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Criminal Conviction Screening Policies: Best Practices to Avoid Disparate Impact Liability

By MICHAEL W. SKOJEC, ESQ. and MICHAEL P. CIANFICHI
BALLARD SPAHR LLP

Overview

In June 2015, the Supreme Court officially recognized disparate impact theory as a method for bringing a lawsuit under the Fair Housing Act (FHA). Disparate impact theory is grounded in the idea that although policies are no longer explicitly discriminatory, statistical disparities between different races can nevertheless show that a policy has a negative discriminatory effect—even if unintended.

The Department of Housing and Urban Development (HUD) recently issued Guidance discussing how a criminal conviction screening policy could violate the FHA under disparate impact theory. This white paper reviews the new HUD Guidance, relevant case law and offers best practices.

The information discussed in this document is general in nature and is not intended to be legal advice. It is intended to assist owners and managers in understanding this issue area, but it may not apply to the specific fact circumstances or business situations of all owners and managers. For specific legal advice, consult your attorney.

NMHC/NAA Joint Legislative Program
1850 M Street, NW, Suite 540
Washington, DC 20036

202 974 2300 Phone | www.nmhc.org
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Executive Summary

In June 2015, the Supreme Court officially recognized disparate impact theory as a method for bringing a lawsuit under the Fair Housing Act (FHA). Disparate impact theory has long been used in other contexts, like employment law, to attack practices or policies that are not overtly discriminatory, but instead are seemingly race-neutral yet actually have disproportionate discriminatory effects on particular protected classes, like a certain race. Disparate impact theory is grounded in the idea that although policies are no longer explicitly discriminatory, statistical disparities between different races can nevertheless show that a policy has a negative discriminatory effect—even if unintended.

In April of this year, the Department of Housing and Urban Development (HUD) recently issued Guidance discussing how a criminal conviction screening policy could violate the FHA under disparate impact theory. The HUD Guidance notes that racial disparities in incarcerations rates will result in certain races, like African Americans, being denied housing more often than other races because of criminal screening policies. The HUD Guidance requires housing providers to support their uses of background tests with "substantial, legitimate, nondiscriminatory interests" such as the safety of residents, employees, and property.

For housing providers that already consistently implement a criminal screening policy which fairly weights and reflects legitimate concerns posed by particular types of offenses, the new HUD Guidance does not change a lot. In fact, the HUD Guidance is just that—guidance. It does not carry the force of law like formal agency rules and a court is not bound to accept its conclusions.

This HUD Guidance should, however, be taken seriously and change the policies of housing providers that currently automatically exclude any applicants with any prior conviction or that have policies that are unwritten, inconsistently applied, or not thoughtfully developed and justified. The best recommended practice in light of the recent HUD Guidance is to carefully consider what types of offenses pose the greatest threat to the interests of a housing provider; for example, convictions for violent offenses against people or property, or sex offenses. The justifications in support of these types of concerning convictions should be written down within the policy. In conducting the background test, the most concerning types of convictions should be given greater weight and should be looked at further back in the applicant's record than offenses that pose a lesser concern to a housing provider, for example, convictions for public intoxication, minor marijuana possession, trespassing, or tax fraud. The greater the concern for a particular type of offense, the greater the weight it should be given in the screening process.

The fact that HUD mandates particular automatic exclusions in the public housing context for certain convictions, coupled with the fact that the Supreme Court indicated a higher bar for plaintiffs bringing disparate impact lawsuits than the HUD Guidance seemed to admit, both demonstrate the tension and evolving nature of this area of law. Attention should be paid to formal agency rules or case law precedent over the ensuing years that will clarify the standards for acceptable screening policies. For the time being, the best practices will be to take the HUD Guidance seriously to ensure screening policies comply with its minimum requirements, as discussed in this white paper.

At A Glance: Recommended best practices to do and to not do in drafting and implementing a criminal conviction screening policy

DO	DO NOT
Have a written and thoughtfully developed criminal screening policy	Inconsistently apply the screening policy or allow subjective considerations to be part of the decision
Narrowly tailor the screening policy to reflect legitimate concerns over convictions that directly relate to the legitimate interests of a housing provider	Ignore mitigating information and fail to review on a case-by-case basis accounting for the time passed since the conviction, the nature and severity of the conviction, and efforts to rehabilitate
Write down justifications in support of the legitimate interests for the policy	Automatically deny an applicant because of the mere existence of a prior arrest
Give greater weight to convictions that reflect the legitimate concerns	Automatically deny an applicant because of the mere existence of a prior conviction
Allow an individual the opportunity to explain mitigating circumstances and provide evidence of rehabilitation if he or she is declined for tenancy	Exempt certain people or classes of people from the screening policy
Provide detailed training to staff to consistently apply the screening policy and to understand the justifications for the policy	Use a criminal screening policy as a pretext to exclude certain individuals or classes of individuals

Introduction

This white paper consists of two main parts, with Part I focusing on best practices and screening policies and Part II providing background context to the application of disparate impact theory under the FHA. First, Part I.A sums up the contents of this white paper by listing best recommended practices in light of the recent HUD Guidance, relevant case law, and federal law (all discussed in Part II). Part I.B expands on the best recommended practices by breaking the practices down into several categories, including why exclusion based on prior arrests should be avoided and how to determine the appropriate amount of years back to screen for based on the type of crime.

Part II provides background context in support of the policies and recommended practices discussed in Part I. Part II.A explains the concept of disparate impact theory, how the Supreme Court recently applied it to the FHA, and the particulars of the recent HUD Guidance that applied disparate impact theory to criminal background screenings. Part II.B then discusses the proper level of deference that courts give to informal agency guidance like the recent HUD Guidance and how it does not constitute binding legal authority. Part II.C concludes the Memorandum by analyzing the relatively sparse case law precedent involving criminal screening policies challenged under the FHA.

Policies and Practices

Recommended Best Practices

To address a point of first concern, the recent HUD Guidance does not ban housing providers from conducting criminal screenings on applicants. It simply outlines HUD's position on how disparate impact lawsuits could proceed against housing providers that do not have justified criminal screening policies that address legitimate concerns in the housing context. Additionally, as discussed in detail in Part II.B, the recent HUD Guidance does not carry the force of law. Nevertheless, generally abiding by its recommendations is a best practice for avoiding exposure to lawsuits and the associated costs. Below is a summary of the recommended best practices based on the recent HUD Guidance as well as other legal authorities and experience.

Develop a written policy that clearly states the legitimate concerns of the housing provider that justify the screening, including how many years back the screening will go, the types of crimes that will pose the highest amount of concern, and why they do.

Have a Policy: Develop a written policy that clearly states the legitimate concerns of the housing provider that justify the screening, including how many years back the screening will go, the types of crimes that will pose the highest amount of concern, and why they do.

Determine Legitimate Interests: Engage in thoughtful deliberations about what are the "substantial, legitimate, nondiscriminatory" interests that motivate the need for criminal screening. Concerns about the health and safety of residents and employees as well as the safety of the property will be significant concerns. Record these concerns in writing the policy and tie them to how the screening is structured.

No Automatic Conviction Exclusions: Do not have a policy that automatically excludes any and all individuals just because of a prior criminal conviction.

Ignore Arrests: Do not have a policy that factors the existence of a prior arrest into consideration for denying an applicant.

Apply Policy Equally and Consistently: Apply the background check and policy to each and every applicant consistently. Do not make subjective determinations to only apply screenings to certain individuals, which would only result in exposure to claims of inconsistent and discriminatory treatment.

Individually Assess Records and Conduct: If pending criminal charges or arrests are considered at all, only look at the underlying conduct to determine if it is inconsistent with the legitimate concerns expressed in the policy. Likewise, for actual convictions, if you decide to have individual screening on every denial, individually assess the nature and severity of the offense, as well as when it occurred and the underlying facts giving rise to it to determine if it provides a basis for exclusion under the screening policy. Consider mitigating factors and evidence of rehabilitation through statements or documentation put forward by the applicant.

Narrowly Tailor Inquiries: When asking applicants questions about their criminal convictions, limit questions to those related to legitimate interests and concerns as stated in the screening policy.

Train Staff: Provide detailed training to local management and staff to know how to communicate the policy and effectively apply it in a consistent and unbiased manner.

Screening Policy Practices

The ensuing section reviews types of screening policies and recommends best practices in light of the recent HUD Guidance. These recommendations in part draw from precedent in employment law related to disparate impact, as well as existing HUD and case law authority. The overall theme to remember when reviewing or drafting a criminal screening policy is to ensure that there are thoughtful justifications documented in support of it and that it is consistently applied to all applicants.

In the employment context, while the federal agency guidance also prohibits automatic exclusions because of arrests, it does permit employers to look behind the arrest at the underlying conduct to determine if that type of conduct is inconsistent with written policies.

Relation to Title VII Employment Screening

With the lack of substantial case law on the issue of disparate impact and criminal conviction screenings under the FHA, it is useful to examine how courts have treated disparate impact claims in the employment context with regard to employer criminal screening policies. Because Congress passed federal anti-discrimination employment law (often referred to as Title VII) and the FHA within several years of each other and with identical protected classes, courts often borrow from Title VII case law to interpret the FHA (Title VIII).[1] This white paper will reference anti-discrimination case law in the employment context by analogy where appropriate or where FHA case law on the matter is lacking. It is acknowledged that employers can have interests and concerns somewhat different from housing providers with respect to criminal background screening; however, the substantial and developed case law and guidance in the employment context nevertheless makes for a useful analogy.

Arrests Record Screening

The recent HUD Guidance is explicit in its rejection of using an arrest record as a basis for excluding a tenant.[2] There are many reasons, discussed both in the HUD Guidance and case law, as to why excluding an applicant solely on an arrest that did not result in a conviction should not be a basis for excluding an applicant.[3] Namely, because an arrest alone is not proof of any wrongdoing under this country's presumption of innocence. HUD is generally correct in that an arrest does not clearly indicate any criminal wrongdoing and that a blanket policy of excluding all applicants with a prior arrest would violate the FHA.

Adhering to HUD's position on the prior arrests matter is a best recommended practice. Although the ensuing discussion will point out the possibility of looking *only* to the underlying conduct giving rise to the arrest, housing providers should consider the risk of such a policy in light of HUD's firm stance and the associated administrative burden of looking at and justifying how the underlying conduct, despite no conviction, nevertheless provides a basis for exclusion.

As indicated, there may still be instances in which a careful housing provider could exclude an individual based on his arrest record(s). One could look at the underlying facts giving rise to the arrest and determine if that type of conduct would justify exclusion as a threat to resident or property safety under the screening policy. In the employment context, while federal agency guidance also prohibits automatic exclusions because of arrests, it does permit employers to look behind the arrest at the underlying conduct to determine if that type of conduct is inconsistent with written policies.[4]

Housing providers making an exclusion on this basis would have to be very careful to have a written policy that provides notice to applicants of this policy and its justifications. What is more, this type of exclusion must be done on an individualized case-by-case basis where the housing provider can point to specific events or conduct based on actual evidence that indicates the prospective applicant would constitute a threat to the safety of residents and/or the property contrary to the housing provider's substantial and legitimate interests.

In addition to the general caution that must be exercised if excluding an individual based on a prior arrest, another danger arises from the inherent nature of an individualized case-by-case review. Looking at an applicant in that manner presents an opportunity for subjective determinations, which could result in inconsistent results for similarly situated applicants, opening the door to potential litigation for unlawful discrimination. Given these risks, the best recommended practice is to adhere to HUD's stance and not employ a policy where a prior arrest is a factor in exclusion.

In addition to the general caution that must be exercised if excluding an individual based on a prior arrest, another danger arises from the inherent nature of an individualized case-by-case review.

Best Practices

- Do not automatically exclude any applicant because of a prior arrest.
- Generally, avoid excluding any applicant because of a prior arrest.
- If the conduct giving rise to an applicant's arrest is sufficiently concerning as a threat to the health or safety of other residents, have a written policy that so states, and be able to point to substantial individualized evidence of the applicant's past conduct supporting this concern.

Public Housing Exclusion Policies

The following sections discusses federal criminal screening requirements for public housing as an example of types of crimes that HUD has acknowledged to be sufficiently serious to warrant exclusion. The fact that Public Housing Authorities (PHAs) are required by law to screen and exclude applicants with certain convictions on their record does cause some tension with respect to HUD's recent Guidance. Until the following regulations are modified, a policy by a private housing provider that excludes individuals for any of the following reasons should still be permissible. For example, a PHA is required to deny admission to applicants for the following reasons:

- If a household member has been evicted from federally assisted housing for drug-related criminal activity within the past three years[5]
- If a household member is currently engaging in illegal use of a drug[6]
- If there is reasonable cause to believe that a household member's illegal drug use or pattern of illegal drug use threatens the health, safety, or right to peaceful enjoyment of the premises by other residents[7]
- If any household member has been convicted of drug-related criminal activity for manufacturing or producing methamphetamine on the premises of federally assisted housing[8]
- If any household member is subject to a lifetime registration requirement under a State sex offender registration program[9]

- If there is reasonable cause to believe that a household member's abuse or pattern of abuse of alcohol may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.[10]

If an applicant has a criminal record that is not affected by the mandatory prohibitions, a PHA should consider several factors in determining whether the conviction(s) warrant exclusion, including: the time, nature, and extent of the conduct; evidence of rehabilitation and the probability of future favorable conduct; evidence of the applicant's family's willingness to participate in social services or counseling; and successful completion of drug or alcohol rehabilitation, if applicable.[11]

Both the mandatory prohibition offenses as well as the mitigating consideration factors are instructive indicators of what HUD (and, in some cases, Congress) has already deemed to be reasonable and permissive screening policy actions.

The FHA itself also provides a safe harbor in allowing *any* housing provider to deny an individual that has been convicted of the "illegal manufacture or distribution of a controlled substance."[12] As the Supreme Court explained, "[b]y adding an exemption from liability for exclusionary practices aimed at individuals with drug convictions, Congress ensured disparate-impact liability would not lie if a landlord excluded tenants with such convictions."[13]

The FHA itself also provides a safe harbor in allowing *any* housing provider to deny an individual that has been convicted of the "illegal manufacture or distribution of a controlled substance."

These statutory and regulatory exclusions demonstrate that both HUD and Congress acknowledge legitimate concerns faced by housing providers in determining whether an applicant is suitable to live in its facilities amongst other residents. Although the recent HUD Guidance expresses concern with criminal screening policies that have a racially discriminatory effect, these exclusions nonetheless validate the reasons for such policies. As of now, housing providers should be able to exclude applicants based on the above offenses and reasons, presumably without concern for disparate impact liability.

Number of Years Screening Policies Should Go Back

There is no bright line as to how many years back a criminal background check can or should look. In the employment law context, courts have stated that there does need to be some type of cut off in time when reviewing the criminal conviction history of an applicant.[14] Similarly, screening policies for housing applicants should also be tailored to the policy's objectives and not look back at an applicant's past indefinitely. Instead, the policy should proportionately reflect the type of crimes about which a housing provider is most concerned.

First, it is important to identify the types of convictions that give rise to a concern by the housing provider relating to its substantial, legitimate, and nondiscriminatory interests. Certain types of crimes, like violent and sexual offenses against persons, will be legitimate concerns to a housing provider because of its responsibility to provide a safe and healthy environment for its residents. Other types of crimes may independently represent bad judgment, but not be of a major concern to a housing provider with respect to its legitimate interests in protected residents and property, such as tax fraud or public urination. A screening policy should appropriately reflect the weighted concern posed by different types of offenses and contain documented justifications in support of the determination of how those types are classified.

For similar reasons, the amount of years back the policy screens for certain convictions should be proportionate to the amount of weight attached to that conviction. In determining the amount of years back to screen for particular convictions, one must also consider the

nature and severity of the offense, as the HUD Guidance counsels. More serious convictions that relate to the concerns of a housing provider can be screened back over a longer duration than offenses indicating less of a concern. For example, again, convictions for violent crimes against persons or property should be treated differently, both in the amount of years back screened and in the consideration for suitability for housing, than a conviction for possession of marijuana.

Although criminological studies on recidivism rates vary on the amount of years needed to elapse until a convicted criminal has the same percent chance of committing another offense as would a general member of society, many studies center around the range of seven to ten years. Recidivism rates, however, vary widely by type of crime and there is no magic number of years that will indicate a perfectly rehabilitated and risk-free resident. In the employment context, many states limit criminal background checks to seven years. What is more important than arbitrarily picking a cut-off number of years, however, is for housing providers to determine which types of offenses present the greatest amount of concern, and to look back at an applicant's criminal history for those types of crimes for a longer duration than less concerning convictions. For example, violent offenses, property crimes, and sex-related offenses will likely be at the high range of years a criminal screening policy looks back because those types of crimes pose the greatest concern to a housing provider. Conversely, crimes like embezzlement or minor drug possession might have only a little bearing on an applicant's suitability as a resident and require fewer years back for which to screen.

Although criminological studies on recidivism rates vary on the amount of years needed to elapse until a convicted criminal has the same percent chance of committing another offense as would a general member of society, many studies center around the range of seven to ten years.

Best Practices

- Determine the level of concern that types of offenses cause as it relates to the legitimate concerns of a housing provider.
- Differentiate between offenses that do and do not pose a threat to those concerns.
- Proportionately weight the screening policy so that the amount of years back a screening reviews reflects the concern associated with that offense.
- Document this policy and insert deliberated justifications to support its contents.
- Implement this policy on a uniform basis for all applicants.

"Least Restrictive Alternative" Policies

The HUD Guidance recites that even if a housing provider demonstrates a legitimate interest to justify its screening and exclusion for certain crimes, the plaintiff then has one last opportunity to prevail on the disparate impact claim by showing that the housing provider could still account for that interest by implementing a policy that has a less discriminatory effect.

One example proposed by HUD is to delay criminal screening until the end of the application process, after the applicant's financial and other qualifications have been assessed. Delaying the screening until the end, HUD contends, will prevent convictions from becoming a pre-screening mechanism that could lead to exposure to subjective discrimination. Through suggesting this option, HUD does not seem to fully appreciate the administrative and technical burdens associated with implementing this type of screening policy. Although delaying criminal screening until the very end of the application process would ensure full compliance

for those that wish to choose the safest path, this Memorandum does not recommend this option as a best practice due to its administrative burden and costs.

A better method by which a housing provider could demonstrate that its policy constitutes a least restrictive alternative is by allowing an applicant to submit documentation and statements that mitigate or explain any concerning convictions flagged by the screening process. Providing the individual with an opportunity to explain mitigating circumstances or evidence of rehabilitation would reduce the opportunity that a plaintiff could have in arguing that there should have been a less restrictive way to implement the policy.

Best Practice

- Allow applicants to explain and provide mitigating circumstances if a criminal conviction is flagged as a cause for denial.

The Supreme Court, in June 2015, officially recognized disparate impact theory as a valid means of asserting a violation of the FHA.

In light of the Supreme Court ruling, HUD issued the Guidance asserting its interpretation of how disparate impact theory would apply to criminal conviction screening policies because of racially disparate incarceration rates.

Background and Context

The discussion in Part I of this white paper relates to how to design criminal conviction screening policies so that they are not susceptible to disparate impact claims of discrimination. Here, Part II explains how the concept of disparate impact liability emerged under the FHA and why the recent HUD Guidance has made screening policies an area of increased attention for housing providers and advocacy groups.

Although disparate impact theory has long been a means of bringing discrimination lawsuits, for example, in the employment context, it was not until recently that the Supreme Court officially recognized it as a valid way of alleged FHA discrimination. With that pronouncement by the Supreme Court, HUD issued guidance connecting disparate impact liability to criminal conviction screening policies because of the racial disparity evident in criminal convictions in this country. Although the Guidance does not constitute binding law and is not firmly supported by relevant case law, it nonetheless should be seriously considered as indicative of HUD's enforcement intentions.

Disparate Impact Theory

Aggrieved individuals can bring discrimination lawsuits under two theories: discriminatory intent or discriminatory effect (also called disparate impact). Because many policies are no longer explicitly and intentionally discriminatory against a protected class, disparate impact theory is used to attack policies that might initially seem neutral but actually have a negative and disproportionate impact on particular races. The Supreme Court, in June 2015, officially recognized disparate impact theory as a valid means of asserting a violation of the FHA.

In light of the Supreme Court ruling, HUD issued the Guidance asserting its interpretation of how disparate impact theory would apply to criminal conviction screening policies because of racially disparate incarceration rates. HUD recited the three-step burden shifting framework under which it would review a screening policy with respect to disparate impact theory. To review, the most critical takeaways of the guidance are that blanket policies excluding any applicant with any criminal conviction are likely unlawful and that housing

providers must have "substantial, legitimate, nondiscriminatory" interests that justify screening for particular types of convictions.

Disparate Impact Theory and the Fair Housing Act

The Fair Housing Act expressly prohibits refusing housing to an individual through intentional discrimination because of their membership in a protected class, such as race, gender, or national origin.[15] A blanket policy of refusing to rent to individuals of Irish national origin, for example, clearly constitutes unlawful discrimination under the FHA. Many rental policies, however, are not explicitly discriminatory in that manner but instead seem, at first blush, race neutral. For example, a housing provider could have a policy of refusing to rent to individuals who wear green shirts. Although this policy would seem to be neutral on its face, an aggrieved individual could bring suit under the FHA if he could show that such policy had a disproportionate impact on members of a protected class, say, a particular religion that required the wearing of green shirts. This lawsuit would be brought under the theory of disparate impact.

With disparate impact theory now an approved standard for liability under the FHA, HUD issued its Guidance on how conducting background screenings for criminal convictions on applicants could give rise to a disparate impact claim.

Although disparate impact is nowhere mentioned in the text of the FHA, the Supreme Court recognized it as a valid claim under the FHA, affirming what a significant number of Circuit Courts of Appeals had previously determined.[16] In this recent Supreme Court case, *Texas Dept. of Housing v. Inclusive Communities Project*, the Court announced the standard under which a plaintiff could bring a FHA discrimination suit premised on disparate impact. Since the discriminatory treatment is not explicit or intentional, the plaintiff must prove his case by using statistical evidence to demonstrate that the policy causes a racial disparity.[17]

Under the Court's explanation of FHA disparate impact theory, a plaintiff's claim would fail if he cannot produce that type of statistical evidence demonstrating a strong causal connection between the housing provider's policy and the discriminatory effect.[18] This "robust causality requirement," the Court stated, "protects defendants from being held liable for racial disparities they did not create."[19] The Court indicated that the bar is still relatively high for plaintiffs wishing to bring a FHA disparate impact claim, noting that "private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.'"[20] The Court stated that "housing authorities and private developers [must] be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest."[21]

Recent HUD Guidance on Criminal Screening and Disparate Impact

With disparate impact theory now an approved standard for liability under the FHA, HUD issued its Guidance on how conducting background screenings for criminal convictions on applicants could give rise to a disparate impact claim.[22] The HUD Guidance determined that while having a criminal conviction is not a protected class under the FHA like that of religion, nationwide statistics indicate that racial minorities like African-Americans and Hispanics are incarcerated at a disproportionate rate to their share of the general population. As a result, these racial groups have more criminal convictions on their record and could be disproportionately excluded by criminal conviction screenings.

Viewing this incarceration rate as a sufficient causal connection, the HUD Guidance then concludes that "where a policy or practice that restricts access to housing on the basis of criminal history has a disparate impact on individuals of a particular race . . . such policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial,

legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect."[23] The HUD Guidance concludes that policies consisting of "a blanket prohibition on any person with any conviction record . . . will be unable to meet this burden."[24] Instead, screening policies must look at the individual and the conviction(s) on an individualized, case-by-case basis in a way that "distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not."[25] The inherent issue in taking an individualized approach, as HUD recommends, is that it could potentially open the door to subjective discriminatory allegations. For this reason, as discussed in Part I of this white paper, it is important to have written and justified policies to rely on.

Three-Step Burden Shifting Framework for Disparate Impact Theory

The HUD Guidance discusses a three-step, burden shifting framework for analyzing the viability of disparate impact claims premised on criminal conviction discrimination; a framework based on regulations that HUD itself issued in 2013.

The HUD Guidance discusses a three-step, burden shifting framework for analyzing the viability of disparate impact claims premised on criminal conviction discrimination; a framework based on regulations that HUD itself issued in 2013.[26] The first step under the framework is evaluating whether the screening policy in fact has a discriminatory effect on a protected class.[27] The HUD Guidance states a preference for local statistics over national ones where available in determining if incarceration rates indicate racial disparity.[28] The HUD Guidance also seems to accept that national incarceration statistics satisfy the *prima facie* burden for showing a disparate impact, but ultimately cautions that each case requires a "fact-specific and case-specific inquiry."[29] The HUD Guidance makes no mention of the Supreme Court's "robust causality" requirement in analyzing statistical figures.

If the plaintiff satisfies his burden at the first step by demonstrating causation between the screening policy and the resulting racially disparate treatment, the defendant-housing provider then must show that it has a "substantial, legitimate, nondiscriminatory" interest to justify the screening policy.[30] The housing provider must not only show evidence that it has such an interest, but also that the policy actually achieves that interest.[31] Although the HUD Guidance omits any mention of the Supreme Court's reference to policies being permissible unless they are "artificial, arbitrary, and unnecessary barriers," the Guidance does acknowledge that "[e]nsuring resident safety and protected property are often considered to be among the fundamental responsibilities of a housing provider, and courts may consider such interests to be both substantial and legitimate, assuming they are the actual reasons for the policy."[32] The HUD Guidance indicates that a housing provider can satisfy this prong with reliable evidence that its screening policy actually assists in protecting interests like resident safety, but it warns that conclusory generalizations or stereotypes will not satisfy this burden.[33]

Although the HUD Guidance shies away from providing specifics on what types of convictions can be permissibly screened, or how many years back a screening can permissibly look back upon, it does provide general guidance that the policy must distinguish "between criminal conduct that indicates a demonstrable risk to resident safety" and "criminal conduct that does not."[34] Somewhat more specific is the further direction that an acceptable policy will, at the least, account for the "nature and severity of an individual's conviction" as well as "the amount of time that has passed" since the conviction.[35]

Lastly, if the housing provider adequately justifies the legitimate interests for its policy, the third step shifts the burden back to the plaintiff to show that the housing provider's asserted interest could be nonetheless achieved through a less discriminatory alternative policy.[36] The Guidance suggests that one possible less discriminatory practice would be by delaying

consideration of criminal history until the very end of the application review, after considering financial and other qualifications.[37]

Deference: Agency Guidance Versus Rules

An important question raised by the issuance of the new HUD Guidance is whether informal agency guidance constitutes legally binding authority that the courts must enforce. The answer is that the HUD Guidance is not legally binding and would only be given a moderate amount of deference by the courts, based on factors like how persuasive the court deemed HUD's position.

An important question raised by the issuance of the new HUD Guidance is whether informal agency guidance constitutes legally binding authority that the courts must enforce.

The answer is that the HUD Guidance is not legally binding and would only be given a moderate amount of deference by the courts, based on factors like how persuasive the court deemed HUD's position.

Administrative agencies, like HUD, can enact two types of rules: legislative rules that carry the force of law or non-legislative rules, often referred to as interpretive rules, policy statements, or guidelines. Legislative rules carry the force of law because they are subject to a rigorous development process that includes public notice and commenting, and, as a result, are given significant deference by the courts if their legitimacy is challenged. Non-legislative rules, like the recent HUD Guidance, are not given the same level of deference by reviewing courts because they were not enacted under lawmaking authority. Agency guidance is intended to explain an agency's understanding of a statute, not to create substantive law.

The weight of authority or deference that a reviewing court provides with respect to agency guidance is a complex area of law. Unlike the stronger deference provided when agencies act on congressional authority, here, courts would provide a somewhat "intermediate" deference if the pronouncements of the recent HUD Guidance brought a housing provider to court. Under this intermediate deference standard, the weight courts provide to the informal guidance depends on factors such as "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[38] This means that the court will consider several factors in deciding whether to defer to HUD's conclusions by looking at how much care HUD put into its guidance, its consistency, its formality, the extent to which HUD is an expert in that area, and the overall persuasiveness of HUD's position.[39] In short, the amount of deference a reviewing court would provide to HUD's Guidance would be "proportional to its power to persuade."[40]

It is impossible to predict how a reviewing court would balance these factors and whether multiple courts would come to the same conclusion. The takeaway, however, is that the HUD Guidance does not have binding force of law. Therefore, a court does not have to automatically defer to its conclusions in finding, for example, that nationwide incarceration statistics support a causal connection for disparate impact theory. Nor would a reviewing court necessarily have to accept the conclusion that a policy that fails to "account for the nature and severity" of a conviction would not likely meet the "legitimate interest" burden. Instead, the court would have the authority to skeptically examine the persuasiveness of HUD's reasoning and its validity or consistency, which could include with respect to the *Inclusive Communities Project* Supreme Court decision.

Relevant Case Law

While there is not a significant amount of court decisions to analyze whether criminal conviction screening can give rise a FHA violation through disparate impact theory, several

recent cases have discussed the issue to varying degrees, and have largely ruled that the criminal screening policy at issue did not violate the FHA. In light of the recent Supreme Court decision validating disparate impact claims under the FHA and the subsequent HUD Guidance, it will be important to pending and future cases for insight as to how the courts react to the HUD Guidance and what standards they apply to screening policies and their underlying justifications.

Prior Decisions on Criminal Conviction Screening

In 2009, the court in *Evans v. UDR, Inc.* found that "the FHA clearly does not prohibit landlords from denying a person occupancy on the basis of his criminal record."[41] The court then acknowledged that the housing provider's screening policy was permissible because it was neutral on its face and applied equally to all applicants regardless of race.[42] The equal application of criminal history screening is important to courts because it negates any possible racial animus on the part of the housing provider.

The equal application of criminal history screening is important to courts because it negates any possible racial animus on the part of the housing provider.

In *Miller v. McKinley, Inc.* in 2007, a court likewise found a background check policy to be race-neutral because the release forms that all applicants had to sign beforehand did not convey any racial information.[43] This fact led the court to reject the FHA discrimination claim because "convicted felons are not a protected class" and because the applicant's race was not the reason for her rejection—but instead, her prior felony convictions.[44] Proof that a housing provider has rejected White applicants for similar convictions has also negated disparate impact allegations of racial discrimination under the FHA.[45]

Therefore, there is case precedent supporting the proposition that it "is not a violation of the Fair Housing Act for a tenant to be denied rental of a dwelling because they have a criminal conviction."[46] Courts making such types of conclusions point to the text of the FHA itself, which states that "Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."[47] Courts also point to the Code of Federal Regulations, which permits Public Housing Authorities to consider factors including "criminal activity that is a threat to the health, safety or property of others" in screening tenants.[48] One court, in justifying exclusion of an applicant because of his poor credit and rental history, stated as an aside that even if those reasons had not been legitimate, "it is clear that his felony conviction also provides a basis for his exclusion."[49]

On the other hand, it will be a violation of the FHA if a criminal background check is used as a pretext for racial discrimination. In *United States v. Collier*, a landowner had demanded identifying information on potential buyers who he suspected to be African American from the real estate agent so that he could perform a background check on them.[50] He did not make a normal practice of performing background checks, had only performed five total on applicants over the prior ten years, and just attempted to use it as a pretext to exclude the applicants.[51] This case demonstrates that it is unlawful to use criminal screening policies in a discriminatory and inconsistent manner.

An obvious conflict exists between the above series of cases and recent HUD Guidance, namely, in that the HUD Guidance expressly forbids blanket prohibitions on renting to individuals with a criminal conviction while there is case law stating that the FHA does not prohibit that practice.[52] This discrepancy is what a reviewing court would have to reconcile using the appropriate level of agency deference if a housing provider were sued under the reasoning of the HUD Guidance. Although it is impossible to predict how a future court

might rule without taking an individualized assessment of the relevant facts, there is one pending case that could, in the short term, shed light on how courts respond to the new HUD Guidance.[53]

The analysis is admittedly an early assessment of the intersection between criminal screening policies and the HUD disparate impact rule approach.

Conclusion

This white paper is intended to provide a better understanding and historical and legal context as to the recent HUD Guidance on criminal background screening policies, which have become a topic of serious concern in the housing community. It is also intended to provide recommended best practices.

The analysis is admittedly an early assessment of the intersection between criminal screening policies and the HUD disparate impact rule approach. The way both HUD and the courts treat these types of disparate impact claims may (and, indeed, is likely to) evolve over the coming years as courts provide precedent for interpretation of the HUD Guidance and as HUD or Congress enacts further clarifying guidance, regulations, rules, or statutes.

Although the issue is in a state of flux, the recent HUD Guidance does not significantly alter the screening policies currently employed by many housing providers, provided that those policies already are proportionately tailored to weight certain types of convictions to meet legitimate safety and property interests in a non-arbitrary way.

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[1] *See, e.g.*, Tsombanidis v. West Haven Fire Dep't, 352 F.2d 565, 575 (2d Cir. 2003) ("When examining disparate impact claims under the [Fair Housing Act] and ADA, we use Title VII as a starting point."); Gamble v. City of Escondido, 104 F.2d 300, 304 (9th Cir. 1997) ("We apply Title VII discrimination analysis in examining Fair Housing Act . . . discrimination claims.").

[2] HUD Guidance at 5 ("A housing provider with a policy or practice of excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.").

[3] *See* Schware v. Bd of Bar Examiners, 353 U.S. 232, 241 (1957) ("The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct."); *see also* HUD Guidance at 5 ("Because arrest records do not constitute proof of past unlawful conduct and are often incomplete (*e.g.*, by failing to indicate whether the individual was prosecuted, convicted, or acquitted), the fact of an arrest is not reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual.").

[4] EEOC Enforcement Guidance No. 915.002, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, April 2012, *available at*: https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

[5] 24 C.F.R. § 982.553(a)(1)(i)

[6] 24 C.F.R. § 982.553(a)(1)(ii)(A); 24 C.F.R. § 960.204(a)(2)(i)

[7] 24 C.F.R. § 982.553(a)(1)(ii)(B); 24 C.F.R. § 960.204(a)(2)(ii)

[8] 24 C.F.R. § 982.553(a)(1)(ii)(C); 24 C.F.R. § 960.204(a)(3)

[9] 24 C.F.R. § 982.553(a)(2)(i)

[10] 24 C.F.R. § 960.204(b)

[11] 24 C.F.R. § 960.203

[12] 42 U.S.C. § 3607(b)(4)

[13] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2521 (2015).

[14] Green v. Missouri Pac. R. Co., 523 F.2d 1290, 1298 (8th Cir. 1975) ("We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. . . . To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.").

[15] 42 U.S.C. § 3604.

[16] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2518 (2015).

[17] *Id*. at 2523.

[18] *Id*.

[19] *Id*.

[20] *Id*. at 2524 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

[21] *Id*. at 2523.

[22] U.S. Department of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing of Housing and Real Estate-Related Transactions (Apr. 4, 2016) (hereinafter referred to as the "HUD Guidance").

[23] HUD Guidance at 2.

[24] HUD Guidance at 6.

[25] HUD Guidance at 6.

[26] See 24 C.F.R. §100.500.

[27] HUD Guidance at 3 (citing 24 C.F.R. § 100.500(c)(1)).

[28] *Id*. at 3.

[29] *Id*. at 4.

[30] *Id*. at 4 (citing 24 C.F.R. 100.500(c)(2)).

[31] *Id*. at 4.

[32] *Id*. at 5 (citing 78 Fed. Reg. at 11470 (stating that a "legitimate" interest means one that is genuine and not false or fabricated)

[33] *Id*. at 5.

[34] *Id*. at 6.

[35] *Id*. at 7.

[36] *Id*. at 7 (citing 24 C.F.R. § 100.500(c)(3)).

[37] *Id*. at 8.

[38] *See* United States v. Mead Corp., 533 U.S. 218, 228 (2001) (quoting Skidmore v. Swift & Co., 323 U.S. v. 134, 140 (1944)).

[39] *See id*. (citing *Skidmore*, 323 U.S. at 139–40).

[40] *See id*. at 234–35.

[41] Evans v. UDR, Inc., 644 F. Supp. 2d 675, 691 (E.D.N.C. 2009).

[42] *Id*. at 692. See also Harrison v. Darby, No. C.A. 2:08-3874-PMD, 2009 WL 936469, at *3 (D.S.C. Apr. 7, 2009), *aff'd*, 333 F. App'x 801 (4th Cir. 2009) (granting summary judgment to housing provider in FHA discrimination case premised on criminal conviction screening where housing provider had a policy to run a background check on all tenants prior to renewing).

[43] Miller v. McKinley, Inc., No. 05-40310, 2007 WL 2156273, at *9 (E.D.Mich. July 26, 2007).

[44] *Id*. at 4, 9.

[45] Payne v. N. Callaway Senior Citizens Ctr., No. 11-4044-CV-C-NKL, 2011 WL 6337719, at *1–2 (W.D. Mo. Dec. 19, 2011)

[46] Harrison v. Darby, No. C.A. 2:08-3874-PMD, 2009 WL 936469, at *5 (D.S.C. Apr. 7, 2009), *aff'd*, 333 F. App'x 801 (4th Cir. 2009)

[47] Talley v. Lane, 13 F.3d 1031, 1034 (7th Cir. 1994) ("The Fair Housing Act does not require that a dwelling be rented to an individual who would constitute a direct threat to the health and safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.") (citing 42 U.S.C. § 3604(f)(9)).

[48] Bourbeau v. Jonathan Woodner Co., 549 F. Supp. 2d 78, 87 (D.D.C. 2008) ("Landlords remain free not to rent to voucher holders provided they do so on other legitimate, non-discriminatory

grounds, such as an applicant's rental history or criminal history.") (citing 24 C.F.R. § 982.307(a)(3)).

[49] Sutton v. Freedom Square Ltd., No. 07-14897, 2008 WL 4601372, at *6 (E.D. Mich. Oct. 15, 2008), *aff'd sub nom.* Sutton v. Piper, 344 F. App'x 101 (6th Cir. 2009).

[50] United States v. Collier, No. CIV.A.08-0686, 2010 WL 3881381, at *10 (W.D. La. Sept. 28, 2010).

[51] *Id.*

[52] *Compare* HUD Guidance at 6 (prohibiting a policy that "imposes a blanket prohibition on any person with any conviction record), *with* Evans, 614 F. Supp. at 691 ("[T]he FHAA clearly does not prohibit landlords from denying a person occupancy on the basis of his criminal record.").

[53] In *The Fortune Society v. Sandcastle Towers Housing Development Fund*, the plaintiff, an advocacy group, alleged that the housing provider has a policy of "automatically excluding any person with a record of criminal conviction" that does not account for the nature or date of the conviction, nor any evidence of rehabilitation. This policy, the plaintiffs contend, violates the FHA under disparate impact theory as demonstrated by incarceration statistics in New York. If the allegations in the plaintiff's complaint are true, this case could be the first to test whether blanket exclusions based on criminal convictions do actually violate the FHA, as the recent HUD Guidance argues. If so, the court could additionally elaborate on the types of factors that housing providers should use in drafting criminal screening policies. *See* Complaint, The Fortune Society, Inc. v. Sandcastle Towers Housing Development Fund Corp., Case No 1:14-cv-6410 at *2 (E.D.N.Y. 2014).