

## Using Criminal Records as Screening Tools can Create Potential Discrimination

HUD recently issued guidance regarding the common practice of using criminal records during the screening of potential tenants, (see U.S. Dep't of Housing and Urban Development. *Office of General Counsel Guidance on Application of FHA Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*. April 4, 2016) available [here](#). This new HUD guidance discusses how using criminal records during the screening process to deny occupancy can constitute a violation of the Fair Housing Act. (Fair Housing Act. 42 U.S.C.S. § 3601, approved 5/20/16). The Fair Housing Act prohibits discrimination in the sale, rental, or financing of dwellings in other housing-related activities on the basis of race, color, religion, sex, disability, familial status or national origin. The HUD guidance cites many statistics illustrating the prevalence of Americans with criminal backgrounds. About 100 million American adults have a criminal record of some kind. Despite these statistics, individuals with criminal records face extra barriers when attempting to secure housing, including public and other federally-subsidized housing.

As confirmed by the 2015 US Supreme Court decision, actions which are not on their face discriminatory, but which have a disparate effect or impact on one or more protected classes, may trigger liability under the Fair Housing Act. (*Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015)). As HUD details in the preamble to the guidance, there are a disproportionate number of African Americans and Hispanics with criminal records across the United States, hence using criminal records to bar admission to affordable housing may burden potential tenants of one race or national origin more than another. Therefore, if a housing provider's policy restricts access to housing based on criminal records and is discriminatory in effect, the policy may meet the threshold to establish potential violation of the Fair Housing Act under HUD's recent FHA Rule. (see U.S. Dep't of Housing and Urban Development, *Fair Housing Act*, 42 U.S.C.S. § 3601) available [here](#).

The HUD's Fair Housing Act Rule provides that once this threshold of disparate effect is met, the burden is on the owner or management agent to show that the practice in question is necessary to serve a substantial, legitimate and nondiscriminatory interest of the housing provider. Further analysis considers if such interest could be served by another practice that has a less discriminatory effect on a protected class.

Additionally, HUD warns that housing providers may be liable for intentional discrimination when using a potential tenant's criminal history information. Making certain exceptions to a policy for individuals of certain races, national origin or other protected characteristics may violate the Fair Housing Act.

The HUD guidance also distinguishes between the use of arrest history and conviction records. Basing a housing decision on a potential tenant's arrest history is not permitted, as the arrest is not sufficient evidence of wrongdoing. Conviction records, however, may be used by owners when screening potential tenants. The HUD guidance makes it clear that the totality of the circumstances should be considered when owners make housing admission decisions. Factors such as how much time has passed since the crime, the severity of the crime, and other circumstances should be evaluated before an adverse housing decision is made. Housing providers should develop an understanding of how using a policy involving criminal records may be construed as a discriminatory practice.

HUD's discussion about how cases of discrimination are handled is also valuable to both housing providers and individuals seeking housing. The guidance conveys information that clarifies the line between a sound policy and a discriminatory policy, which will serve the many individuals with criminal records seeking affordable housing going forward.