U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-2000

ASSISTANT SECRETARY FOR
FAIR HOUSING AND EQUAL OPPORTUNITY

June 10, 2022

MEMORANDUM FOR: Office of Fair Housing & Equal Opportunity
Fair Housing Assistance Program Agencies
Fair Housing Initiatives Program Grantees

FROM: Demetria L. McCain, Principal Deputy Assistant Secretary for Fair Housing and Equal Opportunity

SUBJECT: Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions

Decent, stable, and affordable housing is a critical prerequisite to health, safety, education, jobs, and the economy.[1] Unfortunately, individuals with a criminal history consistently face daunting barriers to obtaining and maintaining housing.

On March 31, 2022, President Biden declared April as Second Chance Month, emphasizing the importance of helping persons who have had criminal involvement reenter society, reunite with their families, and find stable and safe homes. And on April 12, 2022, Secretary Fudge issued a memorandum instituting an agency-wide effort to review this Department's programs to ensure HUD, its funding recipients, and program participants are as inclusive as possible of individuals with criminal involvement. This directive highlights the importance of applying the principles of the Department's Office of General Counsel's 2016 Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, which cannot be overemphasized.

This memorandum reviews those principles, highlights the need for FHEO investigators, Fair Housing Initiatives Program grantees (FHIPs), and Fair Housing Assistance Program agencies (FHAPs) to be aware of the ways in which criminal background screening policies and practices can violate the Fair Housing Act (the "Act"), provides tips for conducting investigations relating to criminal background screening, and sets out some best practices FHIP and FHAP staff can suggest to housing providers who may be concerned about potential liability relating to the use of criminal background screening information on applicants or tenants.

[1] *See, e.g.,* Carnemolla, Phillippa and Skinner, Vivienne. *Outcomes Associated with Providing Secure, Stable, and Permanent Housing for People Who Have Been Homeless: An International Scoping Review*. Journal of Planning Literature. 2021, 36 (4): 508-525, *available at* https://journals.sagepub.com/doi/pdf/10.1177/08854122211012911; *see also* Fontaine, Jocelyn and Biess, Jennifer. *Housing as a Platform for Formerly Incarcerated Persons*. The Urban Institute. April 2012, *available at* https://www.urban.org/sites/default/files/publication/25321/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.PDF.

HOUSING & DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM[2]

Disparities throughout the United States' criminal justice system are well established and persistent. Blacks represent roughly 13 percent of the total U.S. population but account for roughly 27 percent of all arrests.[3] In 2019, the incarceration rate of Black males was 5.7 times that of White non-Hispanic males, while the incarceration rate of Black females was 1.7 times the rate of White non-Hispanic females.[4] A recent study also reflects that Hispanics are incarcerated in state prisons at a rate that is 1.3 times the incarceration rate of White non-Hispanics.[5] In addition, updated data shows that individuals with disabilities are also disproportionately impacted by the criminal justice system.[6] Research shows that these disparities cannot be simply attributed to certain groups committing more crimes and are better explained by biases in the criminal justice system.[7]

These disparities extend to housing. Housing providers frequently employ policies or practices that exclude individuals with criminal involvement from housing, which should raise red flags for investigators. For example, housing providers commonly use tenant screening companies that provide background check reports that are often inaccurate, incomplete, or have no relationship to whether someone will be a good tenant. This information is then used to deny housing to otherwise qualified applicants. As another example, housing providers sometimes utilize third-party companies to independently screen and reject applicants using algorithms that may contain racial or other prohibited bias in their design. Also at times, some housing providers inform potential tenants that they do not rent to persons with "criminal records," deterring those with any criminal involvement from applying. On other occasions, housing providers evict individuals based on criminal activity that has no bearing on their tenancy, evict entire families because of criminal

---

[2] While "Latinx" is the commonly preferred term, the term "Hispanic" is used as consistent with U.S. Census Bureau terminology.

[3] *See* Nembhard, Susan and Robin, Lily. *Racial and Ethnic Disparities throughout the Criminal Legal System: A Result of Racist Policies and Discretionary Practices*. Urban Institute (August 2021), *available at* https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf. (citing, QuickFacts population estimates, July 1, 2019, United States Census Bureau, https://www.census.gov/quickfacts/fact/table/US/PST045219; Crime in the United States, Table 43A: Arrests by Race and Ethnicity, 2019, United States Department of Justice, Federal Bureau of Investigation Uniform Crime Reporting Program, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topicpages/tables/table-43.)

[4] *See* Carson, E. Ann. *Prisoners in 2019*. U.S. Department of Justice. Office of Justice Programs. Bureau of Justice Statistics (October 2020), *available at* https://bjs.ojp.gov/content/pub/pdf/p19.pdf.

[5] *See* Nellis, Ashley. *The Color of Justice: Racial and Ethnic Disparity in State Prisons.* The Sentencing Project (2021), *available at*, file:///C:/Users/h53470/Downloads/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons%20(1).pdf.

[6] *See* Laura M. Maruschak, et al., Bureau of Just. Stat., U.S. Dep't of Just., *Disabilities Reported by Prisoners: Survey of Prison Inmates, 2016*, at 2 (Mar. 2021), *available at* https://bjs.ojp.gov/library/publications/disabilities-reported-prisoners-survey-prison-inmates-2016; Erin J. McCauley, *The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender*, Am. J. Pub. Health (Nov. 8, 2017), https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2017.304095.

[7] *See, e.g.*, Emma Pierson, et al.. *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*. Nature Human Behaviour, Vol. 4, 736-745 (July 2020) (analyzing data showing that police search Black and Hispanic drivers more often than White drivers, but are less likely to turn up contraband during searches of Black and Hispanic drivers compared to searches of White drivers), *available at* https://www.nature.com/articles/s41562-020-0858-1; *id* (showing that black drivers are less likely to be pulled over at night (when their race is obscured)); Nembhard, Susan and Robin, Lily. *Racial and Ethnic Disparities throughout the Criminal Legal System: A Result of Racist Policies and Discretionary Practices*. Urban Institute (August 2021) (citing multiple studies also showing the racial disparities in the criminal justice system cannot be explained by differences in criminality between racial groups, but instead can be explained by racial bias); *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, *American Civil Liberties Union* (April 2020) (citing data showing that Black people are 3.6 times as likely to get arrested for marijuana possession than White people, despite similar usage rates), *available at* https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf.

activity of one person that has nothing to do with the rest of the household, or evict because a household member was a *victim* of a crime that occurred at or near their home. These and many other policies and practices frequently result in discrimination against protected class groups, including Blacks, Hispanics, and individuals with disabilities.

THE 2016 GUIDANCE & THREE THEORIES OF LIABILITY

On April 4, 2016, HUD's Office of General Counsel issued its Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions. ("2016 Guidance"). This guidance described how to assess claims of illegal discrimination under the Act. It applies to a wide-range of entities covered by the Act, including private landlords, management companies, condominium associations or cooperatives, third-party screening companies, HUD-subsidized housing providers, and public entities that operate, administer or fund housing or that enact ordinances that restrict access to housing based on criminal involvement.[8]

Using criminal history to screen, deny lease renewal, evict, or otherwise exclude individuals from housing may be illegal under the Fair Housing Act under three different theories of liability – discriminatory intent (also known as disparate treatment), discriminatory effects, and refusal to make reasonable accommodations. Each of these theories of liability is explained more fully below.

Complaints concerning criminal involvement will generally require investigation and analysis to determine if the alleged discrimination involved both intentional discrimination and an unjustified discriminatory effect, even if the complainant does not directly allege either specific theory. In certain instances, both intentional discrimination and unjustified discriminatory effects may be present. Complaints alleging disability discrimination may also require investigation under a reasonable accommodation framework.

It is not the complainant's burden to either prove discrimination or disprove respondent's defenses or assertions. That obligation rests with FHEO or the FHAP conducting the investigation and requires independent investigation to establish the facts.

1. DISCRIMINATORY INTENT

Claims that a housing provider has used criminal records or other criminal history information to discriminate intentionally in violation of the Act should be investigated in a manner similar to other allegations of intentional discrimination. Criminal records or other criminal history information may be a pretext for unequal treatment of individuals because of race, color, national origin, disability, or another protected characteristic.

Unless there is direct evidence of discriminatory intent such as written or oral statements, evidence usually is gathered and analyzed using the *McDonnell Douglas* shifting burdens

[8] See Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 2016), *available at* https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

framework, although there may be cases where evidence showing intentional discrimination does not fit within a *McDonnell Douglas* framework. In such instances, this evidence should also be documented and analyzed to determine if there is reasonable cause to believe discrimination occurred.

Examples of evidence that would support a finding of reasonable cause to believe that disparate treatment occurred include (not an exhaustive list):

- A housing provider routinely advises Native American applicants about a criminal records screening policy but does not advise White applicants about the policy.
- A housing provider applied a criminal background screening policy to a Black applicant but did not apply the policy to a White applicant.
- A housing provider rejected a Hispanic applicant based on his criminal record but rented to a White applicant with a comparable criminal record.
- A property manager discouraged a Black applicant with a criminal record from applying, saying their record would likely lead to a rejection, but encouraged a White individual with a comparable criminal record to apply, saying that it was possible their record would not turn up and offering them an application form.
- A housing provider evicted a Black tenant who was convicted of a crime but did not evict a White tenant who was convicted of a similar crime.
- After learning that an applicant was previously homeless and hospitalized for treatment of a mental health condition, a management company departed from its standard procedures and conducted a criminal background screening of the applicant.
- A locality applies a crime-free ordinance requiring the eviction of criminally involved residents in a neighborhood with a significant Black or Hispanic population but does not apply the ordinance in neighborhoods that are predominantly populated by White households.

2. DISCRIMINATORY EFFECTS

Claims that a housing provider's policy or practice concerning criminal background screening or other criminal history information create an unjustified discriminatory effect in violation of the Act should be investigated using the analysis described in the 2016 Guidance. The three steps to a discriminatory effects analysis follow.

Three Steps to a Discriminatory Effects Analysis

Step One (*prima facie* showing)

Investigators must gather evidence regarding whether the challenged criminal history policy or practice *actually or predictably results* in a disparate impact on a protected class. This involves 1) identifying the housing provider's relevant practices or policies, both written and in practice, and 2) identifying statistics which show whether the identified policies actually or predictably result in a disparate impact on a protected class.

General Guidelines/Tips	Examples and further guidance
Identify all policies, including written and unwritten policies or practices.	If a landlord has a written policy that requires rejections for persons with felony convictions less than two years old, but complainant says they were told by housing staff that their application would be rejected based on any felony conviction regardless of date, the investigator should investigate both the written policy and the oral policy conveyed to complainant by staff. If a landlord says that they have no particular criminal records policy, but instead rely on a third-party screening company to make the determination as to which applicants are approved, the investigator should conduct interviews and request information (email communications, contracts, etc.) from the third-party screening company to determine whether the landlord or the screening company itself set the screening criteria. Consider whether the third-party screening company should be an additional respondent in the matter.
Statistics should relate as closely as possible to the particular policy or policies at issue.	Investigators should first attempt to identify statistics that are specifically tailored to the policy at issue. For example, if a policy requires the eviction of anyone who becomes incarcerated during tenancy, the investigator should focus on incarceration data for the relevant populations (see next box). If a policy denies tenancy to anyone with a felony arrest or conviction over the past 10 years, the investigator should focus on felony conviction and arrest data over the past 10 years for the relevant populations. • Many up-to-date criminal justice statistics can be found on the Department of Justice's Bureau of Justice Statistics website, available at https://bjs.ojp.gov/library. • Many statistics regarding local and national incarceration rates broken down by race and ethnicity can be found at https://trends.vera.org/. • The investigator may have to contact state or local government or criminal justice agencies to obtain relevant criminal justice data. • Information regarding a protected class's percentage of the general population (locally and nationally) can be found at the United States' Census Bureau's website, available at https://www.census.gov/en.html. • Demographic information specific to tenants in HUD-subsidized buildings is available at https://www.huduser.gov/portal/datasets/assthsg.html#2009-2021_query. In all cases involving the use of statistics to prove disparate impact, investigators should consult with counsel and an economist or statistician to ensure the most comprehensive and relevant data is retrieved. Perfect data may not always be available, but an economist or statistician may be able to assist in identifying relevant alternative data.
Relevant populations will	Investigators should gather data regarding *actual* applicants and tenants where

General Guidelines/Tips	Examples and further guidance
be case specific.	available to determine the actual disparate impact of a challenged policy. For example, data showing that Hispanics consist of 20% of the respondent's applicants but 70% of those excluded due to a criminal record policy is evidence that the criminal record screening policy has a disproportionate impact on Hispanic applicants. Data showing that Black individuals comprise 65% of the housing provider's tenants, but 95% of those evicted under a policy to evict based on an arrest indicates that the policy to evict for an arrest has a disproportionate impact on Black tenants. If actual data are unavailable or unreliable, investigators should consult with an economist or statistician to determine what data may be sufficient. The investigator may need to be consider the following, in consultation with an economist or statistician: • What is the relevant market area for applicants? • Are there income or other restrictions that may narrow the relevant population? What are the other screening criteria at the property? Although investigators should seek out localized data in most circumstances, national or statewide statistics on racial and ethnic disparities in the criminal justice system may be sufficient in some instances, such as where there is no reason to believe that the local characteristics would differ from the national statistics; where the actual applicant pool for certain housing might not reflect the potential applicant pool, due to a self-recognized inability on the part of potential applicants to meet the very standards challenged as discriminatory; or where actual applicant data is not available or is too small of a sample size.

Step Two - Defense

If the respondent raises any defenses, investigators should seek evidence concerning respondent's asserted defenses. Regardless of the assertions, however, investigators should anticipate common defenses and independently determine whether there is evidence that supports or refutes a potential defense in the course of the general investigation. The complainant should always be advised about any defenses a respondent is asserting and given the opportunity to provide evidence related to the asserted defenses.

Potential Defense	Guidelines for Investigators	Examples and further guidance
The screening policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Many respondents will assert concerns for the	Investigators should determine whether safety or property concerns are the actual reason behind the policy, and if so, whether the policy is necessary to achieve those interests. There must be reliable evidence that	Because an arrest (without more information or a consequent adjudication) is not proof of criminal activity, policies or practices that exclude because of arrests do not serve substantial, legitimate, nondiscriminatory interests and do not constitute valid defenses to disparate impact liability. Policies or practices that ban all convictions do

Potential Defense	Guidelines for Investigators	Examples and further guidance
safety of other residents or the protection of property as the substantial, legitimate, nondiscriminatory interest for the policy or practice.	the policy or practice actually assists in protecting resident safety and/or property. Bald assertions based on generalizations or stereotypes do not constitute a valid defense.	not serve substantial, legitimate, nondiscriminatory interests and thus do not constitute valid defenses to disparate impact liability. Policies or practices that deny housing based on an accurate record of convictions that indicate a demonstrable risk to resident safety and/or property *may* serve substantial, legitimate, nondiscriminatory interests. *However, policies or practices that fail to consider the nature, severity, and recency of an individual's conduct are unlikely to be necessary to serve a substantial, legitimate, nondiscriminatory interest.*
Some respondents may dispute that there is sufficient evidence that the policy results in a disparate impact on a protected group.	Sometimes, there will not be direct evidence of an actual disparate impact of a criminal records screening policy, including because a respondent does not keep demographic data of its applicants or tenants, or because the racial balance at a building may reflect the racial balance of the potential or actual applicant pool. Respondents may also dispute whether there is sufficient evidence that their policy predictably disproportionately impacts a protected class.	In these cases, the investigator should consult with an economist or statistician and counsel to determine the validity of respondent's claim.

Step Three – Less Discriminatory Alternative

If the policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest, investigators should gather information and analyze whether the same interest could be served by another practice that has a less discriminatory effect. If so, respondent's defense fails.

Although the identification of a less discriminatory alternative will depend on the particulars of the criminal history policy or practice under challenge, 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. Relevant individualized evidence might include: 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.

3. REASONABLE ACCOMMODATION

Some complaints relating to criminal involvement may allege that a respondent discriminated because of disability by failing to make an exception or adjustment to a criminal background screening policy or practice, when such exception or adjustment may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling, in violation of the Act. Investigators should gather evidence in these cases just as they would in any other reasonable accommodation case.

For example, a reasonable accommodation to a criminal background screening policy or practice may be required when there is evidence that the individual's disability contributed to the criminal conduct at issue, and there are mitigating circumstances that eliminate or significantly reduce the risk of harm to others or property, such as improvements resulting from previous on ongoing therapy or treatment.

The Fair Housing Act provides that the current illegal use of controlled substances is not considered a disability under the Act.[9] Additionally, the Act does not protect a person whose tenancy would constitute a "direct threat" to the health and safety of other individuals or result in substantial physical damage to the property of others, *unless* the threat can be eliminated or significantly reduced by reasonable accommodation.[10] The housing provider thus must have reliable, objective evidence that a person with a disability currently poses a direct threat that cannot be significantly reduced before excluding them from housing on that basis. For additional information, please refer to guidance on reasonable accommodations under the Fair Housing Act.[11]

TIPS FOR FHIPS AND FHAPS PROVIDING TECHNICAL ASSISTANCE TO HOUSING PROVIDERS

In providing technical assistance to housing providers who want to avoid violating the Act when screening applicants or tenants, FHIPs and FHAPs should recommend the following best practices:

- Private housing providers should consider not using criminal history to screen tenants for housing. Criminal history is not a good predictor of housing success. Most housing providers are not required by law to exclude persons with criminal histories as tenants and can rely instead on other screening criteria that more closely relate to whether an applicant or resident would be a good tenant, such as ability to pay rent, prior rental history, or personal references. Some HUD-assisted housing providers have statutory obligations to exclude persons with certain criminal histories and should consider limiting criminal records screening to the minimum statutory requirements to avoid fair housing violations.

[9] 42 U.S.C. § 3602(h).
[10] 42 U.S.C. § 3604(f)(9).
[11] *See* Joint Statement of the U.S. Department of Housing and Urban Development and the U.S. Department of Justice on Reasonable Accommodations under the Fair Housing Act, *available at* https://www.hud.gov/sites/dfiles/FHEO/documents/huddojstatement.pdf.

- Housing providers should evict for criminal activity only as a last resort (which includes conducting an individualized assessment to determine if the eviction is necessary).
- Housing providers should never evict a person or family because they have been victims of criminal activity.
- Housing providers should not ban a tenant's invited guest from visiting that tenant based on the guest's criminal involvement. In most jurisdictions, landlords may not bar a tenant's invited guests, regardless of circumstance. Local laws may provide options that can be used when a housing provider has evidence that the visitor engaged in criminal activity on the premises. If a housing provider uses a remedy under local law, the housing provider still must be careful to ensure its actions do not violate the Fair Housing Act under any of the principles discussed in this memorandum.
- If housing providers choose to use criminal background screening policies or practices, they should consider taking the following steps to avoid potential violation of the Fair Housing Act:
    - Have a written criminal background screening policy that is made available to all applicants.
    - Ensure they can justify their policy with reliable evidence showing that it actually assists in protecting resident safety and/or property.
    - Ensure that any policy considers the nature, severity, and recency of criminal conduct.
    - Avoid the use of third-party screening companies that utilize algorithms that may contain racial or other prohibited bias in their design, have not been shown to reliably predict risk, may produce inaccurate information about the applicant, or make the decision for the housing provider (rather than providing information to the housing provider to make its own determination).
    - Before making an adverse decision related to an applicant's or tenant's criminal involvement, provide the applicant or tenant with the criminal record, indicate which specific part of the record may form the basis of an adverse decision, and give the applicant or tenant the opportunity to correct inaccurate information or explain extenuating circumstances related to that record.
    - Comply with any state or local law that limits the landlord's ability to run criminal background checks during the screening process or use criminal background information when making rental determinations[12] (unless, in the case of certain HUD-subsidized landlords, federal law *requires* such exclusion). While federal program rules allow certain HUD subsidized landlords discretion to screen certain applicants from housing based on specific criminal records, this discretion is limited by both civil rights laws such as the Fair Housing Act and local laws that limit the kinds of crimes or the manner in which a landlord may screen for criminal background.
    - Consider delaying consideration of criminal history until after an individual's financial and other qualifications are verified and a conditional offer is made.
    - Conduct an individualized assessment that considers relevant mitigating information beyond that contained in an individual's criminal record, as this is

[12] For example, the Just Housing Amendment in Cook County, Illinois forbids housing providers from denying applications for housing based anything but convictions less than 3 years old, and only after a consideration of individualized circumstances, with limited exceptions. *See* https://www.cookcountyil.gov/content/just-housing-amendment-information-landlords/.

likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account. Relevant individualized evidence might include: the facts or circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; how long ago the criminal conduct occurred, evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts.

- Housing providers must ensure that that they are not engaging in disparate treatment in any individualized review process. One study found that when housing providers used discretionary criminal record screening policies — or policies that evaluated prospective tenants on a "case by case" basis—they favored White applicants over similarly situated Black applicants 55% of the time.[13]
- Therefore, these individualized reviews should be utilized only in clearly delineated circumstances when the individual would otherwise be excluded because of current, reliable evidence that the specific crime at issue would threaten safety and/or property.
- Identifying and training or hiring individuals who are aware of potential bias issues and qualified to perform individualized assessments can also help mitigate bias that may arise during these assessments. Individuals involved in applicant and tenant screening also need to understand and know how to apply the Fair Housing Act's reasonable accommodation requirements.

CONCLUSION

Fair housing is critical to the mission of HUD and its fair housing partners. We will continue to work collaboratively to ensure that the Fair Housing Act's protections are realized by all protected classes. I am grateful for our FHIP and FHAP partners' longstanding commitment to fair housing and civil rights and their tireless dedication to the public they serve. Together, we will continue to combat discrimination in housing to ensure that individuals with criminal justice involvement can find and secure safe, affordable, and accessible housing in areas of opportunity.

The National Fair Housing Training Academy will be providing trainings on how to investigate cases involving alleged violations of the Fair Housing Act involving criminal records policies in the coming months. FHIPs and FHAPs are strongly encouraged to attend such trainings.

[13] Matthew Ciardullo, et al., *Locked Out Criminal Background Checks as a Tool for Discrimination* Greater New Orleans Fair Housing Action Center (October 2015) *available at* https://lafairhousing.org/wp-content/uploads/2021/12/Criminal_Background_Audit_FINAL.pdf