. Rather, they tend to determine the desirability of particular applicants based on various forms of primarily historical information that may or may not bear meaningfully on lease performance. Selecting tenants based on the highest credit scores or cleanest criminal history reports or the absence of past eviction case may be “objective,” but that does not mean those criteria are reliable proxies for tenant success or even useful at all. Hence only the metrics offer objectivity—the decisions of which to use or how to use them are fully subjective.

Indeed, supposedly “objective” criteria like credit scores or income-to-rent ratios tend to be arbitrary and lack meaningful predictive value with respect to tenant performance. Most such measures are based on where an individual is situated within a context heavily influenced by historical factors and modern sociological phenomena that routinely disadvantage people of color and treat past performance as necessarily predictive of future performance rather than account for changed circumstances and new capacities.

Nevertheless, in most rental markets simply requiring landlords to adhere to a publicly-available admission policy and disclose the reason(s) for denial would be practical, effective steps to assure a reasonably high degree of “objectivity” in rental admission decisions. This does not mean the particular criteria that landlords select will necessarily be meaningfully predictive of tenant performance, only that the whatever criteria the landlord uses are at least applied objectively.

For applicants who are rejected under an objective application of such factors, however, a landlord should nevertheless be prepared to offer and conduct a further examination of the applicant’s *individual* likelihood of fulfilling the obligations of the prospective tenancy. Though the question to be answered is and objective one, whether the applicant is or is not sufficiently likely to succeed in the housing, answering that question will typically require the consideration of subjective factors. Indeed, often the pursuit of abstract objectivity leads landlords to apply admission criteria in rigid and counterproductive ways, refusing to make well-warranted exceptions in the belief all applicants must be treated “the same” lest the landlord be consumed with discrimination lawsuits.

In some rental markets, demand for available rental dwellings is sufficiently intense that many landlords can expect to quickly draw interest from a number of prospective tenants. Rather than establish a set of minimum admission criteria and offer the housing to the first qualified applicant, the landlord will instead accept multiple applications and compare those applicants to each other. The landlord will then offer the housing first to the applicant it most prefers, and so on.

“Competitive admissions” processes of this kind tend to favor applicants with higher incomes and a lack of adverse background information such as criminal history. Such processes also tend to disadvantage applicants with housing vouchers, applicants who need reasonable accommodations for disabilities, applicants with limited English proficiency, households with children, applicants who have experienced gender-based violence, or other characteristics or impediments that may cause an applicant to appear more likely to demand greater or different services from the landlord or present additional risks to the premises or likelihood of contract performance.

The criteria or methodologies by which landlords rank applicants in competitive admissions processes tend to be egregiously subjective and inscrutable. The lack of insight particular applicants have into the identities or qualifications of other applicants or the reasons for not being selected creates ample opportunity for landlords to engage in unlawful discrimination without a serious risk of detection or enforcement. Especially where screening fees are collected, the impact of competitive admissions schemes on renters with admission barriers can be even more pronounced, as the fees chill applicants who perceive lower chances of being selected from even participating.

Landlords defend competitive admissions as enabling them to select the “best” possible candidates for their rental vacancies. Yet the practice has deleterious public policy consequences in more directly assuring the most desirable rental opportunities go to those with the highest incomes and assets and who do not command deviations from the landlord’s ordinary practices (whether that be providing language translations, making reasonable accommodations for disabilities, participating in a voucher program, etc.). Moreover, differences in qualifications between multiple candidates may be insignificant with respect to the critical question of lease fulfillment—i.e., the risk that a lower-income person with a past eviction or conviction record fails to successfully pay the rent and comply with lease terms may at most be marginally lower than that of a high-earner with no adverse rental or criminal history. Of course, the inscrutable and ad hoc nature of competitive admissions makes any meaningful scientific or

mathematical analysis of such comparative risks impossible, leaving landlords to make such assessments through arbitrary assumptions and spontaneous guesses.

Prohibiting competitive admissions processes and requiring instead that landlords instead choose tenants by comparing their qualifications to a standard set of criteria therefore better serves the public interest. Seattle’s “first-in-time” ordinance represents an early attempt at such a law. Another alternative could be some type of lottery system, whereby applications are accepted for a period of time and screened for certain minimum thresholds, with the housing then offered to one of the qualified applicants by random selection.

An important consideration in deterring or preventing competitive admissions is how certain procedural schemes may differently impact particular populations. For example, renters with disabilities, limited English proficiency, or other circumstances may be disadvantaged in responding first to an apartment listing, or appearing in-person to apply. Accordingly, a lottery-type scheme may be preferable over a first-in-time approach.

Note that when multiple applications are accepted for a single dwelling unit, application fees should not be charged—if at all—until the sequence in which applicants will be considered is determined. Fees should be charged only to those who receive actual consideration (i.e., if the first applicant is approved and accepts the unit, then no fees are charged to other applicants). Otherwise some applicants will pay fees despite never being considered for the housing. Apart from being an abusive consumer practice, such a scheme may amount to an illegal lottery—especially if elements of randomness are introduced into the sequence by which tenants are selected.

14. Do tenant screening practices have unique impacts on certain groups or communities? For example, are there unique impacts on historically underserved populations, such as Black, Indigenous, and people of color; the LGBTQI+ community (especially trans and gender nonconforming individuals); military service members; immigrants; public housing voucher recipients; renters with disabilities; or others?

- a. If so, what are these impacts and which tenant screening practices cause them?*
- b. What research or data can demonstrate or quantify such impacts?*
- c. What steps, if any, are landlords and property managers taking to assess whether and how their use of tenant screening reports might have discriminatory impacts on certain populations?*
- d. To the extent that particular tenant screening practices negatively impact certain groups or communities, are there steps regulators can and should take to address these impacts?*
- e. What barriers are people with IRS-issued individual taxpayer identification numbers (instead of Social Security Numbers) confronting in the tenant screening process?*

Substantially all of the most significant rental housing admission barriers are more common among BIPOC renters. Even though whites tend to commit crimes at similar rates, BIPOC individuals are arrested, convicted and incarcerated at wildly disproportionate rates⁹—and these disparities are well-

⁹ See, e.g., Ashley N Ellis, The Sentencing Project, “The Color Of Justice : Racial and Ethnic Disparity in State Prisons,” 6–11 (2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>; see also Elizabeth Hinton et al., Vera Inst. of Just., “An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System,” 1–2 (2018),

known to appear within renter populations as well.¹⁰ An increasing body of evidence shows that Black women, especially those with children, disproportionately experience eviction.¹¹ And numerous studies have shown that various forms of credit scoring and credit history-based decision-making disadvantage people and communities of color as well.¹² Automated tenant-screening systems that facilitate the screening of tenants based on this kind of historical background information, rather than an individual applicant’s present circumstances and future ability to pay rent, will predictably produce racially disproportionate outcomes.

Many housing providers willingly accept this exchange. Indeed, rental screening companies often celebrate this supposed “consistency” as a major justification for automated screening, on the argument that having computers make formulaic decisions based on the content of applicant background checks shields landlords from possible housing discrimination claims (that may occur when a human leasing agent makes a rental decision tainted by discriminatory bias). The agencies should reject this cynical justification for a practice with deeply discriminatory impacts.

Preliminarily, the supposed benefits of automated systems in preventing disparate treatment is illusory anyway, as fair housing testing and advocate experience have shown that property managers have ample opportunities outside formal application processes to deter or disallow housing seekers from applying or reject applications.¹³ Instead, landlords must prevent intentional discrimination by hiring,

<https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.

¹⁰ See, e.g., Camila Fernandez and Rachel Bogardus Drew, “How the Criminal Legal System Exacerbates Racial Housing Disparities,” *Enterprise* (Aug. 22, 2022), <https://www.enterprisecommunity.org/blog/how-criminal-legal-system-exacerbates-racial-housing-disparities>.

¹¹ Peter Hepburn et al., “Racial and Gender Disparities among Evicted Americans,” *Eviction Lab* (Dec. 16, 2020), <https://evictionlab.org/demographics-of-eviction/>; Catherine Lizette Gonzalez, Women of Color Living in Poverty Face Highest Risk of Eviction, *COLORLINES* (Apr. 9, 2018, 2:13 PM), <https://www.colorlines.com/articles/study-women-color-living-poverty-face-highest-risk-eviction>; Timothy A. Thomas et al., “The State of Evictions: Results from the University of Washington Evictions Project.” § 4.5 (2020), <https://evictionresearch.net/washington/why.html> (finding “Black adults are evicted 5.5 times more than Whites in King County [and] 6.8 times more in Pierce [County.]”).

¹² The National Consumer Law Center collects a number of such studies in its issue brief, “Past Imperfect: How Credit Scores and Other Analytics ‘Bake In’ and Perpetuate Past Discrimination” (May 2016), <https://www.nclc.org/wp-content/uploads/2022/09/Past-Imperfect.pdf>.

¹³ See, e.g., Maxwell Ciardullo, “Criminal background checks: A pretext for housing discrimination,” *Vera Institute* (Oct. 16, 2015) (Greater New Orleans Fair Housing Action Center “conducted a testing investigation of 50 area housing providers, in which equally qualified ‘mystery shoppers’—people posing as prospective renters—inquired about rental availability and any relevant criminal background policy. Matched for income, background, and conviction type (felony vs. misdemeanor), the only thing difference between mystery shoppers was race. Of the 50 site tests conducted, African American testers experienced discrimination 50 percent of the time. Criminal background policies that were discretionary, ambiguous, or evaluated tenants on a ‘case by case’ basis favored white renters 55 percent of the time. In other cases, white renters were encouraged, coached, or provided outright exceptions to criminal background policies in ways that African Americans were not. . . . In one particularly egregious instance, an agent asked the African American tester—but not the white tester—whether he was a drug dealer. When the white tester informed the housing provider that he had a prior felony charge for cocaine possession, the agent advised that the charge was not an issue so long as ‘it wasn’t crack.’”), <https://www.vera.org/news/criminal-background-checks-a-pretext-for-housing-discrimination>.

training, and supervising leasing agents who will comply with fair housing obligations. Yet a great many entrust their work to computers instead—and in so doing, trade a dubious promise of deterring some irregular, individually-motivated discrimination for a near-certainty of systematic, algorithmically-based discrimination against members of protected classes.

That such automated admission systems are in such widespread use, and tend to admit or reject applicants based on the same family of admission criteria and information sources, threatens profound collective outcomes in terms of residential inclusion and the equitable distribution of housing opportunities. This is because the criteria by which the automated systems score and ultimately admit or reject applicants persistently reflect and reproduce patterns of past privilege and exclusion.

By way of example, automated rental admission systems are often programmed to categorically or near-categorically deny admission to applicants with any record of being sued for unlawful detainer (i.e., eviction). This may occur through a strict automated process, by which a screening system is configured to automatically report a decline result whenever unlawful detainer record matching the applicant is found. Or, it may occur algorithmically, such as by assigning a negative point-value to any unlawful detainer case record that either brings the applicant's score below the minimum threshold needed for admission, or to the minimum score needed (so that any additional negative item, no matter how minor, will further reduce the score below the threshold). Either way, the result is that rental applicants who have previously been sued for unlawful detainer are categorically excluded from some portion of the rental market and highly unlikely to qualify at many other properties. While this is not an overtly discriminatory policy, numerous studies have demonstrated that the categorical exclusion of rental applicants with unlawful detainer records has a substantial, disproportionate effect on Black women.¹⁴

The presumptions underlying such “no evictions” policies are (i) that a tenant who was sued for eviction previously must have performed poorly in that past tenancy, and (ii) that poor performance in a past tenancy is predictive of likely performance in a future tenancy. These assumptions are highly suspect. For instance, there are many reasons why a tenant who performs perfectly well in a tenancy might nevertheless be sued for eviction, such as a mistake by the landlord (e.g., failing to properly calculate or post payments to tenant's account), the tenant's withholding of rent due to poor conditions, or retaliation or other bad faith conduct by the landlord. And even when an eviction lawsuit is based on a genuine lease violation, there are many reasons suggesting a default in a previous tenancy would not be objectively predictive of poor performance in a future tenancy, such as: (i) the person whose conduct violated the lease will not be included in the proposed new household; (ii) the eviction was for non-payment of rent or other financial reasons, and the tenant now has new financial resources that substantially improve her ability to pay; or (iii) the prior eviction was long in the past, and the applicant has since gained knowledge, skills, or simple maturity (the lack of which caused the prior eviction).

There do not appear to be any reliable studies or other meaningful evidence establishing that tenants who have previously been sued for eviction actually do perform worse in future tenancies (in general or under particular conditions), or the extent of any such difference, when tenants have the prospective

¹⁴ See, e.g., Peter Hepburn, Renee Louis, and Matthew Desmond, “Racial and Gender Disparities among Evicted Americans,” Eviction Lab (Dec. 16, 2020) (“property owners disproportionately threaten Black and Latinx renters—particularly women—with eviction”), <https://evictionlab.org/demographics-of-eviction/>; see Timothy A. Thomas, “The State of Evictions: Results from the University of Washington Evictions Project” (Feb. 17, 2019), <https://evictions.study/washington/index.html> (“Black adults are evicted 5.5 times more than Whites in King County [and] 6.8 times more in Pierce”).

ability to pay rent. Hence, the proliferation of automated rental admission screening systems that categorically deny housing to any applicants with eviction records drastically reduces the amount of rental housing available to Black women, and it does not because of any strong evidentiary basis but because of flawed “common sense” assumptions on the part of housing providers and screening companies.

Similar dynamics exist with criminal history screening (which also produces radically disparate impacts on African-Americans, as well as Latinos), credit scoring (as African-Americans tend to consistently have lower scores), and other common admission criteria. These overlapping disadvantages mean even greater disparities in housing opportunity for Black households, which face an increased likelihood of having at least one adult member with an eviction record, or a criminal record, or an unpaid landlord-tenant debt or other disqualifying credit history. Especially with these common admission practices reinforced through the use of rental application fees (which deter tenants with significant housing barriers from even applying to higher-quality rental opportunities), the tendency of widespread automated admission screening to drive patterns of residential segregation is not difficult to see.

Zillow has found that “LGBTQ+ renters face disproportionate hurdles to finding housing, like higher costs in areas that protect them from housing discrimination and a higher frequency and likelihood of paying upfront costs like application fees and security deposits.”¹⁵ A prior Zillow study also found LGBTQ+ renters “more likely to have at least part of their deposits withheld, pay application fees) and experience higher rent increases,” and that “[m]any of the challenges faced by LGBTQ+ households in general are even more extreme for LGBTQ+ buyers and renters of color.”¹⁶ At least one conclusion that can be taken from this research is that charging rental application fees increases the harm of housing discrimination—i.e., an applicant is rejected due to LGBTQ+ status (or any other reason) not only missed out on that housing opportunity, but then has diminished resources with which to search for another rental.

Voucher holders face widespread and persistent discrimination, especially in communities that offer no protection against source-of-income discrimination.

Section VI: Criminal history screening

17. How are landlords and property managers currently requesting criminal record information and using criminal records in making housing decisions about prospective tenants?

a. How do landlords and property managers obtain criminal record information? For example, do they ask prospective tenants about their backgrounds, purchase criminal background reports (as part of a tenant screening report or as a stand-alone report), browse mugshot databases, or through other means?

The tenant screening process varies among landlords and property managers. Some landlords ask prospective tenants about criminal history directly, either in conversation or through an application form. Others use third party screening services that search private databases or scrape internet sources for publicly available criminal records. A recent study surveyed landlords about how they evaluated

¹⁵ Manny Garcia, “LGBTQ+ Renters Face More Challenges, Including Higher Up-Front Costs,” Zillow (June 29, 2022), <https://www.zillow.com/research/lgbtq-renters-chtr-2022-31205/>.

¹⁶ Manny Garcia, “LGBTQ+ Buyers & Renters Face More Challenges, Costs when Searching for a Home,” Zillow (June 29, 2020), <https://www.zillow.com/research/lgbtq-buyers-renters-challenges-27416/>.

information from tenant screening reports and which types of information most influenced their decisions.¹⁷ Overall, the study found that landlords tended to lean on the risk scores generated by tenant screening programs, and “even when more detailed information was displayed . . . tended not to translate this information into fairer decisions for tenants.”¹⁸

Still other landlords use a combination of both application forms and tenant screening services. For example, in a current fair housing case in Louisiana, a housing provider used both a tenant screening service to screen for criminal history, as well as a criminal background screening form that the prospective tenant was to fill out themselves as part of their application materials.

When landlords simultaneously ask applicants to self-disclose and run a third-party background check, the result is a “gotcha” screening process that puts applicants at great risk of losing out on the housing that they are applying for. If there are any inconsistencies, the applicant faces denial for “lying” to the landlord. However, these records tend to be spotty and confusing, these inconsistencies are usually not due to an applicant’s intentional or meaningful attempt to mislead.

For instance, one legal aid attorney in Massachusetts reported that applicants often get asked if their record was for a felony, which is not always a straightforward question. Another shared that they hesitated to bring a fair housing complaint against a landlord because the applicant had not disclosed a criminal record during the application process, even though the record would not have been disqualifying. Another attorney observed that they often encounter screening questions which are written vaguely enough to lead tenants to disclose records that they otherwise would not have needed to disclose, including records from criminal cases that have been resolved with a plea deal.

Ultimately, such “gotcha” schemes tend to enable landlords to deny applicants arbitrarily and without accountability. If the applicant’s criminal record wasn’t a sufficient basis under the relevant admission policy, the landlord may point to the “misrepresentation” as the reason for denial—if ever called upon to explain the denial at all.

Legal services attorneys go to considerable lengths to help applicants navigate these schemes. One Minnesota attorney reported: “In a number of cases, the client has not been denied yet but is concerned about applying and how to deal with something in their past. We often write letters explaining why the client’s background should not disqualify them. In order to make these letters more effective, we either track down tenant screening reports from previous application denials or we do our own informal background reports by checking state criminal and housing court records on the client. These letters seem to work in some cases but it’s not always easy to tell how much impact they are having.”

b. What types of criminal records are being used in evaluating tenants? For example, are landlords and property managers focusing on records from a particular part of the criminal process (e.g., arrest records, charging records, conviction records, or a combination) or relating to particular criminal activity (e.g., felonies, misdemeanors, records related to specific types of offenses)?

¹⁷ [Which Information Matters? Measuring Landlord Assessment of Tenant Screening Reports](#) (So, 2022)

¹⁸ *Id.*

Records other than convictions: Landlords use information from all stages of the criminal legal process and do not limit their decision-making to convictions. In a National Consumer Law Center survey, attorneys and other advocates reported that the following records have created a rental barrier for clients:

- A conviction or charge that has been dismissed, dropped or reversed on appeal (54%)
- An arrest that is more than 7 years old (50%)
- An arrest that is 7 years old or less (44%)
- Juvenile adjudication (11%) -
- A conviction that has been sealed, expunged or set-aside (41% of respondents)

Reliance on these types of records is problematic for several reasons. Some records fall short of proving that the applicant ever engaged in criminal conduct (arrests, dismissed or dropped charges), while others undermine state or local government policies to reduce the collateral consequences of a record (sealed, expunged, or set-aside convictions). In the same survey, for example, a South Carolina legal services attorney reported that a person was denied admission for a decade-old misdemeanor drug possession conviction that had been pardoned.

Outdated criminal history records: There is also concern that landlords are relying on outdated criminal history records. In some jurisdictions where landlords are only supposed to consider criminal history that took place within a specific period of time, these so-called lookback periods are often disregarded. An advocate in Cook County, Illinois, reported that landlords do not regularly adhere to a local ordinance that restricts landlords from considering records older than three years; tenant screening companies do not always incorporate such local laws into their screening products either. An Ohio advocate similarly noted that old convictions are often used to deny applications.

Inaccurate dates present additional problems. Although the most relevant date is when the criminal conduct took place, screening reports can make criminal records appear more recent than they actually are, as one Illinois advocate reported. In Virginia, an advocate reported that criminal records were dated based on post-conviction docket entries related to payments of legal financial obligations arising from the person's contact with the criminal legal system. Such a practice can have a harsher impact on people with low incomes who need more time to pay off such debt. Many screening companies report criminal history based on the time of conviction or other disposition, which can lead to bizarre outcomes—e.g., two persons who committed the same crime and were arrested on the same day could potentially have vastly different lookback periods, were one to quickly plead guilty while the other went to trial.

Felony bans: Felony bans have frequently featured in fair housing testing and enforcement actions in recent years. In Washington State, the state attorney general sent testers to pose as prospective renters with felony convictions, and five housing providers denied their applications without inquiring about the nature, circumstances, or timing of the convictions.¹⁹ As a result, the state attorney general entered into consent decrees for each of the five housing providers to adopt more narrowly-tailored admission policies.²⁰ A fair housing center in Washington, D.C., conducted similar fair housing tests and discovered

¹⁹ Press Release, Washington State Office of the Attorney General, AG takes on discriminatory blanket housing bans on renters with criminal histories (Jan. 23, 2017), <https://www.atg.wa.gov/news/news-releases/ag-takes-discriminatory-blanket-housing-bans-renters-criminal-histories>.

²⁰ *Id.*; see also Assurance of Discontinuance, State of Wash. v. Weidner Property Mgmt., LLC. No. 17-2-00821-4 SEA (Wash. Super. Ct., Jan. 19, 2017), available at https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/AOD_FINAL.pdf; Consent Decree,

that the company’s online portal would not allow an applicant who self-reported a past felony conviction to complete the application.²¹ In Virginia, fair housing testers discovered through conversations with multiple property management staff that the housing provider systematically denied the application of anyone with a felony record.²²

Inconsistencies often exist between a landlord’s written screening policy and its implementation. In a case currently before the 5th Circuit (*Louisiana Fair Housing Action Center v. Azalea Garden Properties, LLC*), the landlord’s application form stated the following policy concerning applicant criminal history:

“If the criminal background check reveals any of the following, it will be grounds for rejecting an application: [a]ny [m]isdemeanor conviction in the preceding five (5) years including but not limited to a person or property misdemeanor; [a]ny [f]elony convictions (with no time limit); . . . [a]ny drug related convictions, including petty offenses; . . . [and] [a]ny of the above related charges resulting in ‘Adjudication withheld’ and/or ‘deferred Adjudication.’”

The criminal background screening form included with the application for Azalea Gardens also included the following questions: “Have you ever been arrested for, but not charged with, any federal, state, or municipal criminal offense?”; “Have you ever been arrested for molesting or abusing a minor?”; and “As of the date of this authorization, do you have any pending criminal charges against you?” Despite the stated limits, testing by the local fair housing enforcement agency revealed that in practice, the landlord’s tenant screening process excludes all applicants with any criminal history as reported by a criminal background check, contrary to the express language of its criminal background screening policy.

c. Do landlords and property managers review and consider records about traffic violations (whether reported as infractions, misdemeanors, or otherwise) in evaluating a prospective tenant?

A legal services attorney in Minnesota reported that a landlord tried to take an adverse action against their client on the basis of driving related misdemeanors and felonies, and they were able to successfully

State of Wash. v. Dobler Mgmt Co., Inc. No. 16-2-12461-1 (Wash. Super. Ct., Nov. 7, 2016), available at <https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/6%20-%20Consent%20Decree.pdf>; Consent Decree, State of Wash. v. Coho Real Estate Grp., LLC No. 16-2-26931-1 (Wash. Super. Ct., Nov. 4, 2016), available at https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/3-%20Consent%20Decree_FINAL.pdf; Consent Decree, State of Wash. v. Pacific Crest Real Estate LLC No. 16-2-20773-1 SEA (Wash. Super. Ct., Aug. 29, 2016), available at https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/6%20-%20Consent%20Decree.pdf; Consent Decree, State of Wash. v. Premier Residential, LLC No. 16-2-19043-0 (Wash. Super. Ct., Aug. 10, 2016), available at https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/Consent%20Decree_FINAL.pdf.

²¹ Press Release, Equal Rights Center, ERC Resolves Race Discrimination Lawsuit Against Nation’s Largest Private Landlord (Oct. 5, 2018), <https://equalrightscenter.org/maa-consent-order-press-release/>; see also Consent Order, Equal Rights Center vs. Mid-America Apartment Association No. 1:17-cv-02659 (TNM) (D.D.C., Oct. 3, 2018), available at <https://equalrightscenter.org/wp-content/uploads/maa-consent-order-10-3-18.pdf>.

²² Complaint at 2, Kniaz v. Kay Mgmt. Co., et al., No. 19-CV-01343-LO-IDD (E.D. Va, Oct 23, 2019), available at <https://www.washlaw.org/wp-content/uploads/2019/10/2019.10.23-ECF-001-Complaint.pdf>; see also Partial Judgment Against Defendants by Consent, Kniaz v. Kay Mgmt. Co., et al. No. 19-CV-01343-LO-IDD (E.D. Va, June 9, 2020), available at https://www.virginiamercury.com/wp-content/uploads/2020/07/Kniaz_v_Kay_Management_judgment.pdf.

persuade the landlord that such driving-related records were not relevant to the question of whether the applicant had demonstrated fitness as a tenant.

d. What steps, if any, do landlords, property managers, and other industry participants take to avoid discriminatory impacts from their use of criminal records in assessing prospective tenants?

e. What steps, if any, do landlords, property managers, and other industry participants take to ensure their use of criminal records complies with fair housing laws?

f. What steps, if any, do landlords, property managers, and other industry participants take to verify criminal record information with prospective tenants?

In 2016 guidance, HUD's Office of General Counsel set forth two steps that landlords could take to reduce the discriminatory impact of their screening policies. First, the landlord could conduct an individualized assessment of the applicant, considering information such as "the facts or circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts." Second, the landlord could "delay[] consideration of criminal history until after an individual's financial and other qualifications are verified" and thus "minimize any additional costs that such individualized assessment might add to the applicant screening process."²³

To the detriment of applicants with records, landlords do not routinely offer individualized assessments or delayed consideration of criminal records. Of those that do, often the policies are not disclosed to rejected applicants, the deadlines are so short that applicants cannot take advantage of them, and rental units are leased to other applicants before the reviews are completed, among other problems.

Denials & Individualized Assessments: Landlords tend to automatically decline admission for any criminal background check that reports disqualifying records without reviewing the details of an applicant's criminal history or consider mitigating information. This is especially true where the screening company has recommended a denial. By failing to conduct individualized assessments of applicants who claim rehabilitation, changed circumstances, or other grounds for overlooking a criminal record, these landlords are not taking adequate steps to reduce the discriminatory impact of their policies or to ensure that their use of criminal records complies with fair housing laws.

- In the *Louisiana Fair Housing Action Center v. Azalea Gardens* case referred to above, testers were often told that there was no human element in the screening process and that the computer program the housing provider used would just spit out an answer. "It's actually through a computer system, so we don't really have the pick-and-choose type of stuff."
- One housing advocate managed to convince a national housing provider to change their screening policy to include individualized assessments, but since there is no reporting mechanism in the revised policy, advocates have no way of knowing whether the individualized assessment is working as intended.

²³ HUD, 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 7 (Apr. 4, 2016).

- An attorney in Minnesota noted that the guidance is widely followed by professional property managers, much less so by smaller, “mom and pop” landlords.
- A Louisiana nonprofit attorney reported: “I am unaware of private landlords ever reconsidering or reviewing underlying data and I believe they take the report at face value and nothing more.”
- A Louisiana legal services attorney reported: “Our experience is that housing providers always adopt the recommendation of the tenant screening report (sometimes expressed through a score, but usually as a recommendation to “admit” or “deny”) without any review of the report itself, let alone the “underlying data.” Many applicants simply move on to the next property, and it is only when an applicant pushes back and asks for a reconsideration of the denial based on a specific reason that the landlord (or more specifically the property manager/leasing agent) is prompted to review the actual information in the report. At this point there is sometimes a process by which the applicant can request a “screening override” by providing more information.”
- A Louisiana fair housing advocate reported: “[State industry representatives representing apartment associations and realtors] have testified multiple times at the state legislature that their members use this software so they don't have to get into the details or make individualized determinations.”
- A Florida legal services attorney reported: “My impression of the process is that none of the underlying data is reviewed at all. They are looking at the "admit" "deny" or "admit with conditions" scoring recommendation ONLY.”

Even in jurisdictions where local law requires individualized assessment, landlord compliance is uneven.

- A Philadelphia legal services attorney noted that, despite local law giving applicants right in the tenant screening process, “[i]n my own experience, landlords generally only review the underlying data upon request from an advocate for the tenant. The vast majority of tenants do not have advocates familiar with the law to make that request for them.”
- In Minneapolis, the city ordinance on tenant screening allows for an individualized assessment if an applicant has a criminal record, but the applicant’s recourse for challenging an application denial isn't clear. A Minneapolis legal services attorney reported the following:
 - “Appeals must be rare because managers don’t always know how to respond and their responses take forever. When we’ve won these, it’s generally been where the landlord has either been willing to consider extenuating circumstances or where they realized they had misapplied their screening criteria. For example, a nonprofit landlord used a very complex criminal screening standard with ten categories of crimes each with a different lookback period. When they applied this to an applicant with an extensive but old criminal history, they miscalculated and so we were able to point out all the client’s criminal convictions fell outside the relevant lookback period.”
 - Tenants who have tried to challenge such denials have had difficulty, as have social workers working with tenants: “A number of clients are served by social workers under various programs and they will file appeals in some cases. Those efforts are not always

as effective as they could be, and suggest a need for training on how to do those appeals.”

- In Cook County, the Just Housing Amendment to the Cook County Human Rights Act provides procedural and substantive protections to rental housing applicants with arrest and conviction records. It specifies the timeline and steps for landlords to conduct an individualized assessment, but compliance is limited.
 - A fair housing advocate in Cook County, Illinois, reported: “There is low compliance with a Cook County law called the Just Housing Amendment, which requires a two-step screening process (wherein the first step cannot screen for criminal background). The understanding of this law is poor.”
 - A legal services attorney from Illinois reported: “Cook County law requires a notice if they deny someone based on criminal background, and there are stringent regulations around when housing providers can consider this. However, housing providers usually just tell applicants they are rejected due to a background check, and don't include the required disclosures - and often applicants are wrongfully denied.”

18. What are the potential benefits and harms of considering criminal records in making housing decisions?

a. How do those benefits and harms vary by the attributes of the records, such as offense type or recency of the conviction, arrest, or other record?

There are no established benefits to screening individuals on the basis of past arrest and conviction records, particularly in the absence of an individualized assessment. There is no empirical evidence supporting a causal link between criminal records screening and the safety of rental housing property.

The harms of criminal records screening far outweigh any benefits.

The exclusion of people with criminal records from rental housing causes distinct harms in terms of frustrating reentry efforts and contributing to homelessness and housing insecurity. Criminal records create a significant barrier to housing that can be difficult to overcome. Criminal history screening criteria tend to be arbitrary and reflect landlords’ marketing considerations—such policies seldom, if ever, appear based on any meaningful data or evidence. One legal aid attorney in Minnesota noted that a felony record – no matter what the nature of the underlying offense or how old the record – is usually enough to keep people out of housing. Another observed that, while their state has a good law on tenant screening, they have yet to meet any tenants searching for housing who have any idea of their protections. This is in part because it is difficult to summarize the law in simple flyers to provide to tenants. Frequent inaccuracies on criminal history reports exacerbate these circumstances, but the harms to prospective tenants and families are significant regardless of the record’s accuracy.

Criminal records screening puts applicants with records in a vulnerable position in the rental housing application process and increases the likelihood that they will agree to substandard housing on substandard terms. Applicants with criminal history often put up with otherwise unreasonable demands during the admissions process just hoping to get a place in very crowded housing markets. One legal aid attorney in D.C. reported that their client paid a landlord \$150 for tenant insurance and \$550 for a credit check in order to move into an apartment. Application fees – particularly when they are this exorbitant,

but even when they are not – play a significant role in disincentivizing people with records from even applying to housing. One tenant organizer from Los Angeles told NHLP that tenants who know they have something on their record do not even try to apply for housing, because they know their likelihood of success is so remote.

Screening based on conviction records can also jeopardize the housing of family members who are not system involved. A California legal services attorney said a common example is a child who is released from an institution – jail or prison – needs a place to stay but cannot find one, so their parent takes them in. However, if that parent is living in public housing where having a tenant or a guest who has a record violates a rule – or even if they are just accused of violating a rule – this situation can up-end the entire family and lead to housing insecurity for both the child and the parent.

Screening based on criminal records can also disproportionately impact survivors of domestic violence. Domestic violence is a risk factor for survivors to come into contact with the criminal legal system. Moreover, survivors are often criminalized for defending themselves against perpetrators. Additionally, survivors are often coerced into criminalized behavior, such as property, drug, or public order offenses, or will do so as a way to cope with the symptoms of trauma.

Criminal background screenings where the admissions policies are discretionary are also rife with racial discrimination. A 2015 report from the Louisiana Fair Housing Action Center (formerly the Greater New Orleans Fair Housing Action Center) found that discretionary criminal background policies favored white renters 55% of the time. “In one particularly egregious instance, an agent asked the African American tester—but not the white tester—whether he was a drug dealer. When the white tester informed the housing provider that he had a prior felony charge for cocaine possession, the agent advised that the charge was not an issue so long as ‘it wasn’t crack.’” Criminal records screenings also exacerbate discrimination on the basis of disability status, especially for those arrested and incarcerated due to behaviors related to their mental health.

In a 2021 public health impact study of criminal background check policies in Western Massachusetts, a survey was conducted of individuals with criminal histories.²⁴ These stories speak directly to the harms of criminal records screening:

- “It’s stressful, with me being homeless [because I can’t get housing due to my criminal offender record information (CORI; Massachusetts’s shorthand for criminal history information)], not being able to find something to eat, not knowing where I’m going to sleep. Am I going to be on the street? Am I going to be able to take my medication? That’s critical because I’m diabetic, I’m manic depressive, and I have chronic PTSD. So it affects my whole world.”
- “Honestly, my involvement with the legal system has destroyed [my chances for] any type of housing I’ve tried to obtain.”

²⁴ Public Health Institute of Western Massachusetts, *Health Aging with a Criminal Record in Hampden County, MA: A Health Impact Assessment about the Use of Criminal Offender Registration Information (CORIs) in housing decisions* (Nov. 2021), https://www.publichealthwm.org/application/files/2416/3718/7528/Healthy_Aging_with_a_Criminal_Record_in_Hampden_County_MA_final.pdf

- “It has totally affected me. Because of my CORI, I have been denied repeatedly from different housing authorities and Way Finders because of the CORI. Even things I hadn’t been convicted of they were holding against me – they held my arrest record along with my conviction record against me. And I haven’t been incarcerated or in trouble for 11 years.”

19. How accurate (including complete) are criminal records, both from public records sources like courts and as provided by tenant screening companies? Where there are inaccuracies, where do these errors originate?

a. How often do landlords and property managers become aware of inaccurate or incomplete criminal record information on tenant screening reports?

b. Are there particular types of oversight and quality control efforts that can catch these inaccuracies before they appear on tenant screening reports?

Criminal history reports are notoriously error-ridden, being plagued by such problems as mismatched records, duplicate records that cause applicants with a single criminal record to appear as having multiple, and misleading information of all kinds. Typically the decisive issue in evaluating a criminal history report is whether the inaccuracies present on that report caused or contributed to a denial of admission, not whether any inaccuracies are present.

Eric Dunn of NHLP has described glaring errors on criminal history reports of former clients, such as one man who was improperly matched to a criminal record because he had the same full name and birth year as a registered sex offender in a different state. Another was denied housing when an automated system matched a Washington applicant to a Maryland criminal record; even though the criminal record had a physical description which showed the record belonged to a person of a different race and gender than the applicant, the automated system was not programmed to consider this information.

A significant contributor to errors in background reports, especially those relating to criminal history, is that multiple government agencies often prepare records of the same offense—which then appear in background reports as multiple offenses rather than multiple records of the same offense. For example, one of Dunn’s former clients was arrested and charged with felony burglary, but later pleaded guilty to a criminal trespassing misdemeanor. Yet he was denied housing based on a criminal history report that listed both the burglary and criminal trespass offenses as separate charges (and that also listed two other crimes committed by an uncle with a similar name).

Another problem with criminal history reports is that individuals sometimes provide false names to law enforcement when arrested, which will lead to the creation of criminal history records for actual people with those names. Still another of Dunn’s former clients was unable to access housing for many months because of an out-of-state conviction record belonging to a different person who had given the client’s name as an alias (the resulting record listed both the offender’s real name and the alias); only after the person was cleared through an FBI fingerprint check was the record deleted from his screening report.

Even though these and other kinds of errors occur frequently with rental admission background checks, screening companies often tell a different story—often citing consumer dispute statistics as a proxy for accuracy. Since so few consumer dispute reports, background check companies claim vanishingly small error rates—typically well under 1%, or even under 0.1%. But dispute statistics are not a reliable indicator of accuracy and policymakers should not be led astray by this conflation.

The barriers to disputing a rental admission screening report are many. First, some rental applicants do not even realize they have the right to obtain a copy of their consumer files from tenant-screening companies. While landlords who use third-party background checks must inform applicants of this right, often they do not. Landlords that do make the disclosure often send it by first-class mail and it may not even arrive until after the premises are rented to a different person or the applicant is concentrating efforts on a different property. Particularly for applicants without stable housing, the disclosure may never be received at all.

But even applicants who know or are informed about their right to obtain copies of their screening reports often see little purpose in doing so. Applicants who do have damaged credit, eviction records, or criminal history may assume that if they were denied housing, the reason was not an inaccurate report but rather the landlord's policy; such applicants may not realize the types of more nuanced errors that can occur in the reporting of criminal history information, such as incorrect or missing dates (which affect the application of lookback periods or time limits on reporting), the possibility of offenses being counted multiple times, inaccurate or incomplete disposition information, and other errors. Of course, even if applicants obtain copies of their screening reports, typically the screening companies do not disclose enough information for applicants to figure out whether the particular criminal records they have should actually have disqualified them under particular landlord policies anyway.

Beyond these impediments, in many scenarios an applicant can expect the premises at issue will be rented to another applicant well before a report can be requested and received, inaccuracies detected, a dispute prepared and lodged, a reinvestigation conducted, a correction made to the screening report, and the updated report sent to the housing provider. Or, applicants themselves may have limited time remaining in their previous housing and not have time themselves to await this process.

For many applicants, the fact that a successful dispute will not lead to admission to the related housing further defeats the purpose of requesting screening reports or disputing inaccuracies, especially when screening companies make it burdensome to do so. Applicants do have some incentive to correct screening report errors simply to prevent the same errors from appearing on future screening reports. But correcting a screening report error with a single company tends to be of limited value because there are so many tenant-screening companies in operation.

Note that while errors on criminal history reports may arise from the files of criminal records vendors (i.e., that other tenant-screening companies resell), many tenant-screening companies do not disclose the identity of their vendors when making consumer file disclosures. Consumer reporting agencies are required to disclose "the sources of the information" when making consumer file disclosures,²⁵ but many tenant-screening companies strangely interpret this duty to mean disclosing only the original court or law enforcement agency that created a criminal record. By failing to disclose the vendors from which they purchase criminal records, such tenant-screening companies make it more difficult for housing seekers to pursue upstream corrections in their criminal background reports.

Still other consumers request copies of their tenant-screening reports but do not receive them. Consumer reporting agencies have increasingly demanded that consumers produce various forms of identification they may not have or that may be costly or burdensome to reproduce, before disclosing a consumer file. Some background check companies will not send a physical report to a consumer without a home address, which can be a significant barrier for those without stable housing. Some agencies do

²⁵ 15 U.S.C. § 1681g(a)(2).

not cooperate with third-parties attempting to assist consumers in obtaining their reports.

Many consumers who do obtain copies of their screening reports are unable to detect errors that might exist within them. As described above, the disclosures commonly given to consumers are limited and usually only the most egregious errors—such as being mis-matched with criminal records belonging to other people—are realistically apparent from the materials. A related factor is that many consumers who request their reports do not receive physical or electronic copies of the reports, but only oral disclosures of particular contents by telephone. This further reduces the ability to spot errors embedded in the finer details of a report.

Even if errors are found in a report, applicants will not necessarily dispute them. Applicants are seldom told the reason(s) for denial of a housing application, and must therefore usually just guess at whether a particular correction will enable them to qualify for the housing from which they were rejected. An applicant may not find it worthwhile to dispute errors that appear minor or unlikely to change the outcome—especially since future rental applications will presumably be screened with new reports, likely by different screening companies. Applicants may also choose not to dispute errors if they lack corroborating evidence, are deterred by the burdens of gathering and submitting the evidence, or have technological barriers or language barriers.

Rental applicants are also sharply limited in the types of information they may dispute through a consumer reporting agency. Generally, consumers may dispute only factual errors in the completeness or accuracy of the material—such as whether a particular record belongs to the applicant, whether the date or disposition or current status is correctly shown, etc. But a contention that a particular record should not have resulted in the denial of housing (despite being accurate and complete) may not be recognized as a proper basis for a Fair Credit Reporting Act dispute—even though the screening company is often the entity that determines which records result in acceptance or denial under a housing provider’s admission policy.

Applicants are also not permitted to dispute information items that require screening companies to evaluate or resolve disagreements or apply legal rules. Thus, for example, if a past landlord claims the tenant left owing money for damage to the premises and the tenant denies having caused the damage, the screening company has no obligation to consider any photographs, invoices, or other evidence that might be presented to corroborate or dispute the claim, and need not consider legal defenses the tenant might have to the charges (such as noncompliance with inspection requirements or deadlines for asserting post-move out charges).

This is only a partial list of impediments and disincentives to disputing information on tenant screening background reports. The net result is that few applicants request their reports, fewer receive them, even fewer detect errors that may be present on their reports, and even fewer still actually lodge disputes of those errors. Low dispute rates are not an indicator that screening reports are highly accurate. Instead, low dispute rates indicate how poorly our credit reporting laws empower consumers, and how well screening companies deter and prevent enforcement of what meager protections exist.

20. Are there issues with the overall accuracy or completeness of criminal records that impact their usefulness in assessing individuals for housing or the benefits of considering them in making housing decisions? What research (statistical or otherwise) exists to show whether criminal records (or particular types of criminal records) are useful or relevant to assessing whether a

particular individual is more likely to have a negative housing outcome (for example, to damage property, harm other residents, or otherwise violate their lease) when compared to the general population?

While there is a pervasive stigma that continues to keep people with conviction histories blocked from housing, there is little empirical evidence tying criminal records to unsuccessful tenancy. In a 2019 study that looked at more than 10,000 households, researchers found that a history of a vast majority of offenses, including marijuana possession, sex work, alcohol, and loitering, had no significant effect on housing outcomes.²⁶ Further, the study found that criminal offenses that occurred more than 5 years prior to move-in had no significant effect on housing outcomes, and the effect of a criminal offense on a resident's housing outcome declines rapidly over time. Public health researchers who studied the impact of using criminal records in public housing admissions did not find any evidence to show that people with criminal backgrounds are more likely than other residents to commit crimes.²⁷

21. Are there steps regulators can or should take with respect to the use of criminal records in tenant screening?

1. Require landlords to justify their criminal history screening practices with empirical evidence
2. Eliminate application fees so that people with criminal history aren't deterred from applying for housing.
3. Prohibit criminal history screening in federally-subsidized housing beyond criteria that is mandated by federal law.
4. Prohibit tenant screening on the basis of arrest and other non-conviction records.
5. Require that landlords, upon denial, to provide applicants with a written adverse action notice that specifies the specific conviction record(s) causing denial and provides a copy of any underlying tenant screening report.
6. Require landlords use shorter lookback periods when considering criminal histories in admissions decisions, and that the lookback period run from the date of the offense.
7. Ban "gotcha" processes in which landlords ask applicants to disclose their criminal history information as well as running a criminal background check on that applicant, and also prohibit landlords from denying admission to an applicant for failure to disclose a criminal history alone.
8. Interpret the phrase "sources of the information" in 15 U.S.C. § 1681g(a)(2) to require a consumer reporting agency making consumer disclosures to reveal all sources, including the

²⁶ [Success in Housing: How Much Does Criminal Background Matter?](#) (Warren, 2019)

²⁷ Public Health Institute of Western Massachusetts, [Health Aging with a Criminal Record in Hampden County, MA: A Health Impact Assessment about the Use of Criminal Offender Registration Information \(CORIs\) in housing decisions](#) (Nov. 2021), https://www.publichealthwm.org/application/files/2416/3718/7528/Healthy_Aging_with_a_Criminal_Record_in_Hampden_County_MA_final.pdf

entity from which that consumer reporting agency received the information (such as a data vendor or other intermediary between a public records system and the consumer reporting agency making the disclosures).

Section VII: Eviction records screening

22. How are landlords and property managers currently requesting eviction record information and using eviction records in making housing decisions about prospective tenants?

a. How do landlords and property managers obtain eviction record information? For example, do they ask prospective tenants about prior eviction actions against them, purchase public records containing eviction information (as part of a tenant screening report or as a stand-alone report), browse public housing court records, or use other means?

b. What types of eviction records are being used in evaluating tenants? Do landlords and property managers consider only the public record (e.g., records obtained from a court) or do they also consider additional context (e.g., proof of satisfaction of judgment; supporting documents that demonstrate an eviction proceeding was retaliatory or in violation of local law; or relevance of an eviction proceeding that was filed before the prospective tenant began receiving housing subsidies)?

c. To what extent do landlords consider the outcome of an eviction proceeding in evaluating a prospective tenant? (e.g., Do landlords consider whether an eviction proceeding was dismissed versus an eviction proceeding in which the prospective tenant was ordered to vacate?)

d. What steps, if any, do landlords, property managers, and other industry participants take to avoid discriminatory impacts from their use of eviction records in assessing prospective tenants?

e. What steps, if any, do landlords, property managers, and other industry participants take to ensure their use of eviction records complies with fair housing laws?

f. What steps, if any, do landlords, property managers, and other industry participants take to verify eviction record information with prospective tenants?

Landlords use a variety of means to learn about and consider eviction records in screening—including all the methods mentioned: asking on applications, searching public records, purchasing background reports, and contacting past landlords. Many landlords use multiple approaches.

Until recently the predominant landlord practice was simply to deny admission for any filed eviction case. Increasingly there has been more variation in landlord policies toward eviction records, possibly as a result of the Covid-19 pandemic (in which large numbers of tenants acquired eviction case records irrespective of whether any actual grounds for eviction may have existed). Yet denials based on mere evictions remain common—and some tenant-screening companies do not bother even distinguishing eviction cases that ended in judgments from cases that were dismissed. A Missouri advocate stated:

“So what happens here is that, unfortunately, because of Case Net, the screening companies give information that there’s an ‘eviction’ on the applicant’s record and of course it’s not really an ‘eviction.’ Often it’s just a lawsuit was filed. Lots of times the folks move out, the case is dismissed, there is no actual eviction.”

Applicants with past eviction judgments are still almost always routinely denied, especially if the judgment is recent or unpaid. Some landlords have adopted shorter lookback periods for eviction records, usually between 3-5 years and sometimes as short as 2 years. Less common are landlords who distinguish between eviction *filings* and eviction *judgments*, treating any record of involvement in eviction litigation as adequate grounds for denial. Advocates have seen some tenant screening companies that will exclude satisfied (i.e., paid) eviction judgments from tenant-screening reports, but this appears not to be a common practice.

Though some landlords have become more willing to overlook some eviction records, however, many landlords continue aggressively screen out applicants with any hint of involvement in eviction proceedings. In addition to purchasing third-party background checks that have eviction information, such landlords will ask about past evictions on written application forms, search public records systems in the jurisdictions where the applicant has lived, and sometimes even contact past landlords to inquire about evictions. Because many of these search methods do not involve the use of consumer reports, this manner of screening enables landlords to find eviction records that are well beyond seven years old or that would not appear in a third-party screening report for other reasons. Asking about eviction records on application forms can also prompt applicants to disclose sealed eviction records for fear of being denied if the records are somehow discovered.

Landlords also tend to define the term “eviction” loosely in their admission policies and application forms, so that applicants may disclose having eviction histories even where no public record of any eviction exists. For example, tenants who were given eviction notices and moved out, but never sued for unlawful detainer, may believe they were “evicted.” In some states tenants may be given unfiled eviction pleadings but resolve the case before it is ever filed in court. On the flip side, some tenants may be denied admission for withholding information or making misrepresentations on a rental application if they fail to disclose involvement in preliminary stages of an eviction case that they do not think of as constituting “eviction.”

Beyond some that distinguish between broad outcomes (e.g., dismissals, judgments, satisfactions, etc.), landlords generally do not consider the grounds or circumstances of an eviction case except in response to a request for reconsideration of an application—usually either in a review procedure available in subsidized housing or with the assistance of an attorney or other advocate. Few tenant screening reports contain useful information with which to consider the circumstances surrounding an eviction case and automated scoring and decision models are not programmed to consider such information. Even when landlords do consider the circumstances of an eviction matter, landlords only sometimes undertake such considerations with a genuine willingness to reverse the denial.

Few if any landlords take steps to avoid discrimination in the use of eviction records—which are consistently shown to disproportionately impact Black women the most heavily. Landlords, with the encouragement of tenant-screening companies, are commonly conditioned to view applicants with eviction records as “risks” to be “minimized.” Minimizing risk in this context generally means calibrating eviction history policies to be as exclusive as landlords believe they can be while still filling their rental units.

23. What are the potential benefits and harms of considering eviction records in making housing decisions?

a. How do those benefits and harms vary by outcome (e.g., dismissals versus judgments)

and recency of the eviction action?

Perhaps the most direct harm that the use of eviction records in admission screening causes is that such screening reproduces the harmful effects of a past eviction long into the future. The vast majority of evictions are for nonpayment of rent, and tend to be triggered either by income disruptions—such as a lost job, departure of a rent-contributing household member, or other emergency. Yet the record of a past eviction tends drastically to limit a person’s housing opportunities long after that person has returned to employment, secured a voucher or other financial resources, or otherwise overcome the economic problem that led to the past eviction. As one Chicago advocate explains:

“One thing I see a lot, working with the rapid rehousing program or connecting people to shelter or dealing with legal issues there, is that a lot of survivors [of gender-based violence] can get DV bonus rapid rehousing—but then they can’t even use their subsidies because they might have an eviction record or something else in their background. One survivor couldn’t leave shelter because she had an eviction record from seven years ago.”

Indeed, the inability to secure stable and appropriate housing may itself impede or prevent a person from overcoming the initial setback, as the exigencies of homelessness or near homelessness may encumber efforts to secure or maintain employment, exacerbate physical or mental health conditions, disrupt children’s education and care plans, and so forth.

Eviction records screening in rental admissions also drives residential segregation. Because Black renters and Black female renters especially are sued for eviction at grossly disproportionate rate, Black renter household are more often restricted in their rental housing alternatives. Often the practical effect of overlapping eviction, rent debt, and criminal history screening is to trap Black renter households in low-opportunity areas of concentrated poverty, where they become targets for slumlords and financial predators of various kinds.

Another significant, but often overlooked harm that eviction records screening causes is to undermine rights and protections for current tenants and negatively impact the ability of state court systems to meaningfully adjudicate landlord-tenant disputes and make tenants whole when they prevail. That is because landlords commonly downgrade any applicant who has been sued for eviction, irrespective of the reason for the suit, the surrounding circumstances, or the outcome of the case. This diminishes, to a comparable extent, the future housing prospects of a tenant who prevails on the merits of an eviction case the same as a tenant against whom a judgment is entered. The only way to avoid such an injury is simply not to be sued in the first place.

Many of the rights and protections tenants have can really only be vindicated or enforced in the eviction context. For example, most states protect tenants against retaliatory eviction suits for activities such as requesting repairs, reporting unsafe housing conditions to code enforcers, participating in tenant organizations, or testifying against the landlord in court or in a fair housing investigation. Some states authorize tenants whose repair requests are not honored to withhold rent, or to “repair and deduct” the cost of repair from the rent. During Covid-19, many state and local governments and the federal government established restrictions on evictions even for traditionally permissible causes such as nonpayment of rent. To actually enforce any of these rights or protections, however, a tenant must have the ability to actually appear in an eviction case and move for dismissal based on the anti-retaliation provision, rent withholding statute, eviction moratorium, or other protection at issue. If making such an appearance marks the tenant with an eviction record that adversely affects her access to housing for a

long period of time, that tenant will be incentivized simply to move out of the dwelling unit before any case is filed. This dynamic undermines numerous laws and the public policies behind them, and even calls the legitimacy of state eviction courts themselves—which create eviction records and make them available to the public—into question.

Numerous housing advocates report having had clients with meritorious legal defenses choose to move out of rental properties rather than appear and assert those defenses due to concern over the impact of an eviction case filing on their future access to housing. An advocate from Atlanta described seeing tenants make such choices “almost every day,” while a California tenant organizer described seeing this phenomenon “daily in Los Angeles.” HJN members from Boston, Ohio, and New Mexico similarly reported seeing tenants routinely choose to move out rather than assert claims or defenses so as to avoid acquiring eviction records. A Chicago advocate described seeing the fear of acquiring eviction records deter immigrants with limited English proficiency from enforcing that state’s immigrant tenant protection law.

Another advocate, a legal aid attorney in Southern California, stated “What I also hear pretty regularly from our organizing partners is that those tenants may not even be reaching us as clients because they self-evict the second they get a notice or something like that, fearing even the existence of that case.” Numerous HJN members echoed the sentiment that the individuals with whom they personally interact are just the small tip of a large iceberg—with many more tenants quietly moving out to avoid eviction records without ever speaking to an attorney or other housing advocate.

Some landlords actively exploit tenants’ concern over losing the ability to rent elsewhere as a means of pressuring tenants into moving out when no grounds for eviction exist. For example, a Minnesota HJN member stated:

“I have noticed, particularly with Somali callers, that their landlord is making a threat that they ‘will mess up their credit.’ So it’s kind of the housing and the credit all kind of wrapped-up into one: that if they ask for repairs or if they report them to the city, that they’ll mess up their credit, which usually carries the threat of an eviction there.”

The same advocate confirmed that landlords sometimes file non-meritorious eviction cases against tenants just out of spite or as retaliation for asserting legal or contractual rights—the purpose not being to actually evict the tenant but simply damage the tenant’s future housing access.

A Boston advocate added “I have a letter in which a landlord made that threat. The letter says that if the tenant wins it will be even worse for them.”

Eric Dunn of NHLP described how the widespread practice of categorically denying admission to any applicant against whom an eviction suit is filed, and the secondary effect of that practice on tenants’ rights the legitimacy of landlord-tenant court proceedings, is what drew his professional interest in rental admission screening long ago:

“Around 2005, as a housing lawyer in Seattle, Washington, tenants I’d previously represented in eviction proceedings began reporting difficulty obtaining new rental housing due to records of involvement in eviction litigation—even tenants who had prevailed or otherwise favorably resolved their cases. Upon further investigation, I began to learn that housing providers commonly rejected applicants with records of being named as defendants in eviction litigation

automatically, irrespective of the circumstances or outcomes of those cases. When I then began advising new eviction defense clients about the adverse consequences of being sued for eviction, even wrongfully, many would choose to move out rather than assert viable defenses to eviction. They rationally decided that the cost of acquiring eviction records that would materially limit their future housing opportunities was greater than the immediate loss of housing. This was professionally demoralizing, and led me to understand that only by limiting the use of eviction records in admission screening could a tenant possibly secure complete relief by prevailing in an eviction case.”

A tenant organizer from California, who described her own experiences with retaliation and discriminatory practices by landlords, stated:

“It was hard for me, and now as a tenant organizer, I don’t feel 100% comfortable telling a tenant, ‘fight for your case, you have rights,’ because I know the reality is different from my own personal experience.”

The organizer described abusive police reports and threats to call immigration authorities as other forms of intimidation that landlords employ against tenants; eviction records are now weaponized in much the same way. Multiple other advocates signaled agreement with the organizer’s remarks, with a California legal aid lawyer stating her “stories are very common/familiar even with strong rules in place in California prohibiting landlord inquiries into immigration status, local rules with specific consequences for harassment, etc.”

On the other hand, tenants who have been sued for eviction by their landlords sometimes may actually prefer to move out, even if they have meritorious defenses or even already prevailed in their cases. But this may not be possible, since the record of that very eviction case filing may prevent them from securing suitable housing elsewhere. This can frustrate efforts to settle eviction cases or enable tenants to leave disagreeable tenancies on favorable terms. “Yes, very often tenants want to leave but can’t,” described a Georgia advocate, “because the eviction shows up on their background during the exact time they are looking for other housing.”

The difficulty of understanding where eviction records come from and the implications of settling an eviction case a particular way on that record can become yet another vulnerability for unrepresented tenants. As a Boston advocate explains:

“I also see a lot of court-based terrible settlements that tenants enter into because they think (and sometimes are told by the landlord) that if they settle it ‘won’t be on their record.’ Of course, the case still shows up as a judgment against them. So they are waiving rights based on a fear of tenant screening repercussions regardless of the actual impact on their record. This to me emphasizes the importance of clear, well-publicized rules on what information landlords are able to get and use.”

That some landlords have begun adopt admission screening policies with slightly more granularity among eviction records, such as ignoring dismissed cases or using lookback periods shorter than the FCRA default (7 years), has made the impact of an eviction filing a shade less damaging than in the not-so-distant past. But the extent to which landlords continue categorically excluding applicants with past eviction filings remains sufficiently broad that the chilling effects on tenants’ rights and overall patterns of exclusion are largely the same.

Some industry voices claim eviction records have predictive value as to tenant performance. A report from Trans Union that compared residents who were evicted to residents who were not evicted in about 200 rental properties, and found: "In the 'not evicted' group, 5.5% of residents had prior evictions. For those who were ultimately evicted, that number rose to 21.7% of residents with a prior eviction."²⁸ As discussed above, that study actually does not establish that eviction records have predictive value because it does not compare the rate at which persons with past evictions succeeded in their tenancies compared with persons without past evictions. Even if it did, simply comparing the performance of tenants with past eviction records to those without is an overly simplistic way of examining this issue and would likely overstate the degree to which renters with past evictions default on future leases when they have the means to pay.

The large majority of evictions are for nonpayment of rent, and if a person who doesn't have sufficient resource to afford their housing will constantly either be homeless or at risk of eviction. As housing is a basic need, one cannot rationally assume people will forego housing just because they lack sufficient means to reliably afford it. Hence, grouping tenants whose financial positions have not materially improved since a past eviction together with tenants having a genuinely improved ability to pay likely causes the latter group to appear much riskier than they truly are. And in practice, landlords who screen for eviction history almost certainly screen for income and financial resources as well.

Even if accepting rental applicants with past evictions does expose a landlord to a higher risk that a lease goes unfulfilled, that difference is slight and even Trans Union's study shows most tenants with eviction records will perform the obligations of their leases successfully. Again, the Trans Union study did not attempt to determine the actual percentage of tenants with past eviction records who were evicted a second time. However, we do know that 5.5% of the tenants in the "not evicted" group had past eviction records. If the eviction rate at those 200 building was equal to the national eviction rate (around 6%²⁹), then for every 1,000 tenants in the study, about 65 would have had records from prior evictions. Of those 65 tenants, 52 would successfully complete their tenancies and only about 13 (20%) would be evicted again.

Therefore, even assuming the legitimacy of these statistics, a rational way for landlords to consider evictions in tenant-screening would be to try and distinguish the roughly 20% of applicants (with eviction records) who are most likely to fail from the 80% who are likely to succeed. Accomplishing this would seem to require, at minimum, that an applicant be given an opportunity to demonstrate material improvements in their financial resources or other reasons why they would be likely to succeed in a future tenancy despite having failed in a past tenancy. Simply excluding all applicants with eviction records would not be a rational response to such data.

Indeed, given the high percentage of tenants who succeed in future tenancies despite past eviction records, landlords should readily admit tenants despite eviction records who present credible reasons to suggest the past eviction is not predictive of failure—especially an improved ability to pay rent and utility costs. Circumstances that would seem categorically to render any presumption based on a past eviction filing unreliable would seem to include: (i) the household receives a housing voucher or other

²⁸ <https://newsroom.transunion.com/transunion-analysis-collection-records-are-highly-predictive-of-resident-behavior/>.

²⁹ Ashley Gromis, Ian Fellows, James R. Hendrickson, Lavar Edmonds, Lillian Leung, Adam Porton, and Matthew Desmond, "Estimating eviction prevalence across the United States," PNAS (May 16, 2022), <https://doi.org/10.1073/pnas.2116169119>.

rent subsidy that will assure their rent remains affordable despite income fluctuations, (ii) the eviction occurred when the household was severely cost-burdened (i.e., paying more than 50% of income toward rent and utilities) and the housing they are applying for will not impose severe cost burdens; or (iii) the eviction resulted from a major income disruption such as a lost job or departure of an income-earning household member and that lost income has been restored; (iv) the eviction resulted from a significant rent increase or other predatory circumstance; or (v) the eviction was for a non-financial reason that no longer exists (e.g., such as an abusive partner who will not be joining the new residence).

24. How are tenant screening companies accounting for different jurisdictions' approaches to eviction proceedings and judgment amounts in their tenant screening products?

25. How do tenant screening companies differentiate between the actual amount in controversy and any additional fees levied or permitted by the court (e.g., statutory attorney's fees, treble damages, or collection fees)?

26. How do tenant screening companies account for variations in the completeness of records from different jurisdictions? To what extent do tenant screening reports differentiate between judgments for eviction and other types of eviction filings?

Tenant screening companies will report eviction filings and eviction judgments. Some will distinguish satisfied judgments. Tenant screening companies will typically report a judgment amount if a money judgment is entered; seldom, if ever, will the screening report state the different components of a money judgment (i.e., how much for rent, late fees, court costs, attorney fees, or other charges).

Most tenant-screening companies do not report the basis for an eviction action (such as nonpayment of rent, no-cause, etc.). Those that do frequently report this information erroneously. However, landlords seldom treat eviction records any differently based on the basis for eviction so these errors are often not worth the effort to dispute or correct.

Most screening companies will exclude sealed eviction records if they know the records are sealed—but few make proactive efforts to determine whether a record has been sealed before reporting it.

Tenant-screening companies tend to adopt a uniform report format for reporting eviction information regardless of jurisdiction. Sometimes the headers on those report forms do not mesh with the type of information available or relevant in a particular type of eviction case. Often, fields are simply left blank on the report forms. Other times, tenant-screening companies will simply report information in a form that is less than of maximum possible accuracy, rather than modify their report forms for particular jurisdictions. Eric Dunn of NHLP, speaking based on experiences in Virginia and Washington State, said that “screening companies usually report the information that is available and simply leave report fields blank if the necessary information is unavailable or if they do not wish to deal with it.”

Even when eviction records are matched to the proper rental applicant, the reports are often misleading or incomplete. A common problem is that case outcomes (or “dispositions”) are not included. As with most civil cases, eviction lawsuits are civil cases that are typically settled between the parties rather than adjudicated by the court—so many landlords will categorically deny admission to any applicant against whom a case was filed without regard to the outcome. This may lead many screening entities to view the case outcomes as immaterial, and therefore not worth the effort or expense to obtain or report. This becomes a reinforcing loop, as the habitual failure of screening companies to gather or

report case outcomes then further deters landlords from seeking or incorporating case outcomes into their admission criteria. The result is that tenants against whom improper eviction cases that were filed and dismissed by the court for lack of merit are denied housing the same as those against whom judgments were entered.

Even when case outcomes or dispositions are included, the reports seldom contain any true details or other meaningful information about the grounds or circumstances behind the case. This too can render the reports misleading or inaccurate. For example, many states allow tenants to withhold rent when landlords fail to make repairs or maintain rental premises. Typically, in those scenarios, a landlord will sue for nonpayment of rent, and the court will enter a “rent abatement” that retroactively reduces the tenant’s rent obligation based on the diminished value of the rental premises. An advocate from New York gave an example of a case in which a tenant withheld approximately \$3,000 in rent due to poor conditions, and upon proving those conditions to the court was awarded a 90% rent abatement. Yet the resulting judgment, awarding only \$300 rent to the landlord, would appear to have been adverse to the tenant viewed outside its context.

The denial of housing based on dismissed or other inappropriate eviction records is fundamentally unjust and inflicts profound injuries on the legitimacy of court systems and other public institutions that the use of other eviction records may not present. But ultimately no eviction record should be permitted to trap a person in homelessness or substandard living conditions.

27. How accurate (including complete) are eviction records, both from public records sources like courts and as provided by tenant screening companies? Where there are inaccuracies, where do these errors originate?

a. How often do landlords and property managers become aware of inaccurate or incomplete eviction record information on tenant screening reports?

b. Are there particular types of oversight and quality control efforts that can catch these inaccuracies before they appear on tenant screening reports?

28. How does the accuracy of eviction records impact their usefulness in assessing individuals for housing or the benefits of considering them in making housing decisions?

29. What research (statistical or otherwise) exists to show that eviction records (or records in which an eviction proceeding was resolved in a particular way) are useful or relevant to assessing whether a particular individual is more likely to have a negative housing outcome when compared to the general population?

Gross inaccuracies, like mismatched records, are common with eviction records screening because there are typically very few unique identifiers to associate an eviction record with a consumer (often just name and location). But more nuanced forms of inaccuracy are also exceedingly common. Very few eviction records indicate whether a case was resolved by default, by settlement, by court decision, etc. The nature of a LL’s allegation or cause for eviction is seldom apparent, and any defenses a tenant may have raised are not reported. Often the judgments can give a misleading impression of the outcome and cast the tenant in a false light. For example, a tenant may dispute the amount of rent and prevail on the claim, only to have the court enter judgment against the tenant for a lower amount than the landlord had claimed—which the tenant may then be able to pay off and preserve the tenancy. But such a case may simply be reported as a judgment for the landlord in the amount the court determined.

Some studies have been conducted into the accuracy of financial credit reports from the “Big 3” credit reporting agencies (i.e., Experian, Equifax, and Trans Union), and have found significant error rates: between 20-30% of credit reports, with about one fourth of errors being significant enough to affect a consumer’s access to credit or the terms thereof.³⁰ There have not been any studies into the accuracy of other background information such as criminal history reports or eviction records, however, so it is not possible to give a statistical estimate as to how often errors occur. But error rates in tenant screening reports are undoubtedly at least as high as with Big 3 financial credit reports—and likely far higher.

Preliminarily, tenant-screening reports usually incorporate information drawn from Big 3 credit reports—so errors in the underlying credit report are likely to be repeated in the tenant-screening report. But more importantly, criminal history and eviction records tend to be less intrinsically reliable and more difficult to match with specific consumers than the credit accounts one would find on a Big 3 credit report. For example, landlords that file eviction cases typically state only the name(s) of the tenant(s) and the address of the rental premises in the complaint; a landlord would seldom have any reason to include a tenant’s date of birth, Social Security Number, or other personal identifiers in a court pleading—and may even be prohibited by court rules from doing so. Hence, at most a background check company might match an eviction record to a specific person using a first and last name and an address. Yet judicial information systems often do not even capture all of the personally-identifying information a landlord does include in an eviction complaint—such as street addresses, for example.

Thus, in many jurisdictions, the only identifiers a tenant-screening company has available to match an eviction case with a specific person might be name and the court’s location (whether a county, city, or state judicial district). Furthermore, screening companies tend to use matching logic that associates rental applicants with information close to their own—such as alternative spellings of a name, or using a month and year (or sometimes only the year) of birth rather than a specific date. Eric Dunn of NHLP once represented a client who was falsely matched to an eviction record simply because he lived in the same county as a woman with the same last name (Thompson) and a similar first name (Patricia) to his middle name (Patrick).

Traditionally, the only accuracy issues of great consequence relating to eviction records have been those that mismatched an applicant to an eviction case involving someone else. That is because most landlords would deny admission for any eviction case filing, irrespective of the circumstances or outcome. As landlords begin to adopt more graduated policies with respect to eviction records, the accuracy problems are likely to take on greater importance. Rather than simply matching an eviction record to the correct person, an eviction report must include the correct outcome, determine the correct date of the eviction for purposes of applying a lookback period, and potentially include other key details such as the basis for the eviction and any defenses raised or adjudicated. Tenant-screening companies have historically struggled even to consistently report such basic information as case outcomes at all, let alone report them accurately.

³⁰ See Federal Trade Comm., Report to Congress under Section 319 of the Fair and Accurate Transactions Act of 2003 (Jan. 2015), <https://www.ftc.gov/system/files/documents/reports/section-319-fair-accurate-credit-transactions-act-2003-sixth-interim-final-report-federal-trade/150121factareport.pdf>, see Jill Riepenhoff, “Credit Scars: Mistakes Abound,” Columbus Dispatch (May 6, 2012), <https://www.dispatch.com/content/stories/local/2012/05/06/credit-scars.html> see Brian Dakes, “4 in 5 Credit Reports Have Errors,” CBS News (Oct. 12, 2004), <https://www.cbsnews.com/news/4-in-5-credit-reports-have-errors/>

Notably, bare public records often give misleading impressions of eviction case outcomes. For example, many settlement agreements take the form of consent judgments; if reported simply as a “judgment,” this may give the false impression that the plaintiff (landlord) prevailed in a case that was resolved by settlement. Cases where the tenant withholds rent due to poor conditions or disputes charges claimed by the landlord are often adjudicated in eviction cases, with the landlord claiming a higher amount of rent owed and the tenant either disputing that amount or asserting a right to damages that may be set-off against the landlord’s claim; even when the tenant prevails, the resulting court order may be in the form of a judgment for the landlord in the lesser amount. Just reporting such a case as having resulted in a judgment for the landlord casts the tenant in a false light.

During Covid-19, many state courts allowed landlords to file, prosecute, and even obtain eviction judgments against tenants occupying under local, state, or federal eviction moratoria. Many of those tenants paid off their rental arrears and remained in the premises after the eviction moratoria expired, while others moved out on their own terms for reasons unrelated to the judicial proceedings. Again, reporting such cases as eviction records without including the surrounding circumstances is incomplete and misleading.

30. Are there additional steps regulators can and should take with respect to the use of eviction records in tenant screening, and if so, what are those steps?

One important regulatory step would be to make clear that a consumer reporting agency’s obligation under 15 U.S.C. § 1681g(a)(2) to disclose the sources of the information in a consumer file include intermediate public records vendors and not just the original public records source from which an eviction record was obtained. Most tenant screening companies purchase eviction records from other consumer reporting agencies, so requiring a tenant screening company to disclose *its* source for an eviction record can facilitate upstream corrections to improper eviction reports.

Also, to the extent eviction records are sorted, categorized, or aged for the purpose of calculating a score or making an admission recommendation, regulators should recognize that such categorization details are information on file about the consumer and therefore subject to disclosure under 15 U.S.C. § 1681g(a) as well. As discussed above with respect to criminal history algorithms, automated systems that attempt to categorize eviction cases based on the grounds for the eviction, the case outcome, whether a judgment was satisfied, the age of the record, or other information are likely to produce erroneous results in some instances and consumers need insight into those processes if they are to detect and correct such errors.

Regulators should make clear both that consumer reporting agencies may not report sealed eviction records (or records otherwise made impermissible for use in tenant screening under state laws such as Washington State’s RCW 59.18.367³¹), but also that consumer reporting agencies owe a duty to take reasonable steps to ensure the record is not sealed or of limited dissemination before reporting it. At

³¹ RCW 59.18.367(3) (“When an order for limited dissemination of an unlawful detainer action has been entered with respect to a person, a tenant screening service provider must not: (a) Disclose the existence of that unlawful detainer action in a tenant screening report pertaining to the person for whom dissemination has been limited, or (b) use the unlawful detainer action as a factor in determining any score or recommendation to be included in a tenant screening report pertaining to the person for whom dissemination has been limited.”).

present, most tenant-screening companies will refrain from reporting a sealed eviction record if they know it has been sealed, or will delete a sealed record from a tenant file once the fact of the sealing is brought to the company's attention. But few will take proactive measures to determine whether an eviction record has been sealed before reporting it or including it in a scoring calculation.

Another key regulatory step would be to recognize the adverse public policy consequences of denying housing on a categorical or near-categorical basis to applicants with past eviction records, and hence the probability that doing so amounts to an unfair trade practice. This includes not only the discriminatory impact of such screening on Black women, but also the chilling effect on the exercise of tenants' rights and protections and the adverse impact on the judicial system's ability to properly adjudicate landlord-tenant dispute and accord full relief to tenants. This is especially true as to the reliance on eviction filings only—which, like the use arrest records in criminal history screening, amounts to guilt-by-accusation and should be considered insufficient as a basis for making a rental admission decision.

Thank you.

Sincerely,

EQD

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