

## **Memo: Fair Housing and Tenant Selection with Regard to Criminal Record Screening 7/14/21**

The Louisiana Housing Corporation (“LHC”) has a responsibility to affirmatively further fair housing within its housing programs. The Fair Housing Act prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status or national origin. The Fair Housing Act applies to all housing and prohibits both intentional housing discrimination and housing practices that have an unjustified discriminatory effect because of race, national origin or other protected characteristics. Very limited exemptions to the Fair Housing Act are available for owner-occupied buildings with no more than four (4) units, single-family housing sold or rented without the use of a broker and housing operated by organizations and private clubs that limit occupancy to members

On April 4, 2016, the Department of Housing & Urban Development (HUD) released the Office of General Counsel Guidance (“HUD Guidance”) concerning how the Fair Housing Act applies to the use of criminal history by providers or operators of housing and real-estate related transactions. Specifically, the HUD Guidance addresses how the discriminatory effects and disparate treatment methods of proof apply in Fair Housing Act cases in which a housing provider justifies an adverse housing action – such as a refusal to rent or renew a lease – based on an individual’s criminal history.<sup>1</sup> The HUD Guidance concludes:

Because of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden African Americans and Hispanics. While the Act does not prohibit housing providers from appropriately considering criminal history information when making housing decisions, arbitrary and overbroad criminal history-related bans are likely to lack a legally sufficient justification. Thus, a discriminatory effect resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act.

Louisiana has had one of the highest incarceration rates in the country for years. Louisiana’s criminal record database shows 1.7 million adults have criminal records in the state.<sup>2</sup> With 3.6 million total adults in the state, 49% of adults, and likely an even higher percentage of adults applying for affordable housing through one or more of LHCs’ housing programs, have a criminal record.<sup>3</sup>

LHC will complement the Governor’s and Legislature’s efforts to address the effects of mass incarceration by applying the HUD Guidance to all LHC funded housing without any exemptions to the Low-income housing tax credit program (“LIHTC Program”) and other programs administered by LHC.

To that end the LHC has modified its requirements for tenant selection policies to comply with the HUD Guidance. Owners and/or managers of properties that have received LIHTC awards, program funds or

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<sup>1</sup> Office of the General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions. U.S. Department of Housing and Urban Development. April 4, 2016. Available: [www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](http://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF).

<sup>2</sup> Becki Goggins and Dennis DeBacco. Survey of State Criminal History Information Systems. National Consortium for Justice Information and Statistics. November 5, 2020. Pg. 34. Available: [www.ojp.gov/pdffiles1/bjs/grants/255651.pdf](http://www.ojp.gov/pdffiles1/bjs/grants/255651.pdf). (1,743,500 adults in the state criminal history file)

<sup>3</sup> U.S. Census Bureau. American Community Survey, 2019 1-year Estimates, TableID: S0101. (3,563,908 total adults in Louisiana).

other subsidies from LHC are now required to submit a certified copy of their tenant selection policy or practice (“Tenant Selection Policy and Practice”) by January 1, 2022 to evidence compliance with the requirements of the HUD Guidance.

### **Tenant Selection Policies**

All criteria used in the decision-making process must be included in the written Tenant Selection Policy and Practice. The written Tenant Selection Policy and Practice must be specific so that an applicant or a third party may read the Tenant Selection Policy and Practice and reasonably determine the applicant’s likelihood of acceptance to the property. The written Tenant Selection Policy and Practice also must include a nondiscrimination statement, describe any appeals process, and state the applicant’s right to request a reasonable accommodation if the applicant is disabled.

When LHC receives complaints that applicants to any property have been unfairly turned down for housing, LHC will ask for a summary of the facts and circumstances used in the decision to deny the applicant and to compare against the written Tenant Selection Policy and Practice on file at the LHC for the property. Should LHC find that an applicant was denied admission in violation of the approved Tenant Selection Policy and Practice or that the Tenant Selection Policy and Practice in use by the property violates this LHC policy, the property will be subject to compliance action by LHC.

The information above is not intended as legal advice and does not provide a legal opinion as to the matters stated. It is recommended that all property owners consult with an attorney that is well versed in fair housing law when making decisions regarding their Tenant Selection Policy and Practice.

### **Policy on Screening Applicants with Criminal Records**

#### Screening and Appeal Process

- In an addendum to the application form, the management company must explain Tenant Selection Policy and Practice based on an individual’s criminal history how its Tenant Selection Policy and Practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. An applicant must have the right to submit evidence of mitigating circumstances to provide for an individualized assessment of the applicant’s specific criminal history. Individualized assessment of relevant mitigating information beyond that contained in an individual’s criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account. Relevant individualized evidence might include: the facts or circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts. In accordance with the HUD Guidance, LHC recommends delaying consideration of criminal history until after an individual’s financial and other qualifications are verified in order to minimize any additional costs that such individualized assessment might add to the applicant screening process.
- The management company may conduct a criminal background check on each adult member of an applicant household. An adult is defined as a person 18 years of age or older.

If a criminal background report reveals negative information about a household member and admission is denied due to an individual’s criminal history, the subject of the record (and the applicant, if different)

will be provided a detailed notice of the proposed adverse action and an opportunity to dispute the accuracy of the record and/or appeal the determination of the property.

### Admissions Criteria

1. The housing provider must deny admission to applicants with household members who have the following criminal convictions:
  - Sex offenses subject to lifetime registration requirement; and
  - Manufacture or production of methamphetamine on the premises of federally assisted housing.
2. The housing provider may not consider the following in its determination of whether to accept or deny an applicant household:
  - Arrests;
  - Criminal charges that were resolved without conviction;
  - Juvenile records, or any expunged, vacated, or sealed records;
  - Nonviolent misdemeanor convictions;
  - Violent misdemeanor convictions and nonviolent felony convictions that are over three (3) years old at the date of screening; and
  - Violent felony convictions that are over five (5) years old at the date of screening.
3. Charges that are pending for eligible crimes at the time of screening may be considered, subject to the “individualized” assessment described in #5 below.
4. If a member of an applicant household has been convicted of a felony offense or violent misdemeanor offense during the applicable “further review period” (dated from the day of conviction), the housing provider may choose to consider that record in determining whether to accept or deny an applicant household based on the criteria in #5 below.
5. The housing provider will conduct an individualized assessment of the criminal record and its impact on the household’s suitability for admission. This individualized assessment should include consideration of the following factors:
  - The seriousness of the case, especially with respect to how it would affect other residents;
  - The effects that denial of admission may have on other members of the family who were not involved in the action or failure;
  - The age of the household member at the time of the offense;
  - The extent of participation or culpability of individual family members, including whether the culpable family member is a minor or a person with disabilities, or a victim of domestic violence, dating violence, sexual assault, or stalking;
  - The length of time since the violation occurred, with particular weight being given to significant periods of good behavior, as well as the family’s recent history, and the likelihood of favorable conduct in the future;
  - Evidence of the applicant family’s participation in or willingness to participate in social service or other appropriate counseling service programs;
  - Evidence of rehabilitation, such as employment, participation in a job training program, education, participation in a drug or alcohol treatment program, or recommendations from a parole or probation officer, employer, teacher, social worker, or community leader; and
  - Tenancy supports or other risk mitigation services the applicant will be receiving during tenancy.
6. If the applicant’s criminal conviction was related to his or her disability, the management company will consider a reasonable accommodation.

7. The owner shall ensure that this policy is uniformly applied to all applicants in a non-discriminatory manner and in accordance with applicable fair housing and civil rights laws.

**Disclaimer: This policy is not intended as legal advice and does not provide a legal opinion as to the matters stated. It is recommended that all property owners consult with an attorney that is well versed in fair housing law when making decisions regarding tenant selection criteria.**