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Regulations Divisions
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

Re: Industry Associations' Comments to the Proposed Rule for Reducing Barriers to HUD-Assisted Housing – Docket No. FR-6362-P-1

Dear Sir or Madam:

On behalf of the Council for Affordable and Rural Housing, National Affordable Housing Management Association, National Apartment Association, National Association of Home Builders, National Leased Housing Association, and National Multifamily Housing Council (collectively, the "Associations"), we submit these comments in response to the Department of Housing and Urban Development's ("HUD") Proposed Rule entitled *Reducing Barriers to HUD-Assisted Housing* – Docket No. FR-6362-P-1 (the "Proposed Rule").

The Associations represent for-profit and non-profit owners, operators, developers, property managers, housing agencies, and advocacy organizations involved in the provision and promotion of both affordable and conventional housing. The Associations' members are committed to ensuring the safety of their residents, staff members, and communities while also being committed to complying with all applicable nondiscrimination laws.

In an effort to reduce perceived barriers to HUD-assisted housing, the Proposed Rule attempts to standardize policies and practices with respect to the use of criminal records by multifamily assisted housing owners ("owners") and Public Housing Authorities ("PHAs") when making admissions and termination decisions. According to HUD, the Proposed Rule would provide clearer standards that make it easier for owners and PHAs to develop more narrowly tailored policies that fulfill their mission to provide safe housing that protects the quiet enjoyment of all residents, employees and the surrounding communities and that would also improve compliance with fair housing and other nondiscrimination laws. Notwithstanding the intended standardization, HUD asserts that owners and PHAs would retain discretion to make admission and termination decisions.

The Associations applaud HUD's effort to clarify and attempt to make it easier for owners and PHAs to develop, implement, and apply criminal screening policies. However, for

the reasons discussed below, the Associations believe the Proposed Rule is overly complex, overly prescriptive, and, contrary to HUD's assertion, significantly limits a provider's discretion to make admission and termination decisions.

I. INTRODUCTION

A. Statutory and Regulatory Evolution

For many years, HUD has had a framework in place that permits owners and PHAs to consider an individual's criminal history when screening applicants for admission and making decisions to terminate a tenant's assistance or tenancy. This framework derives originally from the "one strike" policy implemented in 1996 that permitted PHAs to deny admission to any applicant with a criminal record and to immediately terminate any tenant who engaged in criminal activity.

Following the implementation of this policy, Congress enacted legislation that conferred additional authority on PHAs and owners to fight criminal activity in and around their properties.[1] This statute, according to the legislative history, "would provide clear statutory guidance to empower PHA's and assisted property owners with the tools to screen out and evict from public and assisted housing persons who illegally use drugs or whose abuse of alcohol is a risk to other tenants. I cannot emphasize enough the need to take responsible and meaningful action to preserve our low-income housing from criminal and destructive activities."[2]

In 1998, Congress recognized the right of *all* Americans to live securely in their homes.[3] As a result, Congress extended the authority to fight criminal activity in and around their properties to assisted housing owners via enactment of the Quality Housing and Work Responsibility Act ("QHWRA").

QHWRA created additional statutory authority for assisted owners, and PHAs, to exclude and evict individuals who engage in certain criminal-related activity, including, although not

[1] The Housing Opportunity Program Extension Act of 1996 (the "HOPE Act") also required Section 8 owners to prohibit admission, for a period of three years, to any individual evicted from public housing or Section 8 housing for drug-related criminal activity. Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (1996).

[2] 142 Cong. Rec. 4751 (1996) (statement of Sen. Bond). Congressman Lazio stated "this bill makes clear that we shouldn't have to wait until there has been an attack on a senior citizen or defenseless family. We should take steps to protect seniors before criminals are allowed into public housing. Criminals shouldn't even get up to bat, let alone be able to take a swing and strike out. Simply calling a criminal out after one strike means that there has been one more innocent victim to crime and violence in public housing." (*Id.* at 2908 (statement of Rep. Lazio)).

[3] *See* the statement by Congressman Lazio ("People in public housing deserve to live in peaceful enjoyment in their own apartments just like other Americans." (144 Cong. Rec. 23779 (1998) (statement of Rep. Lazio)). *See also* the statements of Congressman Moran, "I am especially pleased to see that all parties agreed to retain tough screening and eviction procedures that cover not just public housing but privately-owned publicly assisted housing…" (*id*. at 23779 (statement of Rep. Moran)), and Senator D'Amato, "The Federal Government bears a unique and overriding responsibility to ensure that residents feel secure in their homes, can walk to the store or send their children to school without fear for their physical well-being." (*id*. at 24419 (statement of Sen. D'Amato)).

limited to, drug-related criminal activity. In fact, QHWRA mandated the denial of admission to, and eviction from, federally assisted housing for certain prescribed criminal activity.[4]

HUD issued its final rule implementing the statutory screening and eviction procedures authorized by QHWRA and the predecessor statutes in May 2001 (the "QHWRA rules"). According to the preamble to the final rule, QHWRA provided PHAs and assisted housing owners "the tools for adopting and implementing fair, effective, and comprehensive policies for screening out…applicants who engage in illegal drug or other criminal activity and for evicting or terminating assistance of persons who engage in such activity." (*See* 66 FR 28776).

The Supreme Court observed in *Dept. of HUD v. Rucker*, 535 U.S. 125, 128-29 (2002), that HUD's QHWRA implementing regulations "closely track the statutory language." Drawing from the lower court's decision, which engaged in an extensive textual and legislative history analysis of 42 USC 1437d(l)(6),[5] the Court noted that Congress vested PHAs with '*wide* discretion to evict tenants connected with drug-related criminal behavior.' (*Id*. at 133, fn. 4 (quoting 237 F.3d at 1128, 1133-34 (Sneed dissent) (emphasis in original)).

Notwithstanding the statutory and regulatory authority QHWRA has provided owners and PHAs to consider an individual's criminal history when making admission and termination-related decisions, and the number of years for which they have had this authority, HUD has sought to diminish that authority.

B. HUD's Post-QHWRA Guidance

Not long after HUD published its final QHWRA rules authorizing multifamily owners and PHAs to exclude and evict individuals who engage in certain criminal-related activity, HUD engaged in an effort to "encourage" owners and PHAs to "reconsider and revise unnecessarily restrictive criminal screening and eviction policies." (89 FR 25337). This effort began with several Secretary-issued letters, followed by the issuance of various notices and other HUD guidance.[6] HUD's most recent guidance on the use of criminal history in admission and termination decisions is briefly discussed below.

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[4] Notwithstanding the statutory mandate to exclude or evict individuals engaged in certain prescribed criminal activity, and the current regulations implementing those statutory requirements, as discussed later, HUD has recently taken the position that there are only two mandatory exclusions.

[5] 237 F.3d 1113, 1120-24 (9th Cir.) 2001.

[6] In 2002, Secretary Martinez urged PHAs to limit their use of the "one strike" lease provision, suggesting it should only be used as a last resort. In 2011, Secretary Donovan issued a letter to PHAs urging a balance between the safety of their residents and providing access to housing by individuals with a criminal history. In 2012, Secretary Donovan issued a letter to owners of HUD-assisted multifamily housing to follow the same policies he had encouraged PHAs to adopt the prior year: striking a balance between ensuring the safety of their residents and providing access to housing by individuals "who have paid their debt to society." In 2013, PIH issued a Notice intended to "remind" PHAs that the circumstances that mandate exclusion on the basis of criminal history are "limited" and to encourage them to establish "more inclusive" policies.

1. H 2015-10 *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions*

H 2015-10 declared that arrests are not evidence of criminal activity. Therefore, arrest records may not serve as a basis for denying admission, terminating assistance, or evicting tenants. The Notice allowed that an arrest record may trigger additional inquiry into whether there is sufficient evidence to allow the provider to determine whether the individual did engage in disqualifying criminal conduct. However, it also clarified that HUD did not require implementation of the so-called "one-strike" policies. Finally, the Notice encouraged PHAs and owners to adopt certain best practices, e.g., limit reliance to convictions; consider mitigating circumstances prior to admission decisions; adopt limited lookback periods.

2. HUD OGC: *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* (the "2016 Guidance")

The 2016 Guidance clarified that the Fair Housing Act ("FHA") applied to a housing provider's use of criminal history in making housing-related decisions.[7] As a result, HUD made clear it would apply *disparate impact* and *disparate treatment* theories of liability when evaluating an adverse housing decision based on an applicant's criminal record. The 2016 Guidance also indicated that "blanket exclusions" are problematic.[8] HUD, therefore, directed that criminal history-related policies should be tailored to serve a provider's substantial, legitimate, nondiscriminatory interests, and that, in connection therewith, providers should use an individualized assessment taking into account such factors as the nature, severity, and recency of past criminal conduct before making a housing-related decision. However, HUD noted that even if a provider's policies are narrowly tailored, the provider may still be required to prove any discriminatory effect is justified.

[7] It is unclear why HUD felt compelled to make this clarification since all providers know, or should know, that the FHA applies to everything they do.

[8] In the preamble to the Proposed Rule, HUD notes that there is "no empirical evidence that would justify a blanket exclusion from housing of people with criminal histories or by treating criminal records as per se disqualifying without any evidence bearing on fitness for tenancy." (89 FR 25342). However, HUD does not cite any empirical evidence that shows a negative impact of such exclusions. In fact, research indicates that criminal history is a lower priority issue used to inform tenant screening. Rather, prior evictions, employment, and income are all more relevant to landlords' determinations of fitness for tenancy and the ability to abide by lease obligations. The presence of a criminal history tends to correlate with unemployment and low income stats, and thus oftentimes potential tenants are screened out on the basis of tenant fitness as a whole and not based on criminal history alone. (*See* Lynn Clark, *Landlord Attitudes Toward Renting to Released Offenders*, 71 FED. PROB. J. 20, 24-25 (2007) available at https://www.uscourts.gov/sites/default/files/fed_probation_june_2007.pdf).

3. HUD Principal Deputy Asst. Secretary for FHEO Memorandum re: *Implementation of 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* (the "2022 Memorandum")

The 2022 Memorandum, although intended to provide guidance to FHEO investigators and outside agencies that receive federal funds to assist in enforcing the FHA, highlighted many of the principles discussed in the 2016 Guidance. For example, it reiterated that the use of arrest records to restrict access to housing is never permissible. It also warned against the use of blanket exclusions and encouraged the use of individualized assessments and consideration of relevant mitigating circumstances.

However, the 2022 Memorandum went even further by suggesting that providers should consider not using criminal history at all as a screening tool.[9] It also suggested that providers consider delaying the consideration of any criminal history until after the verification of financial and other qualifications. Furthermore, HUD made clear that it would hold any criminal history-related policies to an extremely high standard under the FHA while also adding a third potential theory of liability – one based on reasonable accommodation (in addition to the application of disparate impact and disparate treatment). Finally, HUD suggested that providers should consider limiting their criminal history screening to the minimum statutory/regulatory requirements that already exist.[10]

C. The Proposed Rule

According to HUD, certain populations, particularly those with a criminal history, face significant barriers to obtaining and maintaining housing. HUD blames various admission and termination policies used by owners and PHAs with respect to individuals with criminal records as one of the primary reasons for these barriers.

The Proposed Rule is intended to "help standardize practices" across HUD programs and to provide "clearer, common-sense rules and standards" that will help providers achieve their goal of ensuring the safety of their residents while avoiding the continued denials of housing based on overly broad and discriminatory policies.[11] (89 FR 25332-33).

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[9] It is astonishing that HUD would make such a suggestion. It ignores the authority conferred on owners and PHAs by Congress to develop policies for both crime prevention and enforcement and owners' and PHAs' fiduciary obligations to provide for the safety of their residents. It also ignores the obligation imposed by HUD on owners and PHAs to provide decent, ***safe***, and sanitary housing.

[10] As previously noted, HUD currently defines the mandatory exclusions more narrowly than the current statute and regulations do.

[11] The Proposed Rule also asserts that it would establish a set of practices in HUD regulations that are already required under state and local laws across much of the country. (89 FR 25333). Although HUD says the Proposed Rule "is informed by some" of these laws, the Proposed Rule refers to less than a dozen such laws, so there is no way to know the extent to which these laws are representative of a broader swath of state and local laws that address criminal history nor which laws specifically informed the Proposed Rule. (*Id*. at 25345).

HUD states the Proposed Rule is intended to minimize unnecessary exclusions from HUD-assisted housing while also allowing owners and PHAs to maintain the health, safety, and peaceful enjoyment of their residents, their staff members, and their surrounding communities. However, the Proposed Rule accelerates HUD's crusade to diminish the authority and discretion currently afforded owners and PHAs. The Proposed Rule will also increase housing providers' burdens by overly complicating admission- and termination-related decisions, in direct contravention of the applicable statutes.

II. DISCUSSION

A. The Proposed Rule is Overly Prescriptive and Infringes Upon the Discretion Afforded Owners and PHAs By Statute

As previously noted, QHWRA was enacted to provide owners and PHAs the tools to develop and implement "fair, effective, and comprehensive policies for denying admission to applicants who engage in illegal drug use and other criminal activity and for evicting or terminating assistance of persons who engage in such activity." (66 FR 28776). The goal was to make public and assisted housing safer places for those who reside and work there, as well as for the surrounding communities.

To enable owners and PHAs to accomplish that goal, QHWRA mandated that applicants be denied admission, or tenants be terminated, under certain prescribed circumstances. It also provided owners and PHAs certain discretion to make admission or termination decisions under certain other prescribed circumstances.

However, since the publication of the final QHWRA rules in 2001, HUD has engaged in on-going efforts to diminish the authority conferred by QHWRA on owners and PHAs to maintain the safety of their properties. In the preamble to the Proposed Rule, HUD justifies its efforts by asserting that "*some*" owners and PHAs have been "unnecessarily restrictive" in their use of criminal history as a screening tool and that "*many*" have used "blanket bans" to deny admission to prospective tenants without any regard to the length of time that has elapsed since the criminal activity occurred and/or the criminal activity's relationship, if any, to an applicant's current fitness as a prospective tenant. (89 FR 25336). In addition, according to HUD, "*some*" providers consider the mere presence of a conviction for certain types of crimes to be a basis for an automatic denial. (*Id.*) As a result of these "unnecessarily restrictive" policies, HUD asserts that opportunities for subsidized housing have been denied to a group of people who need those opportunities the "most" and whom would "most benefit from [those opportunities] to reduce the risk of homelessness and recidivism."[12] (*Id.*)

[12] The Associations would point out that there are many groups who are in dire need of affordable housing and, therefore, question the basis of HUD's assertion that individuals with a criminal record or with a history of involvement with the criminal justice system are the "group of people who need [access to subsidized housing] the most."

HUD asserts that it has seen "similar patterns" in connection with decisions regarding whether to terminate or evict someone. Specifically, according to HUD, in instances where applicable regulatory provisions provide owners and PHAs discretion to terminate or evict for criminal activity, "*some*" providers have failed to exercise that discretion "in a thoughtful and analytical manner." (*Id*. at 25337). Rather, HUD claims these providers automatically evict or terminate a tenant because some criminal activity occurred or is alleged to have occurred without considering any of the mitigating circumstances outlined in the current regulations, which has led to "unnecessary evictions and homelessness."[13] (*Id*.)

This Proposed Rule is the culmination of HUD's 20-plus-year effort to roll back the authority conferred by QHWRA. While the Proposed Rule largely reduces to regulation the guidance HUD has issued in that time, it strips owners and PHAs of the very discretion that QHWRA and the current regulations permit and which HUD asserts it intends to preserve. In fact, proposed § 5.851(a)(1) declares that "[c]riminal histories of applicants and their household members may be considered *only in the manner and for the purposes described in this regulation*," (emphasis added) seemingly suggesting that the language of the statute has no authority.[14]

Among the new provisions contained in the Proposed Rule is a provision that would establish a timeframe, or look-back period, beyond which a provider could not consider criminal-related activity when evaluating an individual's criminal history. Notably, neither QHWRA nor the current regulations impose a specific limitation on the look-back period an owner or PHA may apply. They only require that the applicable timeframe be *reasonable*.[15]

Notwithstanding the discretion afforded owners and PHAs by QHWRA to establish the look-back period they deem appropriate (or *reasonable*), and HUD's assertion that providers would continue to have the ability to establish their own "reasonable" look-back period, the Proposed Rule provides that any look-back period *greater* than three years will be *presumptively unreasonable*, although the Proposed Rule would allow owners and PHAs to impose a longer period with respect to a particular criminal activity if such longer look-back period is supported by empirical evidence.[16]

This proposed arbitrary limitation on what constitutes a reasonable look-back period, along with the imposition of the burden to produce *empirical evidence* to justify a look-back period greater than the Proposed Rule's arbitrary three-year limit, directly infringe upon the

[13] HUD also asserts that many courts have adopted the view that HUD's current termination and eviction regulations "*already require*" owners and PHAs to consider relevant mitigating circumstances before terminating or evicting a tenant. Despite this interpretation, and the fact that "HUD agrees with this view," HUD deems it necessary to revise the regulations to *require* that providers consider mitigating circumstances.

[14] The same language is used in connection with terminations. *See* proposed 24 C.F.R. § 5.851(b) at 89 FR 25361.

[15] The term "reasonable" is used in many contexts. Generally, though, it is an objective standard by which conduct is judged. It implies that the action taken is fair, proper and moderate under the circumstances. It is not subjective and, therefore, does not lend itself to a specific time limit.

[16] According to HUD, empirical evidence would include qualitative and/or quantitative data derived from a published, peer-reviewed research study.

discretion afforded to owners and PHAs by statute and is, therefore, contrary to, and in direct conflict with, QHWRA, the authorizing statute.

In addition, the Proposed Rule would *require* owners and PHAs to conduct an individualized assessment before a final decision whether to admit or terminate is made in connection with any discretionary decision permitted under the Proposed Rule. The Proposed Rule would define individualized assessment as a "process by which an applicant is evaluated for admission to a federally assisted housing program," the point of which "is to determine the risk that an applicant will engage in conduct that would adversely affect the health, safety, and peaceful enjoyment…by other residents, the owner, or property employees."[17] It would "require a holistic consideration of 'multiple points of information' that may include criminal history but also relevant mitigating factors, including but not limited to those set forth in [proposed] § 5.852(a)(1) and (2), and repeated in public housing and voucher regulations as appropriate."[18] (89 FR 25347-48).

Although as previously noted, HUD believes that the current regulations already require owners and PHAs to consider relevant mitigating factors, at least in the eviction/termination context, it would now require it in the admission context, as well.[19] However, both QHWRA and the current conforming regulations give owners and PHAs *discretion* to consider mitigating factors when deciding whether to exclude an applicant or to evict or terminate a tenant. They do not mandate it.

Accordingly, the Proposed Rule conflicts with, and goes well beyond, the existing statutory framework. Consequently, the Proposed Rule, once again, infringes upon the discretion afforded by statute. It would also impose an additional burden on owners and PHAs, cause unnecessary delay and expense, and would require an expertise beyond that which most owner and PHA staff possess.

The Proposed Rule would also impose new notice requirements on owners and PHAs. As a result of these new notice requirements, at least fifteen (15) days *prior* to notification of an actual denial of admission on the basis of criminal activity, an owner or PHA must notify the applicant of the *proposed* denial.[20] The owner or PHA must also provide the applicant a copy of any relevant criminal record/information and inform the applicant that they will be given an opportunity to dispute the accuracy and relevance of that record.

However, the Proposed Rule fails to provide any substantive explanation or justification for these new procedural requirements. Nor does it discuss why current regulatory and handbook

[17] *See* proposed 24 C.F.R. § 5.100. Note that the definition only refers to an evaluation during the admission process.
[18] The current regulations set forth a list of relevant factors an owner *may* consider with respect to an admission or termination decision. 24 C.F.R. § 5.852. The Proposed Rule significantly expands the list of relevant factors that owners and PHAs would now be *required* to consider.
[19] HUD's stated goal for requiring an individualized assessment is to "increase access to covered housing programs." (89 FR 25347).
[20] This would be an interim step that would occur before an applicant is actually rejected.

provisions relating to the rejection of applicants are insufficient to permit an applicant rejected on the basis of criminal activity to adequately dispute such decision at the time the decision has actually been made.[21] Moreover, HUD fails to explain or justify why individuals with a criminal record, a group that is not a protected class under the FHA,[22] are entitled to this extra notice and opportunity to oppose a decision to deny admission while other groups are not. There is no basis in law for favoring the class of applicants with criminal histories over all other applicants and, frankly, providing this additional notice opportunity to applicants with criminal histories will adversely impact, and prejudice, other applicants seeking housing.

In addition, it is unclear whether an applicant who does not take advantage of the interim opportunity to dispute an anticipated or proposed denial, or even if the applicant does take advantage of the opportunity, will still be subject to the notice requirements already in place, i.e., written notice of the rejection setting forth the reasons therefor and notice that the applicant may request a meeting to dispute the rejection.

The requirement to issue a notice outside the normal screening process, particularly when the owner or PHA may still have to issue a subsequent notice at the time the actual decision to reject is made, imposes an additional burden on the housing provider, one that is completely unnecessary and that would result in additional delays in performing the owner's/PHA's screening process and in filling units. Additionally, the interim notice would extend the period of time that units remain vacant, thus frustrating HUD's, the PHAs' and owners' goals of filling vacant units as rapidly as possible, and further contributing to the homelessness crisis.

In connection with all determinations based on criminal activity, the Proposed Rule would require that such determinations be supported by a *preponderance of the evidence*.[23] To the extent HUD provides any substantive explanation for imposing a specific evidentiary standard, it merely says that existing regulations are largely silent regarding any particular standard of proof that must be met before making an adverse housing decision based on criminal activity, and that requiring the application of a specific standard of proof "responds to the need for housing providers to have a clear, uniform standard with which to evaluate evidence underlying important decisions that have significant consequences on the future housing opportunities of tenants and prospective tenants." (89 FR 25348).

QHWRA imposes no such burden of proof on owners and PHAs. Yet, HUD wants owners and PHAs to bear a burden of proof usually used in civil trials and one that even seems to

[21] For example, 24 C.F.R. § 880.603(b)(2) requires an owner to immediately notify an applicant in writing of the decision to reject and the reasons therefor. The notice shall also inform the applicant that the applicant has the right to meet with the owner or agent "in accordance with HUD requirements." Handbook 4350.3 ¶ 4-9C.2 directs that the required written rejection notice include (a) the specific reason(s) for the rejection and (b) the applicant's right to either respond to the owner in writing or to request a meeting within fourteen (14) days to dispute the rejection.

[22] It is worth noting that although individuals with a criminal record are not a protected class, the Proposed Rule effectively makes them one.

[23] *Preponderance of the evidence*, a newly defined term in proposed § 5.100, means "when taking all the evidence together and considering its reliability and unreliability, it is more likely than not that a claim is true." The use of the word "claim" is a little confusing inasmuch as it unclear what it is supposed to mean or to what it refers.

exceed the burden of proof imposed on owners or PHAs under a disparate impact analysis.[24] To meet this new burden, owners and PHAs must consider the "reliability" and "unreliability" of the information. The need to assess the reliability and unreliability of whatever information is available will inevitably lead to delays which, in turn, could result in the loss of prospective tenants and extend unit vacancies. More significantly, it would require property staff to make assessments and evaluations that they are not qualified to make. Additionally, HUD's proposal would impose additional administrative burdens on providers, which amount to unfunded mandates.

Admission decisions, generally, are inherently judgment calls that require providers to consider all aspects of their eligibility criteria. As a result, there will undoubtedly be differences of opinion on specific decisions. However, HUD seeks to substitute its judgment for that of owners and PHAs in contravention of federal statutes, state statutes and common law (tort) duties of care.

Pursuant to current regulation, owners have the discretion to reconsider a previously rejected applicant for admission if the applicant provides "sufficient evidence that the members of the household are not currently engaged in, and have not engaged in, such criminal activity during a *reasonable period*, determined by [the owner], before the admission decision." (*See, e.g.,* 24 C.F.R. § 5.855(c) (emphasis added)). However, there is no obligation to do so.

The current regulatory provision is consistent with the language of the statute which allows an owner or PHA discretion "after the expiration of a *reasonable period* beginning upon such activity" to condition admission of any applicant previously rejected under this section upon the applicant submitting sufficient evidence that the member(s) of the applicant's household who had engaged in criminal activity that led to the previous denial have not engaged in any criminal activity "during such *reasonable* period." (89 FR 25335 (emphasis added)).

In contrast, the Proposed Rule would completely eliminate housing providers' discretion to accept or consider an application from an applicant previously denied admission on the basis of criminal activity or to condition the reconsideration of an applicant on the submission of sufficient evidence that no members of the applicant's household are currently engaged in, or have engaged in, any criminal activity for a reasonable period of time before the submission of the new application. This is another blatant example of HUD taking away the discretion afforded by the authorizing statute.[25]

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[24] Pursuant to HUD's discriminatory effect regulation, as part of the burden-shifting analysis, once a policy or practice is shown to have a disparate impact on one or more protected classes, the burden shifts to the housing provider to prove the challenged policy or practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the provider. *See* 24 C.F.R. § 100.500(c)(2).

[25] Another example of HUD usurping the authority conferred through statute is its proposed revision of 24 C.F.R. § 960.203(b), which derives from 42 U.S.C. 1437d(j)(1)(I), as amended by QHWRA, to eliminate a particular scoring requirement under the Public Housing Assessment System ("PHAS"), which awards points to PHAs that have adopted and implemented effective screening and eviction policies and other anticrime strategies, based on HUD's claim that the provision is "obsolete" and "fundamentally at odds with the purpose of this proposed rule." The proposed revision is in direct contravention of current statutory provisions and, therefore, is not "obsolete."

The Associations recognize that those who may have been incarcerated or otherwise have had entanglements with the criminal justice system need support for re-entry into society and support efforts to assist those individuals.[26] However, there needs to be a balancing of interests, i.e., the interests of those striving to re-enter society and a provider's fiduciary duty to ensure a safe environment for all. The Proposed Rule utterly fails to strike that balance.

Rather, the Proposed Rule would have the opposite effect. The Proposed Rule would, instead, deprive owners and PHAs of much, if not all, of the discretion afforded them pursuant to QHWRA to screen out, and to evict or terminate the assistance of, those individuals who have engaged in certain criminal activity, thereby interfering with an owner's and PHA's fundamental responsibility to ensure the protection of property and the safety of their residents. Notwithstanding this impact, HUD has provided no legal basis to usurp or override this statute.

B. The Proposed Rule May Disincentivize Participation in HUD Programs

To avoid discouraging owner participation in the HCV and PBV programs, most of the changes contained in the Proposed Rule would not apply to those owners.[27] The Associations support HUD's decision to carve out the HCV and PBV programs from applicability of the majority of the changes in the Proposed Rule. While HUD is legitimately concerned about the impact the proposed changes may have on HCV and PBV owners, it fails to recognize the impact the changes may also have on all owners. Indeed, the overly prescriptive nature of the proposed changes may cause some assisted owners to conclude they cannot effectively screen or evict for criminal activity, which may induce assisted owners to leave HUD-regulated housing programs, further exacerbating the limited supply and availability of affordable housing.

In addition to diminishing an owner's or PHA's discretion to make admission and termination decisions based on criminal activity, the Proposed Rule would also impose certain new obligations on owners and PHAs. First, the Proposed Rule would require owners and PHAs

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Moreover, it directly conflicts with Congressional intent to vest PHAs with greater authority over criminal screening decisions to create safer communities. (144 Cong. Rec. 24418 (1988) (statement of Sen. Mack)). We, therefore, question HUD's authority to revise the PHAS regulations to cease awarding points as prescribed by statute.

[26] HUD cites several studies in support of its position that criminal history is an inaccurate predictor of housing outcomes. However, HUD seemingly overlooks, or omits from its discussion, the importance of having support services in place to ensure formerly incarcerated individuals will be successful and will remain lease compliant. In fact, one of the studies HUD cites involved the provision of a substantial amount of supportive services in conjunction with housing. (*See* Daniel K. Malone*, Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders*, 60 Psych. Serv. 224, 224-30 (Feb. 1990)). Notably, the author of that study stated that "*generalizing the results of our study to other situations may not be valid*. It may be that the robust array of clinical, social, and recreational services tailored to the individual needs of… [the] housing residents is what allows participants with a criminal history to succeed in housing." (*id*. at 229 (emphasis added)). Therefore, applying the result of these studies to individuals without supportive services will likely result in increased negative housing outcomes.

[27] The reason for limiting the application of most of the changes contained in the Proposed Rule to those owners who participate in the HCV and PBV programs is to avoid discouraging owners from participating in these programs.

to make their tenant selection policies available to the public through such means as posting on the owner's or PHA's website and/or on social media platforms.

Furthermore, the Proposed Rule would impose two additional obligations exclusively on owners. Specifically, the Proposed Rule would require owners to provide tenants notice of any substantive changes in their tenant selection plans ("TSPs"). Following such notification, for a period of thirty (30) days, owners must provide tenants, and any representatives, the opportunity to inspect and copy the proposed changes, as well as provide a "reasonably convenient" place in which to do so. The Proposed Rule would further require that tenants be permitted to submit written comments to any proposed changes.[28] (89 FR 25351).

HUD attempts to justify these changes by explaining the changes are consistent with HUD's belief that tenants should have a voice in how their homes are managed. HUD also asserts that these changes may help incentivize owners to update their TSPs "to reflect program requirements and best practices" and would provide tenants insight into a provider's tenant selection policies which, in turn, would help make providers accountable for their policies. (*Id*.)

Owners and PHAs are already required, pursuant to the regulations or the applicable HUD handbook provisions, to make a copy of their TSP available for review upon request. Moreover, owners already have sufficient "incentives" to update their TSPs to reflect current program requirements, e.g., to retain their subsidy and avoid enforcement proceedings. However, the requirement to notify tenants of changes, and to allow tenants an opportunity to submit written comments with respect to such changes, is an unnecessary, unwarranted, and unjustified intrusion into an owner's operations. Therefore, contrary to HUD's assertions, this requirement is much more likely to *disincentivize* owners.

Owners may also be disincentivized to continue to participate in HUD programs as a result of HUD's dismissive posture toward, and blanket treatment of, housing providers. Some of HUD's statements about unnecessarily restrictive criminal policies, the use of blanket bans, etc. suggest that HUD recognizes that not *all* owners and PHAs engage in conduct, or apply policies, that are contrary to the current regulations or HUD guidance. In general, though, the Proposed Rule reflects a mindset that *all* owners and PHAs do engage in discriminatory practices. However, rather than use its enforcement authority under the FHA or other civil rights laws to address those instances where an owner or PHA has employed "unnecessarily restrictive" policies, imposed "blanket bans" or established other clearly discriminatory policies, HUD has chosen to revise the regulations to impose a more prescriptive set of requirements on *all* housing providers in direct contravention of the governing statute.

As a result, the Proposed Rule's overly prescriptive directives, along with the imposition of new, and unnecessary, obligations, will have a chilling effect on owners.

[28] Although not currently in the Proposed Rule, HUD seeks input on whether owners should be required to respond to any comments received from tenants.

C. The Proposed Rule May Unintentionally Impact Owners of Non-Assisted or Conventional Housing

HUD's 2016 Guidance discussed how a disparate impact theory of liability may apply in situations where an adverse housing-related decision is based on an individual's criminal history. Accordingly, the 2016 Guidance asserted that a policy that restricts access to housing as a result of a person's criminal history may violate the FHA if the policy disproportionately affects a protected class of people and the housing provider does not have a sufficient justification for the policy.[29]

The Proposed Rule cites HUD's duty to affirmatively further fair housing and its obligation to ensure that owners, PHAs, and other grantees do not discriminate in HUD's housing programs as an additional justification for the Proposed Rule. Specifically, HUD says any authority to consider criminal history in admissions or terminations decisions is constrained by the anti-discrimination requirements imposed on housing providers by the FHA and other applicable civil rights laws; that even lawful policies are subject to the obligation to make reasonable accommodations. (89 FR 25345).

The Proposed Rule also reiterates HUD's position that criminal screening policies may result in a disparate impact.[30] Accordingly, HUD asserts the Proposed Rule "is intended to address certain common practices that HUD believes may sweep too broadly in their attempts to serve legitimate interests such as tenant safety and so may expose PHAs and HUD-assisted housing providers to risk of violating the Fair Housing Act or other civil rights statutes." (89 FR 25347).

Because Fair Housing requirements apply equally to assisted and non-assisted housing providers, the directives contained in the Proposed Rule could have the unintended consequence of affecting non-assisted owners because the same concerns raised by HUD with respect to the criminal-related policies of assisted owners and PHAs may arise in connection with non-assisted owners' policies.

D. The Proposed Rule Makes Inexplicable and Unsupported Changes to Certain Provisions of QHWRA

HUD asserts that there are only two statutorily required exclusions applicable to federally assisted housing: (1) persons who are subject to a lifetime registration requirement under a State

[29] This is true with respect to any policy a provider employs.

[30] Like both the 2016 Guidance and the 2022 Memorandum, the Proposed Rule discusses statistics that appear to show that individuals with prior criminal involvement face significant barriers to obtaining safe, secure, and affordable housing. Because Black and Hispanic individuals are arrested, convicted, and incarcerated at disproportionately higher rates than the general population, the use of criminal records as a screening tool is, according to HUD, likely to have a disproportionate impact on minorities. Therefore, although individuals with a criminal record are not a protected class, HUD asserts that a policy that restricts access to housing based on an individual's criminal history may violate the FHA if the burden of such a policy disproportionately affects individuals in a protected class. (89 FR 25346).

sex offender registration requirement and (2) persons convicted of producing methamphetamines on federally assisted property.[31] The other so-called "mandatory" exclusions are, according to HUD, "qualified" exclusions. (89 FR 25337). This is in clear conflict with the both the statute and the current regulations.[32]

In addition to the foregoing, HUD has changed the standard upon which an owner or PHA shall base its decision to deny admission or to terminate tenancy or assistance. Specifically, with respect to a decision to deny admission to an applicant on the basis of an applicant's use or pattern of use of an illegal drug, or an applicant's abuse or pattern of abuse of alcohol, the statute requires an owner or PHA to determine whether such use or pattern of use "*may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents*." (42 U.S.C. § 13661(b)(1)(B)) (emphasis added)). The current corresponding regulations also require an owner or PHA to determine whether such conduct, i.e., use or pattern of use, "*may interfere with*" or "*interferes with*" the health, safety, and right to peaceful enjoyment…" (*See* 24 C.F.R. §§ 5.854(b), 5.857, 960.204(a)(2)(ii) (emphasis added)). The Proposed Rule, on the other hand, would substitute the word "*threaten*" for the word "*interferes*" in both instances.

Similarly, the statute permits an owner or PHA to deny admission if it "determines that an applicant or any member of the applicant's household is or was, during a reasonable time preceding the date when the applicant's household would otherwise be selected for admission, engaged in any drug-related or violent criminal activity or other criminal activity which would *adversely affect* the health, safety, or right to peaceful enjoyment of the premises…" **(**42 U.S.C. § 13661(c) (emphasis added)). However, the Proposed Rule again substitutes the word "*threaten*" for the language contained in the statute (i.e., "*adversely affect*"). We note that this substitution is not only used in the Proposed Rule, it is also inexplicably used in the current regulation. (*See* 24 C.F.R. § 5.855).

Finally, in the context of evictions and terminations, the statute requires that an owner or PHA determine whether a tenant's illegal use or pattern of illegal use of a drug, or abuse or pattern of abuse of alcohol, may "*interfere*" with the health, safety, and right to peaceful enjoyment. (42 U.S.C. § 13662(a)(2) (emphasis added)). The corresponding current regulation uses the same language used in the statute (i.e., "interferes with") while the Proposed Rule would substitute the word "*threaten*" for the word "*interferes*." (*See* proposed 24 C.F.R. § 5.858). However, in the context of evictions or terminations based on a tenant's abuse or pattern of abuse of alcohol, both the corresponding current regulation *and* the Proposed Rule substitute the word "*threaten*" for the word "*interferes*." (*See* 24 C.F.R. § 5.860).

[31] Notably, the second mandatory exclusion does not apply to private owners as a result of which private owners have only one "mandatory" exclusion available to them.

[32] It is unclear why HUD has made this distinction. The statute establishes specific bases upon which an applicant is either *ineligible* for admission or upon which an applicant's admission *shall* be *prohibited*. (42 U.S.C. § 13661(a), (b)). It also confers *discretion* on owners and PHAs to deny admission to applicants who have engaged in certain prescribed conduct. (*Id*. at § 13661(c)). The implementing regulations closely track the statute's language and divide the bases for denial of admission between circumstances when the provider "*must* prohibit admission" and when the provider is "*specifically authorized*" to deny admission, i.e., the discretion to deny. (24 C.F.R. §§ 5.854, 5.855) (emphasis added)).

Substituting the word "threaten" for either "adversely affect" or "interferes" is significant. These words are not remotely synonymous. As a result, substituting the word "threaten" for either the word "interfere" or "adversely affect" creates a much higher burden the housing provider must meet when making a decision whether to admit or terminate. Moreover, these substitutions are in complete contravention of the statutory language. Again, HUD offers no explanation or basis for these substitutions. In fact, HUD does not even acknowledge that it intends to make, or has made, any such substitution

E. The Proposed Rule Would Impose Greater Burdens and Have More Significant Impacts on Owners Than HUD Estimates

HUD's Proposed Rule would increase owners' and PHAs' costs of compliance because more staff with specialized training will be required to implement and execute the complex and overly prescriptive tenant screening and lease termination policies. The Proposed Rule will also require more staff time, attention and expertise, including specialized knowledge of social science and empirical evidence, making it even more difficult and more costly for owners and PHAs to attract and retain qualified staff to carry out the policies.

Not only does HUD fail to address these burdens, but it significantly underestimates and downplays the time that would be required to implement the Proposed Rule. HUD's estimated burden hours are overly optimistic, allotting only half an hour (0.5) to implement new lease provisions, two (2) hours to revise and issue lease termination notices, one and a half hours (1.5) to revise TSPs and notify tenants of proposed substantive changes, and only half an hour (.5) to make copies of the criminal records at issue and provide a description of why the records are relevant to the admission decision, arriving at a total annual burden hour estimate of 106,968 hours. (89 FR 25360). The Associations' members estimate that they currently spend 4 to 6 hours on lease termination activities per property, and they estimate that HUD's proposed changes would increase the time burden by thirty percent (30%).

HUD also neglected to specify and clearly articulate the scope of expected "one time" changes to owners' and PHAs' leases for criminal activity and illegal drug use. HUD further ignores the iterative impact and burden of changing multiple leases for tens of thousands of households. (*Id.*) It is unclear if such lease changes pertain to owners' and PHAs' discretionary termination criteria, or if HUD plans to revise the HUD Model Lease to more clearly align with the changes contemplated by the Proposed Rule.[33] Presumably, in the absence of HUD making necessary revisions, owners and PHAs will be required to obtain HUD permission to depart from the Model Lease provisions, which imposes additional burdens and delays.

[33] We note that HUD has indicated that it plans to issue revised multifamily Model Leases that conform to the new HOTMA requirements. (Notice H 2023-10/PIH 2023-27, "Implementing Guidance: Sections 102 and 104 of the Housing Opportunity Through Modernization Act of 201 (HOTMA)" at 11-12 (Sept. 29, 2023 as supplemented Feb. 2, 2024)). It is unclear if HUD will make similar changes to the HUD Model Leases to reflect the procedures required to implement the proposed lease termination criteria and procedures mandated by the Proposed Rule.

In addition, the Proposed Rule fails to consider the increasing costs of obtaining liability insurance and how the overly prescriptive requirements that would result from implementation of the Proposed Rule would likely adversely impact owners and PHAs. For example, admission of a resident with a history of violence who then commits an act of violence against another resident of the community, will almost certainly expose the owner or PHA to significant state tort liability. At a time when insurance is difficult and expensive to obtain for multifamily housing in general, and affordable housing in particular, HUD should consider these costs.

III. RESPONSES TO SPECIFIC QUESTIONS

In addition to welcoming comments on all aspects of the Proposed Rule, Section VII of the Proposed Rule contains a number topics for which HUD seeks specific comment. (89 FR 25357). While a number of the topics are addressed, at least to some extent, in the preceding comments, we have endeavored to respond to the specific topics identified.

However, the Associations note that many of the questions are skewed towards the types of conclusions HUD supports or results that HUD desires to achieve, calling into question the true purpose for these inquiries, whether the inquiries are objective, and how responses to the questions will be received if they depart from or disagree with HUD's premises.

1. *Currently engaging in* or *engaged in."* The proposed rule would provide that, for purposes of determining whether criminal activity that may be the basis for termination or eviction is "current," a PHA or owner may not rely solely on criminal activity that occurred 12 months ago or longer to establish that behavior is "current." Should HUD establish such a rule and, if so, is less than 12 months an appropriate timeframe?

Response No. 1: HUD's proposal to define "current" as any criminal conduct that occurred less than 12 months prior to the decision, is arbitrary, unreasonably and unnecessarily limiting, and, arguably, contrary to the statute. Except with respect to the requirement to prohibit admission to any applicant evicted from federally assisted housing for drug-related criminal activity in the last three (3) years, the statute does not establish any specific timeframes. Rather, it relies on a reasonableness standard, as do the current regulations. Therefore, in the absence of any substantive justification for establishing a specific timeframe, or rule, regarding when conduct is considered "current," the statute should control and owners and PHAs should be able to continue to use the discretion conferred by statute. Furthermore, in light of the Proposed Rule's significant departures from statutory discretion afforded PHAs and owners, as a minimal safeguard HUD should limit the negligent screening liability that owners and PHAs would be exposed to for admitting persons with criminal histories who subsequently commit crimes against other residents.

2. *Lookback period for criminal activity.* The proposed rule would provide that it is presumptively unreasonable for PHAs and owners to consider convictions that occurred more

than three years ago in making admissions decisions. This is based in part on research on recidivism that indicates that people's risk of committing a crime drops precipitously after the person has not reoffended for a period of three years. The proposed rule would provide, however, that this presumption can be overcome based on evidence that, with respect to specific crimes, older convictions are relevant to individualized assessments of current suitability for tenancy.

a. Is three years the appropriate time period for this presumption? Are there specific crimes for which a longer lookback period should be considered? If so, what are those crimes, how long of a lookback period would be recommended, and what is the supporting rationale? In general, what should HUD consider to be adequate "empirical evidence" that, for a specified crime of conviction, would overcome the presumption that a lookback period of longer than three years is unreasonable?

b. By the same token, are there certain offenses for which a lookback period that exceeds three years may be presumptively unreasonable? HUD seeks specific comment on all aspects of the proposal to presumptively but not conclusively cap the lookback period for any given offense at three years.

Response No. 2: The statute provides owners and PHAs the discretion to decide what constitutes an appropriate look-back period. It requires only that it be *reasonable.* By affording owners and PHAs discretion to establish their own *reasonable* look-back period(s), and, thereby, determine what is appropriate for their specific properties to ensure the health, safety, and peaceful enjoyment of their residents, Congress recognized there is no one-size fits all. Creating a standard that makes the consideration of any criminal conviction that occurred more than three years ago *presumptively unreasonable*, HUD takes away that discretion in direct contravention of the statute suggesting that HUD appears to believe that there is, and apparently should be, a one-size fits all period of time applicable to which criminal activity may be considered relevant when making admission decisions.

In an attempt to justify this proposed limit, HUD cites research that indicates that the danger of recidivism "drops precipitously" if an individual has not reoffended for a period of three (3) years. However, in the Proposed Rule, HUD states that "studies have shown that a person with a prior criminal conviction that has not committed a subsequent offense within *four to seven years* is no more likely to be arrested for a crime than a person in the general population." (89 FR 25343) (emphasis added)). This statement would seem to undercut HUD's argument that three years is a sufficient timeframe upon which to assess whether an individual with a criminal record is suitable for admission.

To mitigate the impact of limiting what constitutes a reasonable look-back period, the Proposed Rule would permit owners and PHAs to impose a longer look-back period with

respect to certain crimes if they are able to provide empirical evidence justifying the longer period. However, owners and PHAs have neither the staff nor the expertise to identify and produce the type of empirical evidence HUD would require to overcome a presumption of unreasonableness.

In addition, establishing such a limit will make it more difficult for owners and PHAs to make any meaningful distinctions between felonies and misdemeanors, particularly if providers are limited by how the look-back period is calculated, something on which the Proposed Rule is silent. Specifically, if providers are limited to calculating the look-back period from the time of conviction, rather than the time of release from confinement if there was confinement, it will be more difficult to deny admission to those individuals convicted of some of the most serious crimes (i.e., felonies such as murder, rape, sexual assault, or other crimes involving physical violence) because such convictions often involve confinement, and, if an individual has only been recently released, an owner's or PHA's ability to make meaningful assessments regarding what is best for their individual properties would be severely hamstrung.

Similarly, The Proposed Rule fails to differentiate between applicants with one prior conviction and an applicant with multiple convictions over an extended period of time. Multiple convictions over a period of time, even if one or more of those convictions occurred outside of HUD's proposed look-back period, could be evidence of a pattern of conduct that should mitigate against admitting such an individual.

Owners and PHAs are subject to applicable state laws and potential tort claims. In many states, there is an almost strict liability standard applied to housing providers for crimes committed against residents by other residents, particularly with respect to the admission of residents with lengthy histories of violent crimes. An owner or PHA must take into account state laws and court decisions as it considers an applicant's criminal record. However, the Proposed Rule does not take into account any state law issues and would seemingly prohibit an owner's or PHA's ability to consider an applicant's lengthy criminal history.

More importantly, though, in direct contravention to the statute, the imposition of this arbitrary limitation, along with the burden to produce empirical evidence to justify a longer look-back period, infringes upon the discretion Congress afforded owners and PHAs. Therefore, HUD should refrain from establishing this one-size fits all look-back period and allow owners and PHAs decide what works best their properties, not HUD. Moreover, in light of the Proposed Rule's marked departure from the statutory discretion afforded to PHAs and owners, HUD should provide a negligent screening liability limitation as a minimal safeguard to owners and PHAs.

3. *Opportunity to dispute criminal records relied upon by PHA or owner (Denials).* The proposed rule would provide that PHAs and owners provide applicants with relevant criminal records no fewer than 15 days prior to notification of a denial of admission, as well as an opportunity to dispute the accuracy and relevance of the records relied upon. Is 15 days prior to notification of a denial of admission an appropriate timeframe? Do the processes described in §§ 5.855(c), 882.518, 960.204, and 982.553 adequately balance the needs of applicants and housing providers? If not, what additional processes or measures would be helpful?

Response No. 3: Individuals with a criminal record are not a protected class. Notwithstanding that HUD concedes this point, these new proposed procedural requirements would seem to confer a special status on this group of individuals. However, HUD fails to adequately explain why this group, as opposed to any other group, is entitled to an extra notice requirement and an additional opportunity to oppose a decision to deny admission *before* the actual decision is made. In addition, the Proposed Rule fails to discuss, much less justify, why the current notice requirements associated with a decision to reject an applicant are insufficient to provide these specific individuals an adequate opportunity to oppose such a decision.

Furthermore, these additional notice requirements do not adequately balance the needs of applicants and housing providers. Rather, without any substantive legal justification, the proposed new notice requirements tip the balance to those applicants with a criminal record by giving those individuals a second bite at the apple. This will unquestionably create unnecessary delays and impinge on a housing provider's ability to fill units which, in turn, may lead to the loss of other applicants and/or prospective tenants. Therefore, HUD should not impose the proposed notice requirements and allow the current notice requirements to serve their purpose.

4. *Mitigating factors.* The proposed rule would provide that PHAs and owners consider the following set of mitigating factors when a decision to deny or terminate assistance or to evict is predicated on consideration of a criminal record: 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 criminal conviction or the criminal conduct, and evidence of rehabilitation efforts. Are there other mitigating factors that should be considered? Should HUD define these mitigating factors in greater detail in regulation or guidance? Please provide suggested definitions or standards.

Response No. 4: Before the publication of the Proposed Rule, a provider had absolute discretion whether to consider mitigating factors when making admission and termination decisions. This discretion is provided by statute, regulation and HUD's applicable handbooks. The only circumstances under which a provider has been *required* to consider mitigating, or extenuating, circumstances is in the disability context, i.e., providers must consider mitigating, or extenuating, circumstances when required as a matter of a reasonable accommodation.

Requiring owners and PHAs to conduct an individualized assessment and consider whatever mitigating factors HUD would ultimately prescribe, strips owners and PHAs of the discretion provided by statute (and conforming regulation) and has the effect of elevating decisions involving individuals with a criminal record to the same level as decisions involving individuals with a disability. However, since individuals with a criminal record are *not* a protected class, there is no legal basis for treating these decisions in the same manner as those decisions involving individuals with disabilities, a class which *is* protected under the FHA and other civil rights laws. Furthermore, imposing this obligation would impose unnecessary delay and expense on providers, as well as require an expertise that neither owners nor PHAs possess.

5. *Justifying denial of admissions.* The proposed rule would provide that criminal activity in the past can be the basis for denying admission only if it would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA/property employees. Should HUD provide additional specificity in the rule or in subsequent guidance on this requirement, and if so, on what aspects?

Response No. 5: As noted in Section D above, HUD has inexplicably, and without any legal justification to do so, substituted the word "threaten" for the actual language used in the statute. Specifically, HUD would substitute the word "threaten" for either "adversely affects" or "interferes with," notwithstanding that these words are not synonymous. The significance of this proposed word change cannot be overstated inasmuch as it will have the effect of significantly increasing the burden providers must meet to justify a decision to reject or terminate an individual with a criminal record in complete contravention to the plain language of the statute and the legislative intent. Accordingly, HUD should continue to use the language contained in the statute and, where the word "threaten" has already been substituted in current regulations for the actual language used in the statute, HUD should revise those regulations to correspond with the statute.

6. *Ensuring consistency of tenant selection plan.* The proposed rule would amend 24 CFR part 5 to add a new section, § 5.906. Proposed § 5.906(a) would require an owner of federally assisted housing as defined at § 5.100, other than an owner of a property receiving tenant-based assistance and project-based voucher and moderate rehabilitation owners, to amend the tenant selection plan required by § 5.655 within six months after the effective date of the final rule to ensure its consistency with §§ 5.851 through 5.905. HUD seeks comment on whether the six months proposed for amendment of the tenant selection plan is reasonable.

Response No. 6: Owners and PHAs have just undergone the arduous and time-consuming process of revising their Tenant Selection Plans ("TSPs") to incorporate the new HOTMA requirements. It is unreasonable to require them to undergo this process so soon after having done that. Therefore, the timeframe within which owners and PHAs should be required to revise their TSPs should be extended to 9 to 12 months after the effective date of the final rule.

7. *Evidence relating to exclusions.* The proposed rule would require housing providers who exclude a household member to apply a "preponderance of the evidence" standard when determining whether the household member participated in or was culpable for an action or failure to act that warrants denial or termination. This proposal would address the need for housing providers to have a uniform standard with which to evaluate evidence underlying decisions that affect a tenant's or prospective tenant's future housing opportunities. What makes evidence generally reliable in this context? Should HUD provide further guidance as to the use of evidence in this regulation or in sub-regulatory guidance?

Response No. 7: Notwithstanding that the statute does not impose any burden of proof on owners and PHAs, the Proposed Rule would require a standard of proof be met before an owner or PHA makes an adverse housing decision based on criminal activity. The proposed standard of proof is the evidentiary standard applicable to civil trials and exceeds the burden of proof applicable in a disparate impact analysis. It would require owners and PHAs to consider the reliability and unreliability of the information. As a result, staff will be required to make assessments and evaluations they are not qualified to make and will inevitably lead to delays and the possible loss of prospective tenants. Moreover, it deprives owners and PHAs of the discretion Congress intended them to have when making admission and termination decisions with respect to their properties on the basis of an individual's criminal activity. Therefore, HUD should stop treating these decisions like they are being decided in a litigation context and forego creating a specific burden of proof.

8. *Rescreening of tenants for criminal activity*. At §§ 982.301 and 982.355, HUD proposes to prohibit the receiving PHA from rescreening a family that moves under the portability procedures of the HCV program (including for criminal activity). HUD is aware that there are other circumstances under which a PHA or an owner might rescreen a tenant for criminal activity, and HUD would like to consider the issue of rescreening for criminal activity in a comprehensive manner. As such, HUD specifically seeks comment from PHAs and owners on whether there are circumstances under which rescreening a tenant for criminal activity is appropriate, and if so, an explanation of the precise circumstances and reasons therefore. Specifically, for those PHAs and owners who rescreen, under what circumstances do you rescreen after an initial screening, how often do you conduct such rescreening, how long have you been conducting such rescreening, on approximately how many tenants/participants, and what has been the results of your rescreening? Specifically, has your rescreening then led to any evictions or terminations? If so, how many, what were the specific offenses for which they were evicted, what was the case outcome for those offenses, and when did the offense occur in relation to the eviction or termination? Other than the offense in question, were there other concerning factors raised by the tenant/participant? Do you believe your rescreening serves a legitimate purpose? For all members of the public, how, if at all, should HUD address comments about rescreening in the final rule?

Response No. 8: Rescreening tenants for criminal activity is appropriate to ensure that HCV voucher holders and members of their households will abide by the requirements set forth in the Tenancy Addendum, notably the requirements to refrain from engaging in criminal activity or alcohol abuse. (Form HUD-52641-A, Section 8(c)).[34] Rescreening helps to ensure that the limited supply of housing remains available to those households who continue to abide by the lease obligations. Rescreening of tenants already in residence also enables owners to address situations where a tenant failed to divulge the existence of a history of criminal activity when they initially applied for housing.[35]

9. *Owner responses to tenant comments on tenant selection plans*. Proposed revisions to 24 CFR 245.115(b)(3) would give tenants the right to comment on proposed changes to the tenant selection plan, with or without the help of tenant representatives, and submit them to the owner and to the local HUD office. Should owners be required to respond to comments received from tenants on proposed changes to the tenant selection plan prior to finalizing those changes? If so, what is a reasonable time frame for an owner to respond?

Response No. 9: Not only should owners not be required to respond to comments submitted by tenants on any proposed changes to an owner's tenant selection plan, owners should not be required to notify tenants of proposed changes nor should tenants be given the opportunity to submit written comments on any such proposed changes. Implementing such a process is an unjustified and unwarranted intrusion into a provider's operations. Moreover, it would confer extraordinary power on tenants and/or their representatives. It would also impose an undue burden on providers, inevitably lead to delays, and result in unnecessary costs.

10. *Screening Requirements for HCV and PBV Owners.* As noted earlier, HUD is requesting comments on owner screening requirements for the HCV and PBV programs with respect to criminal records and criminal activity. Specifically, should HUD establish the same or similar requirements for HCV and/or PBV owners as proposed for owners under part 5? If not, what, if any, requirements should be established for denials on the basis of criminal records, current or recent criminal activity, illegal drug use, or alcohol abuse?

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[34] Prohibited criminal activity constituting grounds for termination of tenancy includes but is not limited to (a) any criminal activity that threatens the health or safety of, or the right to peaceful enjoyment of the premises by, other residents (including property management staff residing on the premises); (b) any criminal activity that threatens the health or safety of, or the right to peaceful enjoyment of their residences by, persons residing in the immediate vicinity of the premises; (c) any violent criminal activity on or near the premises; or (d) any drug-related criminal activity on or near the premises engaged in by any member of the household, guest, or other person(s) under the resident's control.

[35] The Proposed Rule would limit an owner's or PHA's ability to deny admission to an applicant who failed to disclose the existence of a criminal record to the situation where the owner/PHA solely relies on self-disclosure, i.e., no third-party verification, and the undisclosed criminal record "would be material to an admission decision." (See proposed §§ 5.852(c) and 960.203(d)). Such a policy is contrary to the statute and its intended purpose, i.e., to screen out individuals with a criminal record. Furthermore, a failure to disclose reflects on an applicant's character and raises questions about whether this is the type of individual providers want to, or should, admit to their properties.

HCV Owners: Should an owner participating in or considering participating in the HCV program be required, as opposed to encouraged, to conduct an individualized assessment before refusing to rent their unit to an HCV family based on criminal activity? Likewise, should there be restrictions on an owner's screening in terms of a lookback period for criminal activity? How would such restrictions apply, and what would be the mechanism and the enforcement action, if any, that a PHA would be responsible for taking in such instances? Would any additional requirements adversely impact owner participation in the HCV program and to what extent? Are there other approaches short of regulatory requirements that would encourage HCV owners or potential HCV owners to adopt such practices voluntarily?

PBV Owners: Should the criminal activity screening requirements be more extensive for or exclusively applied to PBV owners as opposed to HCV owners? For example, what aspects of the PBV program, which are generally similar to other HUD project-based assistance, should HUD consider to either continue to treat it more like HCV or rather, apply the requirements proposed in this rule.

Response No. 10: As noted previously, the Associations support HUD's intention to exclude owners of properties that participate in the HCV and PBV programs from the majority of the changes in the Proposed Rule, and we share HUD's concerns that the Proposed Rule would disincentivize owners from continuing to participate in the HCV and PBV programs. We expect that constructive encouragement of owners is more likely to improve participation rates rather than imposing mandatory requirements that reduce owner autonomy over their properties. Additional ideas to encourage greater participation rates may include additional funding for supportive programs to assist formerly incarcerated individuals with reintegration. As noted above, studies that reported the greatest housing retention outcomes for formerly incarcerated individuals combined extensive social services with housing. HUD should also consider paying participating owners an additional premium to house persons leaving the criminal justice system, much as it does by enabling management agents to collect an additional fee for adopting a preference to house homeless individuals.

11. *Continued use of the term "alcohol abuse".* As discussed in the preamble, this proposed rule continues the use of the statutory term "alcohol abuse" when describing the relevant potential disqualifying circumstances related to alcohol. HUD seeks public comment on the continued use of the term and whether there are alternative, less pejorative, and/or more current terms that could replace "alcohol abuse".

Response No. 11: Notably, this is one instance, perhaps the only instance, in which HUD recognizes the implications of changing the language contained in the statute. It is one with which the Associations agree. The language of the statute should, therefore, prevail.

IV. CONCLUSION

The Proposed Rule directly contravenes QHWRA by ignoring the statute's mandates, depriving owners and PHAs of the discretion afforded by the statute, and imposing new standards and burdens clearly not contemplated by Congress. It flagrantly ignores the framework established by QHWRA and its implementing regulations which have been in place for decades that give owners and PHAs the ability to make admission or termination decisions under certain prescribed circumstances based on what they deem is best for their individual properties. HUD has provided no legal justifications for its proposed departures from the existing statutory mandates other than expressing general disagreement with the existing regulations. HUD is not without tools to take action against an owner or PHA that employs overly broad, unnecessarily restrictive policies that may result in a disproportionate impact on a protected class.

Furthermore, what HUD considers necessary or important to provide "clarity" to housing providers via the Proposed Rule is more accurately unduly prescriptive. Additionally, the Proposed Rule would impose new or excessive regulatory burdens that risk driving housing providers away from HUD programs, thereby further reducing the scarce supply of vitally needed affordable housing.

On behalf of the Associations, we appreciate the opportunity to respond and comment on the Proposed Rule. The Associations remain committed to ensuring that housing remains available and open to suitable tenants and that their members are able to satisfy the fiduciary duties owed to existing residents to ensure such housing is safe.

Sincerely,

Sheila C. Salmon

Sheila C. Salmon
Member

Council for Affordable and Rural Housing
National Affordable Housing Management Association
National Apartment Association
National Association of Homebuilders
National Leased Housing Association
National Multifamily Housing Council