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VIA ONLINE SUBMISSION TO Regulations.gov

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, Room H-113 (Annex X)
NW, Washington, DC 20580

RE: Tenant Screening, P235400

Dear Sir or Madam:

This letter is submitted on behalf of the National Leased Housing Association ("NLHA") and the Council for Affordable and Rural Housing ("CARH") (NLHA and CARH are referred to jointly in this letter as the "Commenters"). Together, the Commenters represent the interests of thousands of providers of affordable multifamily housing around the country. In this letter, they respond to the pending Request for Information ("RFI") issued by the Federal Trade Commission ("FTC") and the Consumer Financial Protection Bureau ("CFPB") (jointly, FTC and CFPB are referred to herein as the "Agencies"). In the RFI, the Agencies posed a lengthy list of questions concerning practices relating to tenant screening for multifamily properties around the United States.

The Commenters are extremely concerned that the questions raised in the RFI suggest that the Agencies are considering an unprecedented expansion of Federal involvement in relations between housing providers and residents of multifamily housing properties, entering into an area that is largely – and properly – committed now to regulation by the states and local governments. In those comparatively narrow areas where Congress has previously undertaken regulation of admission practices for multifamily housing – such as with respect to prohibition of discriminatory rental practices under the Fair Housing Act, 42 U.S.C. §§3601 et seq. ("FHAct") – Congress has done so under express statutory authorization. There is no comparable statutory authorization for the Agencies to insert themselves in the details of tenant selection practices. As explained in more detail below, the Agencies should restrain themselves from undertaking actions that could upset the balance of Federal-state relations and interfere with those limited areas in which Congress has already acted.

Rather than address specific questions posed in the RFI, the Commenters want to address the RFI in general terms, to show that for a variety of reasons, efforts to impose additional restrictions on tenant screening practices at the Federal level are unwise, unnecessary and likely to frustrate existing protections imposed by other Federal agencies and state governments.

Background

The Commenters are uniquely positioned to provide insights into tenant selection practices of the affordable housing community and to respond to the RFI:

- For decades, NLHA has served as a sophisticated and effective force in dealing with the changing political and economic realities of low and moderate income housing. An architect of the Section 8 project-based and tenant-based housing legislation, NLHA leads in the formation of national housing policy and is a key player when program and funding decisions are being made in Congress, at the Department of Housing and Urban Development ("HUD") and the Treasury Department. NLHA's hard hitting facts, solid analysis and persuasive arguments have

helped obtain necessary legislative and regulatory changes affecting federally related housing and tax policy for over forty years.

- Since 1980, CARH has served as the nation's premier association for participants in the affordable rural housing profession. CARH represents the views and concerns of its members before Congress and appropriate officials at the Department of Agriculture ("USDA") Rural Development ("RD"), HUD, and Treasury, and before state housing finance agencies and other state and local agencies that focus on housing. By serving as the coordinator of industry comments on proposed regulations, legislation and funding, CARH provides a respected voice for the concerns of all major participants in the affordable rural housing industry.

Together, NLHA and CARH represent broad coalitions of builders, owners, developers, property managers, non-profits, housing authorities, investors, accountants, architects, attorneys, bankers, and the companies that supply goods and services to the industry. Because of the breadth of their memberships, the Commenters are able to provide authoritative viewpoints on Federal regulatory matters that affect the affordable housing industry and the multifamily housing industry more generally. NLHA and CARH frequently comment on urgent housing-related matters and in recent years have participated as amici curiae on matters pending before the U.S. Supreme Court.

Tenant screening practices are among the important topics that have been a focus of the Commenters' educational and advocacy efforts for many years. Beginning in the 1990s, Congress took steps to impose crime screening requirements on "Federally-assisted housing," defined to include public housing, housing receiving tenant-based or project-based assistance under the Section 8 rental assistance program, housing assisted under HUD's Section 202 and 811 programs, housing financed under the Section 236 program, housing insured, assisted, or held by HUD or by a state or local agency under Section 236, and housing assisted by the Rural Development administration under Sections 514 or Section 515 of the Housing Act of 1949. See 66 Fed. Reg. 28792 (May 24, 2001) (discussing history of various legislative efforts to require owners of Federally-assisted housing to screen applicants for various types of criminal history); 24 CFR § 5.100 (defining "Federally-assisted housing"). In 2001, HUD published a detailed set of regulation, imposing rules about persons with criminal histories that ***must*** be denied admission to Federally-assisted housing (see, e.g., id. at §5.854 (drug-related criminal history), .856 (sex offenders), and .857 (alcohol abusers)) and persons who ***may*** be denied admission (id., §5.855 (other criminal history)), among other mandates. The HUD regulations also imposed additional rules authorizing housing providers to access crime screening information through public housing authorities. Id., §5.901 et seq. Among other things, these rules authorize public housing authorities to charge reasonable fees for performing crime screening for owners, and provide mechanisms for applicants to challenge inaccurate reports. *See id*., §§5.903(d)(4) and (f).

The Rural Housing Service, a subagency of Rural Development ("RD"), has published rules that impose most of HUD's crime-screening regulations on participants in its direct multifamily housing loan and grants program, including the Section 515 program. See 7 CFR §3650.154(j). Many of CARH's members are participants in the Section 515 program and are subject to these crime-screening requirements.

Together, these rules recognize the importance of tenant screening activities in general and crime screening in particular, and the valuable information that screening offers to housing providers. The Commenters actively represented their members' interests as HUD developed and implemented these rules and have continued their task of educating their members about their rights and duties under these crime screening rules while sharing questions and feedback from their members with HUD and RD.

While HUD has taken vigorous action with respect to imposing crime screening duties on owners of Federally-assisted housing, it has alerted other owners about potential pitfalls of some tenant screening practices – particularly crime screening – in other contexts. For example, in April 2016, HUD's Office of General Counsel ("OGC") published extensive guidance discussing crime screening practices and

warning that some practices could have a disparate impact on minorities that may violate the Fair Housing Act. See OGC, Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (available at https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF) (the "OGC Guidance"). The OGC Guidance explained that because "African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population . . .criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers." Id. at 2. Among other things, the OGC Guidance warned that arrest records are "not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual." Id. at 5. If challenged on a disparate impact theory, the use of such records "cannot satisfy [the housing provider's] burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest" under HUD's disparate impact regulations.[1] Id.

Use of conviction records was also scrutinized by the OGC Guidance. Housing providers that use conviction records to screen applicants also have a duty to show that those records satisfy the same rigorous level of proof. Thus, the OGC Guidance warned that "[a] housing provider that imposes a blanket prohibition on any person with a conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – will be unable to meet this burden." Id. at 6. Even a "more tailored policy or practice that excludes individuals with only certain types of convictions must still provide that its practice is necessary to serve a 'substantial, legitimate, nondiscriminatory interest'" and be able to show that "its policy accurately distinguishes between criminal conduct that indicates a demonstratable risk to resident safety and/or property and criminal conduct that does not." Id. Crime screening policies therefore must consider the "nature, severity, and recency" of criminal conduct before using conviction records to disqualify an applicant. Id. Moreover, as part of its disparate impact analysis, the OGC Guidance pointed out that there may be less discriminatory alternatives to categorical exclusions of persons with a record of criminal convictions, and urged owners to apply an "individualized assessment of mitigating information," such as the age of the applicant when the criminal conduct occurred, evidence of subsequent tenant history, and evidence of rehabilitation efforts. Id.

Since the OGC Guidance was issued in 2016, HUD has continued to vigorously study the use of crime screening records in admission decisions. As recently as August 2022, HUD's Office of Fair Housing and Equal Opportunity ("OFHEO") published additional guidance to HUD staff and private entities that may bring disparate impact challenges to crime screening practices. OFHEO, 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 (the "OFHEO Guidance").[2] The OFHEO Guidance is, if anything, more critical of the use of criminal records to screen applicants than the original OGC Guidance, stating that "[c]riminal history is not a good predictor of

[1] Under HUD's disparate impact regulations, originally issued in 2013, a person challenging a housing provider's policy or practice has the initial burden of showing that the challenged policy or practice "caused or predictably will cause a discriminatory effect." 24 CFR §100.500(c)(1). If the challenger meets that burden, the burden switches to the housing provider to prove "that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" of the provider. Id., §100.500(c)(2). If the housing provider meets that burden, the burden switches back to the challenger to show that those interests "could be served by another practice that has a less discriminatory effect." Id., §100.500(c)(3). While there are lingering questions about whether HUD's disparate impact regulations conform to guidance in the U.S. Supreme Court's decision in *Tex. Dept. of Hous. and Comm. Affairs v. The Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), HUD recently readopted its original 2013 disparate impact regulations which had been substantially rewritten during the prior administration. 88 Fed. Reg. 19450 (March 31, 2023).

[2] The OFHEO Guidance is available at https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf

housing success." Id. at 8 (emphasis original). Whether or not that is true, it is clear that HUD has taken the initiative to address perceived fair housing concerns with respect to the use of crime screening practices and has warned housing providers about problems the use of that data may cause.

More recently, HUD announced plans to update its existing crime screening rules in ways that would harmonize them more closely to the OGC Guidance. See Press Release, HUD Outlines its Action Plan to Remove Unnecessary Barriers to Housing for People with Criminal Records (available at https://www.hud.gov/press/press_releases_media_advisories/hud_no_23_083). This announcement explains that, among other things, HUD intends to require owners of Federally-assisted housing to avoid categorical exclusions of persons with criminal histories and to require individualized assessments of applicants' criminal history before denying admission, and promises additional protection for applicants from inaccurate criminal records. According to the announcement, HUD plans to make additional rulemaking in this area and to issue new guidance to PHAs and housing providers concerning the use of crime screening records.

Together, HUD's actions with respect to regulating the use of crime screening by owners of Federally-assisted housing and its actions under the FHAct to warn housing providers about potential pitfalls resulting from the use of criminal data constitute a far-reaching body of protections for applicants. Moreover, this is an evolving area of HUD regulation, with new guidance from OFHEO issued last year and the promise of additional regulations concerning the use of crime screening by providers of Federally-assisted housing forthcoming soon. These facts demonstrate that HUD has already created an extensive regime of protections applicable to tenant screening, apparently with more on the way. HUD, the Federal department directly concerned with housing the nation's families, has staked out a growing set of rules to provide essential protections to applicant and renters. As explained below, other Federal agencies, lacking HUD's statutory authorizations and practical experience, should be wary about wading into areas that are already thoroughly developed and well-policed.

Discussion

An expansion of regulation of tenant screening practices by other Federal agencies is inconsistent with long-standing concepts of Federalism, appropriate limitations on agency involvement in areas traditionally committed to state law, and likely to confuse and interfere with existing Federal regulations authorized by statute. The Agencies should allow HUD and state governments to exercise powers committed to them and avoid inserting another layer of burdensome regulations.

1. Historically, Regulation of Relations between Housing Providers and Renters Has Been Controlled by State Law

Traditionally, state law has governed relations between housing providers and renters (including rental applicants) with comparatively little Federal involvement. There are numerous reasons for the Federal government's reluctance to involve itself in this area. First, the market for rental housing differs widely across the country, with some urban centers providing millions of rental units in sprawling apartment properties of many different configurations to rural areas, where multifamily housing properties may be much smaller and widely distributed. Rental unit configurations vary widely too, from apartment flats, to townhouses, to single family homes and mobile homes, among many other choices.

The wide variety of rental housing in the United States suggests that the problems that housing providers and tenants encounter are seldom solvable with top-down solutions imposed by Federal regulators. A good example is eviction laws, which vary tremendously from jurisdiction to jurisdiction and respond to unique issues that are best handled at the local level. The same respect for local variation should apply to tenant screening practices as well. The types of information that housing providers reasonably need will depend on many local factors, such as employment opportunities, past rental experience, and other factors that reflect the renter's reliability. Over the years, a wide and varied body of law defining the

respective rights of housing providers, renters, and applicants has developed at the state and local level to reflect the specific needs of persons participating in local rental markets. It's important for Federal regulators to respect these local decisions and to allow room for individual housing providers, renters, and applicants to work out solutions, including approaches to tenant screening, that work for them and address the problems they encounter.

Renting an apartment is much like making a loan: In both cases, a property owner is entrusting a portion of its property to another party and trusting that in exchange for that property, the user will make timely payments for the use of that property – interest, in the case of a loan, and rent, in the case of a rental unit. Housing providers have additional concerns – that the property is returned to them at the end of the lease term in good condition and that, while the renter is using the owner's property, it respects the life, health and quiet enjoyment of property staff and other tenants. Tenant screening is a critical part of assessing the overall reliability of potential renters to timely perform their lease obligations.

Indeed, there is no shortage of experiments at the state and local level showing that lawmakers are responsive to challenges posed by current local economic conditions and ready to step in when needed. For example, in 2019, the New York State legislature adopted a sweeping set of reforms to landlord-tenant laws, reflected in the Housing Stability and Tenant Protection Act, that addressed a number of matters, including rent stabilization, eviction reform, and, importantly, tenant screening practices, by forbidding housing providers from rejecting tenants because they had been in a court case with a prior landlord. In such cases, state and local lawmakers did what they do best – assess the needs of local owners and renters and find solutions that best fit what their local needs require. Where state and local law has, over time, developed robust rules responsive to those local needs – and demonstrated the ability to respond in a timely basis when those needs become urgent – Federal agencies should be reluctant to second-guess those decisions or impose their own "improvements."

2. <u>In Those Cases Where Congress Has Intervened in Relations between Housing Providers and Renters, It Has Done So Through Express Statutory Authorization.</u>

As noted in the Background section above, where problems with housing markets rise to a level that demands national attention, Congress also has acted in decisive fashion. The clearest example of this is the FHAct, which was adopted by Congress in 1968 during the height of racial tensions following the death of Rev. Dr. Martin Luther King. In response to that crisis and the realization that millions of Americans on a daily basis were being denied equal access to housing, Congress decided to act and prohibited discrimination based on race, religion, color and national origin in a variety of housing-related situations. See, e.g., 42 U.S.C §3604(a) and (b). In the years since, the original list of protective classes has been expanded to include the additional classes of sex, familial status and handicap (or disability). Nevertheless, in spite of the expansion of the FHAct's coverage, it remains an exception that proves the general rule that the Federal government has avoided intervening in relations between housing providers, renters, and rental applicants.

The FHAct was intended to overturn almost a century of pervasive segregationist practices that denied equal housing opportunities to a large proportion of American society, simply because of the race, color, religion or national origin of the family seeking housing. A national response at the Federal level was both necessary and appropriate. The same cannot be said about tenant screening practices. Like almost every other segment of American law, legal relations between housing providers, renters and rental applicants remains a patchwork of alternative solutions to local problems. That is a feature, not a flaw, of our federal system. While some aspects of tenant selection practices may fall short of some Platonic ideal, that is not grounds for disrupting the restraint that has prevented the Federal government from interfering with matters traditionally left to state and local governments.

Certainly, there is nothing to suggest that current tenant screening practices pose a threat to housing opportunities comparable to the Jim Crow laws that the FHAct was designed to attack. If Congress felt

that was the case, it would have conferred express jurisdiction on the Agencies to address those practices and impose Federal regulations, as it did in empowering HUD to fight housing discrimination. In the absence of such express authorization, which would define both the problem to address and the tools to fight it, the Agencies should exercise both humility and restraint and avoid intervening in the details of tenant selection practices.

3. Congress and HUD Have Already Imposed a Variety of Tenant Screening Restrictions on Housing Providers That the Agencies Should Not Tamper With.

As noted above, HUD has already taken dramatic action to address tenant screening practices pursuant to express direction of Congress (in connection with crime screening practices for Federally-assisted housing) and under the FHAct. On the one hand, pursuant to express direction from Congress, HUD has imposed a carefully-crafted regulatory regime intended to provide safety and security to residents and staff of Federally-assisted housing by requiring owners to screen applicants on the basis of criminal history, by providing mechanisms to evict tenants whose criminal history may pose a threat to others, by establishing tools to allow owners to access criminal history information in a secure and reliable manner, and by providing means for applicants to challenge inaccurately reported information. 24 CFR §§5.850 et seq. and 5.901 et seq. On the other hand, HUD has also taken steps to warn housing providers in general of the dangers of misusing crime history information and to make it clear that, at least in some cases, owners may be exposing themselves to liability under the FHAct if their crime screening practices result in discriminatory admissions practices. The fact that HUD has announced plans to overhaul its existing requirements for crime screening for Federally-assisted housing and to harmonize them with the OGC Guidance and the OFHEO Guidance indicates that HUD is continuing to devise solutions that meet the needs of owners, renters, and applicants alike.

Further action by the Agencies is not likely to improve the situation. Owners of Federally-assisted housing are subject to detailed crime screening rules now; owners of other types of rental housing are also subject to increasingly detailed guidance from HUD about the potential pitfalls of crime screening practices. It is extremely unlikely that the Agencies will be able to develop tenant screening rules that mesh seamlessly with the already existing regulatory framework HUD has created. Any regulatory efforts by the Agency will have to account for existing regulations that Congress has required HUD to adopt and HUD's informed guidance about potential FHAct issues arising from improper crime screening practices. While HUD's rules do not extend into other areas of tenant screening, such as the use of credit histories, it is unwise for the Agencies to assume that any new rules they adopt will do anything more than complicate the existing rules and potentially frustrate HUD's efforts to balance the interest of all stakeholders. For example, rules that confer additional powers to challenge tenant screening results may contradict HUD's existing rules that allow applicants to question the results of current crime screening practices. See 24 CFR §5.903(f). Any effort to extend additional restrictions on existing Federal level tenant screening policies are likely to create many practical and jurisdictional issues that will add confusion without necessarily improving the fairness and reliability of tenant admission decisions.

Indeed, it is far from clear that restricting owners' ability to perform tenant screening will produce fairer, more accurate or more reliable results at all. In fact, there is strong reason to believe that additional restrictions on tenant screening practices may backfire and lead to harmful unintended consequences. Recently, researchers at the Federal Reserve Bank of Minneapolis studied the impact of restrictions imposed by the City of Minneapolis on tenant screening practices and compared them to the City of St. Paul, which did not adopt such practices. See McKay and Leo, Unintended consequences of limiting rental screening (April 17, 2023)(available at https://www.minneapolisfed.org/article/2023/unintended-consequences-of-limiting-rental-screening). The researchers responded to more than 6700 rental listings in the two cities, "using names that are strongly associated with one of three groups: White Americans, Black Americans, or Somali Americans." They found that in Minneapolis, which adopted restrictions on tenant screening practices, "the share of emails that received a positive response

declined when signed with Black or Somali names, and increased when signed with White names." The researchers reported that "[t]his was not the same response pattern as in St. Paul, suggesting it is Minneapolis' new policy that caused the change." According to the researchers, "[t]he analysis suggests that in the rental market, limiting certain information about applicants can have the unintended effect of increasing group discrimination—in this case, stereotyping based solely on name." Needless to say, any form for discrimination based on any protected class under the FHAct is condemnable, but this interesting study suggests that simply restricting the use and practice of tenant screening is not a solution to patterns of discrimination and may indeed make the situation worse, not better. Here again, less may be more and in the absence of clear indication that further regulations will lead to measurably better results, the Agencies would be wise to avoid imposing additional rules.

4. <u>The Agencies Should Avoid Further Regulation Of Relations Between Housing Providers, Renters and Applicants</u>

The focus of these comments is that to the extent that the RFI indicates that the Agencies plan to take steps to intervene into tenant screening practices, they should resist the impulse to do so. Imposing top-down, Federal standards for tenant screening would be a mistake for multiple reasons:

- It would conflict with the traditional role of state and local governments to oversee and regulate relations between housing providers, renters and applicants, a power that those governments have nimbly exercised in recent years to address important housing needs of local populations.
- It would be inconsistent with the express authority that Congress granted to HUD to address discriminatory housing practices.
- It would interfere and likely conflict with evolving solutions that HUD has struck to balance legitimate concerns about safety and security with reasonable protections to prevent discriminatory use of crime screening data.
- There is no assurance that yet another set of Federal regulations over tenant screening practices would measurably improve the fairness and reliability of admissions decisions. On the contrary, recent evidence suggest that tightening tenant screening criteria may have the harmful unintended effect of promoting other forms of discrimination.

Given that Congress has authorized HUD to impose crime screening restriction on a limited set of providers that own Federally-assisted housing, that HUD has been carefully moving to address potential fair housing issues raised by crime screening practices, and that the evidence suggests that imposing additional restrictions may lead to more, not less discrimination, the Agencies should resist the urge to impose additional restrictions on tenant screening practices and allow HUD and state and local government to continue their evolving experiments that have already significantly strengthened the rights of renters and rental applicants.

We hope these comments are useful to the Agencies. Both NLHA and CARH stand ready to discuss these comments in more detail and would be pleased to speak with representatives of the Agencies to answer any questions you may have.

Very truly yours,

Harry J. Kelly, Esq.
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