

# HUD'S NEW CRIMINAL BACKGROUND CHECK GUIDANCE

## — A PRACTICAL GUIDE FOR THE HOUSING INDUSTRY



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# BIG CHANGES TO THE CRIMINAL SCREENING PROCESS

- When criminal background checks are done
- What can be searched
- What crimes can trigger denials
- How far back we can search
- What other factors should be considered

# Product of Dramatic Social – Political – Legal Trends

- EMPLOYMENT CONTEXT
  - EEOC limits criminal histories
  - Ban the Box movement
- FERGUSON – BLACK LIVES MATTER
- SENTENCING REFORM (3 STRIKES)
  - President Obama commutes 250+ sentences
  - Sentencing Reform and Corrections Act (Bi-Partisan)

# Legal Landscape

- Fair Housing Act –
- Original Interpretation: Intent required
  - ❖ Housing providers
  - ❖ Can't discriminate (treat people differently)
  - ❖ In sale, rental, financing of dwellings or other housing related activities
  - ❖ Because of membership in a **protected class**
    - RACE
    - NATIONAL ORIGIN
    - COLOR
    - RELIGION
    - DISABILITY
    - FAMILIAL STATUS
    - SEX

# Supreme Court Upholds Disparate Impact

- *TX Dept. of Community Affairs v. Inclusive Communities* (6/25/15)
- Validates 2013 HUD Disparate Impact Guidance (24 CFR 100.500)
- Housing providers can violate the FHA where —
  - A facially neutral policy (equally, consistently, fairly applied)
  - Has a disparate (disproportionate) impact
  - On a protected class
  - Regardless of no intent to discriminate

# HUD's New Criminal Background Guidance

## Disparate Impact theory applies to Criminal Background Checks

- Criminal screening is facially neutral
- But, because “African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the population”
- “Criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers.”
- Liability results where the policy actually has or predictably will have a disparate impact on a protected class

*Office of General Counsel Guidance on Application of Fair Housing Act Standards to the use of Criminal Records by the Providers of Housing and Real Estate-Related Transactions  
4/4/16*

# WHAT EXACTLY IS HUD “GUIDANCE”???

- Not a statute or regulation
- A reflection of how HUD
  - Interprets existing laws
  - Will enforce the law
  - *Not supposed to set new standards or impose new requirements – does it?*
- Energizes states, advocacy groups, plaintiff’s bar

## 2 OPTIONS FOR HOUSING INDUSTRY

1. Terminate criminal background screening for now
  - Too much time, manpower, money – no guarantees
  - Wait for follow-up guidance from other sources
    - States
    - Associations (NMHC/NAA)
    - Advocacy groups
    - Courts
2. Develop a **written program** that responds to HUD's guidance



# Step 1: WRITTEN POLICY & PROCEDURES

- Consistent procedures
- Consistent Standards
- Explanation for criminal background check program\*

# EXPLANATION OF WHY.....

HUD says you need ---

- A “substantial, legitimate and nondiscriminatory” justification
- Why this goal can’t be achieved by other means
- You will not meet this burden with “generalizations or stereotypes” about people with criminal records posing a risk

OK but...

- An air-tight explanation is only an issue if process is challenged
- Focus on good procedures and standards
- Let’s ask national organizations (and local chapters) to help with the Explanations...

# Next Steps – What Are We Gonna Do?

2 categories of guidance in the HUD memo

1. Crystal clear guidance – Follow it
2. Generalized guidance – Look to relevant outside sources
  - Employment law
  - Other laws (FCRA, states)
  - Best practices

# PREPARE A STANDARD LETTER FOR APPLICANTS

- We seek your permission to conduct a credit screening.
- If you pass a credit screening, we will then ask your permission to conduct a criminal background search of all occupants (over age18).
- (This is what we look for)
- You will get our decision in writing



# When Should Criminal Check be Run?

## Strictest Interpretation

Don't do criminal check unless and until credit check comes back clean

- Same as EEOC guidance
- Can lead to delays –  
Normally would do both at once
- End result matters most -- not when you got the criminal records but how you handle them



# What are the Screening Criteria?

## Example of Clear Guidance:

- “A practice of excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy” a housing provider’s burden

Do not consider: Prior Arrests or Charges

- Do not ask applicants if they have ever been arrested/charged
- Do not screen for arrests/charges
- Parallels EEOC guidance for employment applicants

# Criminal Convictions – What Applies?

Evaluate –

1. The nature and severity of the conviction
  - does it relate to –
    - Safety of residents
    - Safety of property
2. Look Back Period, ie., length of time since the conviction
3. The age of the person at the time of the conviction.

# DON'T EXCLUDE.....

- Misdemeanors –
  - Possible exception: repeated assaults, thefts
- Some non-violent crimes (bigamy)
- Victimless crimes – (gambling)

# Excludable Felonies – Within Look Back

**Principle:** Must take into account nature & severity of conviction

- Violent felonies that threaten resident safety or destruction of property

Murder

Arson

Kidnapping

Domestic violence

Assault & battery

Destruction of property

False imprisonment

Weapons charges

Robbery/B&E

Stalking



# Permanent Exclusions?

- Manufacturing or Distributing Controlled Substance(not marijuana)
  - Drug possession alone doesn't count
  - You can apply your judgement
- Lifetime sex offender registrants
  - Prohibited in federally assisted housing

## ISSUES--

- Excluding Financial crimes –  
Embezzlement, fraud, tax evasic
- Multiple v. Single Offense
- Pending Prosecutions
- Plea Downs



# LOOK BACK PERIOD

A policy needs to consider the amount of time since conviction in order to meet HUD's standards

- Start the clock from the Date of conviction
- Sliding scale depending on crime severity
- Most conservative: 1 - 3 - 5 - 7 year  
HUD guidance  
FCRA max
- Riskier: > 7+ years – doesn't mean you can't!

# Mitigating Circumstances – Most Controversial

HUD: *individualized assessment of relevant **mitigating information** is likely to have a less discriminatory effect than categorical exclusions that don't take such additional information into account*

## Pros:

- Already doing individualized assessments in employment context
- Isn't it better to show good faith and best efforts?
- How can we justify ignoring HUD guidance?

## Cons:

- Is it possible to ensure consistency when do case-by-case analysis?
- Does it expose us to more liability?
- Staff time, cost and training issues



# What are the Mitigating Circumstances ?

- Facts and circumstances surrounding criminal conduct
- Age at time of conviction
- Evidence of good tenant history before/after conviction
- Evidence of rehabilitation
  - State issued certificate of rehabilitation
  - Probation officer reports
  - Completion of drug treatment
  - Stable employment or efforts to find employment
  - School or training history
  - Evidence of treatment: counseling, anger management, rehab
  - Letters of recommendation
  - Other things that applicant wants to submit

# Evidence Against Rehabilitation

- Subsequent convictions (that don't warrant exclusion)
- Subsequent arrests/charges?
- No records of stability (tenancy, employment, treatment)
- Poor prior tenant history
- Poor probation reports



# CHECKLIST

## Written Protocol

If you just do these 3 things – you'll be way ahead....

- ✓ Don't consider arrests/charges
- ✓ Only exclude for crimes that affect safety/property
- ✓ Shorten look-back periods – no permanent exclusions
  - Except drug manufacturing/sales & sex offenders



# Looking on the Bright Side....

- Not reinventing the wheel
  - Employment law model
  - Some states already limit background checks to 7 years
- Excluding arrests alone greatly reduces denials
- Local implementation laws may create a pathway to compliance
  - ✓ Under consideration in DC, Seattle
- Allows us to say “yes” to more applicants

# Common Concerns

- Unanswered questions -- Must play out in courts
- Adding to industry plate --
  - Assume more risk
  - Play criminologist/sociologist/psychologist
  - Play judge & jury
- Increases risk/liability from all sides
  - Enforcement actions from HUD, advocacy groups, individuals
  - Housing providers can still be sued by crime victims
- Potential added costs to administer program
- Prolonging application process

# If I Had A Magic Wand.....

- HUD would provide more specific guidance
  - but then that would be a regulation
- Moratorium on enforcement actions until industry has time to digest
- Provide industry with immunity from civil liability for crimes that occur on our premises

