



For economic and racial justice

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November 22, 2021

Director Sam Levine
Consumer Protection Bureau
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Regulations and Guidance regarding criminal records tenant screening practices

Dear Director Levine:

Thank you so much for meeting with our coalition this summer and requesting that we provide suggested regulations and guidance regarding landlord tenant screening practices. Proposed regulations under the FTC Act are attached as Exhibit 1; proposed guidance aimed at landlords is attached as Exhibit 2; proposed guidance aimed at tenant screening companies is attached as Exhibit 3. Exhibits 2 & 3 are updates to guidance already released by the FTC in 2016.¹ This letter also helps to elucidate the basis for more extensive and formal FTC Guidance.

In the last several years, HUD, the FTC, and CFPB have released guidance highlighting risks criminal tenant screening practices pose to consumers.² While much of this effort was spurred by HUD's Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions,³ it is heartening that the CFPB and FTC are also viewing such issues as consumer protection matters. Notably, the National Consumer Law Center, which has already proposed essential guidance aimed at tenant screening companies under the Fair Credit Reporting Act, has signed onto this letter. We write both to support and supplement those suggestions, with particular focus on how the FTC can use its authority to regulate unfair or deceptive practices under Section 5 of the FTC Act to rein in potentially harmful tenant screening practices. The FTC has already taken essential steps in this direction.⁴

¹ Lisa Weintraub Schifferle, Screening tenants? Check out the FTC's new guidance, HUD, Nov 28, 2016, <https://www.ftc.gov/news-events/blogs/business-blog/2016/11/screening-tenants-check-out-ftcs-new-guidance>.

² See, e.g., Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, HUD, Apr. 4, 2016, https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF; see FTC Oct. 2016 guidance & Jillson blog post, at *infra*; CFPB Bulletin 2021-03: Consumer Reporting of Rental Information.

³ HUD, at id.

⁴ See, e.g., "Using Consumer Reports: What Landlords Need to Know," FTC, Oct. 2016, <https://www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-landlords-need-know>; Lesley Fair, "A word to landlords about eviction moratoriums," FTC, Mar 29, 2021, <https://www.ftc.gov/news-events/blogs/business-blog/2021/03/word-landlords-about-eviction-moratorium>; see also, e.g., Elisa Jillson, "Aiming for truth, fairness,

In his 2020 address to the National Fair Housing Alliance, then-FTC Chairman Chopra articulated the unique role of consumer protection agencies in protecting consumers against harmful screening practices and the importance of expanding the FTC's efforts under its Section 5 authority:

[A] . . . tool we can use today is the FTC Act's prohibition on unfair acts and practices. As we all know, it is rare to uncover direct evidence of racist intent, which is why disparate impact analysis is a critical tool to uncover hidden forms of discrimination under sector-specific laws like the Fair Housing Act and the Equal Credit Opportunity Act. But many areas of the economy are not covered by these laws. In a recent auto lending discrimination case brought by the FTC, I argued that many discriminatory practices are also unfair under the FTC Act, which covers almost the entire economy. Unfair practices are those that are (i) likely to cause substantial injury (ii) that is not reasonably avoidable, and (iii) that is not outweighed by countervailing benefits to consumers or competition. Discriminatory practices often are three for three, causing grievous harm that cannot be avoided. This means that the F T C Act can serve as an important gap-filler to combat discrimination across the economy, particularly as machine learning and artificial intelligence make more and more decisions about our lives.⁵

We are writing as a coalition of organizations led by and composed of individuals with criminal records, as well as housing and consumer advocacy groups. Below are suggestions for how the FTC can make good on Chairman Chopra's thesis - that FTC's general unfairness authority is an essential tool to rein in tenant screening practices, both through the regulation of landlords and screening companies.

Specifically, we advocate that the FTC take the following actions. For one, the FTC can expand upon the guidance to tenant screening companies and landlords which it issued in 2016, per Exhibits 2 & 3. This will provide important information to these businesses and help elucidate the FTC's stance on these matters. Of the suggested actions, this step can likely be taken most immediately though it also may be given the least amount of deference from courts. In order that guidance be entitled to more deference, we also advocate that the FTC issue more analytically robust interpretive guidance which establishes the basis for the suggestions included in the exhibits. Finally, though we know it is a far less immediate process, we have provided suggested regulations under the FTC Act, per Exhibit 1, which also potentially serve as model language for subregulatory guidance or staff commentary.

and equity in your company's use of AI," FTC, Apr. 19, 2021, <https://www.ftc.gov/tips-advice/business-center/guidance/what-tenant-background-screening-companies-need-know-about-fair>.

⁵ "Introductory Remarks of [then-] Commissioner Rohit Chopra," National Fair Housing Alliance 2020 National Conference, Oct. 6, 2020, https://www.ftc.gov/system/files/documents/public_statements/1581594/final_remarks_of_rchopra_to_nfha_v3.pdf.

Application of FTC Act to Regulate Tenant Screening Practices

As highlighted by then-FTC Chairman Chopra's statement above, the FTC Act covers nearly every aspect of the economy. While other laws like TILA and RESPA focus on unfair practices surrounding the extension of credit, few federal consumer protection laws focus on protecting renters; the FTC Act itself is necessary to fill this gap.⁶ The FTC and CFPB have already taken bold steps to regulate tenant screening companies and landlords' use of screening reports, generally through FCRA guidance and by taking enforcement actions against screening companies. It is essential that the FTC continue to build upon such efforts through additional guidance targeting both screening companies and rental housing providers. As stated by Chairman Chopra, the FTC is uniquely situated to take the lead in reining in harmful tenant screening practices.

Indeed, we are in the midst of both a housing crisis and a civil rights reckoning. Just as the CFPB was formed largely in response to the abusive practices of the lending industry, it is essential that the FTC take steps to minimize harmful barriers to housing faced by the most vulnerable consumers and their families.

Regulation of both tenant screening companies and the tenant screening practices of landlords⁷ is well within the FTC's established bailiwick. As stated, the FTC has already addressed tenant screening practices in guidance directed to both landlords and screening companies. There is, indeed, ample precedent that discrimination, in the housing context and otherwise, also violates consumer protection laws,⁸ and consumer protection agencies enforce

⁶ See Hayes, *infra*, at pp. 4, 20 (noting that consumer protection law is needed to fill gaps left by anti-discrimination laws).

⁷ It bears mention that, while historically the FTC has been seemingly hesitant to regulate landlords under Section 5, there is nothing limiting its jurisdiction in this regard. Further, while historically, landlords were viewed as 'mom & pop' operations and rental transactions were viewed as more analogous to traditional land transfers than consumer dealings, today, landlords are often multi-state investor-backed operations who engage in the market like any other business and who use screening reports provided by data aggregators. See Eric Sirota, *The Rental Crisis Will Not Be Televised: The Case for Protecting Tenants Under Consumer Protection Regimes*, 54 U. Mich. J.L. Reform 667, 707-711 (rental housing marketed like any other consumer product or service such that "treating rental markets as unique from other markets is anachronistic at best."), 721-22 ("The need for increased public enforcement becomes that much greater as the rental industry becomes increasingly nationalized [C]orporations are increasingly dominating the rental market . . . As stated by Harvard's 2018 report on *The State of the Nation's Housing*, '. . . multifamily construction ramped up quickly to become the main source of additional supply.' In some urban areas, the dominance of these larger rental companies is especially pronounced. In fact, more recently, there has even been somewhat of a flourishing of rental-backed security investors and the like.") (Spring 2021) (citations omitted).

Further, while consumer enforcement agencies have historically hesitated to regulate housing providers, most state UDAP laws, many of which incorporate FTC Act jurisprudence, have been interpreted to include regulation of landlords. See NAT'L CONSUMER L. CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 2.2.6.1 (10th ed. 2021), <https://library.nclc.org/udap>; Susan L. Thomas, Annotation, Coverage of Leases Under State Consumer Protection Statutes, 89 A.L.R. 4th 854; see, e.g., *Commonwealth v. Monumental Props., Inc.*, 459 Pa. 450, 465 (1974) (arguing that the FTC's regulation of other rental products indicates its authority to regulate rental housing).

⁸ See, e.g., *Connecticut Fair Housing Center v. Corelogic Rental Property Solutions*, 369 F.Supp.3d 362, 381 (D. Conn. 2019) (allegations that defendant violated HUD 2016 Criminal Records Guidance also state UDAP claim);

specific prophylactic measures to guard against such discrimination in other contexts.⁹ Further, the guidance suggested here aligns with the FTC’s efforts to regulate ‘big data’ and protect consumer privacy. Not only is the criminal records data being bought and sold likely to be inaccurate and incomplete,¹⁰ but use of such data involves the buying, selling, and disclosure of negative, often racially biased,¹¹ information about consumers that may have little to do with the consumer’s ability to be a quality tenant.¹²

Unfair and Deceptive Practices

The FTC has broad discretion to declare individual business practices “unfair” or “deceptive.” The FTC Act is designed explicitly to ensure this administrative flexibility. As stated by the Supreme Court, “It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task’ . . . the sweep and flexibility of this approach were thus made crystal clear”¹³ The section

Green v. Konover Residential Corp., 1997 WL 736528, at * 7 (D. Conn. 1997) (facts alleging Fair Housing Act violation also allege UDAP violation); Green v. Diamond, 2014 WL 5801351 (N.D. Ill. 2014) (targeting Black borrower with predatory reverse mortgage both UDAP and civil rights violation); City of Santa Monica v. Gabriel, 186 Cal.App.4th 882, 887-889 (2d Dist. 2010) (landlord sexual harassment of tenant covered by UDAP); Balthazar v. Hensley R. Lee Contracting, Inc., 214 So.3d 1032, 1039 (La.App. 4 Cir. 2017) (plausible claim for UDAP violation based on employment discrimination); Compl., FTC v. Liberty Chevrolet, Inc., 20-CV-3945, filed May 21, 2020, available at <https://www.ftc.gov/news-events/press-releases/2020/05/bronx-honda-to-pay-over-1-million-to-settle-charges>; Compl., State of Washington v. Greyhound Lines, Inc., 20201236-32, available at https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/Greyhound%20Complaint.pdf (alleging Greyhound committed unfair and deceptive practices by discriminating based upon immigration status); Equal Credit Opportunity Act, 15 USC 1691(a); *see also* RI ST § 6-13.1-30 (“It shall be a deceptive trade practice . . . for any retail establishment . . . to discriminate against a prospective customer by requiring the use of credit . . .”).

⁹ *See, e.g.*, 15 USC 1691(d)

¹⁰ HUD Criminal Records Guidance, at *supra*, p. 5, noting that data used by screening companies is often incomplete.

¹¹ *See, e.g.*, Big Data: A Tool for Inclusion or Exclusion, FTC, pp. iii-v, Jan. 2016, <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>.

¹² Suzanne Zerger, Q&A with Daniel Malone: Criminal History Does Not Predict Housing Retention, Homeless Hub, 2009, <https://www.homelesshub.ca/resource/qa-daniel-malone-criminal-history-does-not-predict-housing-retention>, referencing Malone DK, Assessing criminal history as a predictor of future housing success for homeless adults with behavioral health disorders. *Psychiatr Serv.* 2009;60(2):224–230 (finding “absolutely no criminal background predictors of housing success or failure.”); Cael Warren, “Criminal Background’s Impact on Housing Success: What We Know (And What We Don’t),” Wilder Foundation, Jul. 16, 2019, <https://www.wilder.org/articles/criminal-backgrounds-impact-housing-success-what-we-know-and-what-we-dont> (finding that out of 15 broad categories of offense, conviction records for 11 have no statistically significant consequences for housing outcomes. Even within the four remaining categories, a misdemeanor conviction has no statistically significant predictive effect after two years and a felony has no statistically significant predictive effect after five. Also conceding that even the findings of statistical significance are largely uncertain and are likely over estimations).

¹³ *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240-1 (1972) (quoting H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 19 (1914)).

below will discuss regulation of housing providers and regulation of screening companies in turn.

1. Regulation of Housing Providers under Section 5

As several government agencies and private reports have well documented, over-broad use of criminal history screening is especially injurious to consumers, as consumers with records and their families are potentially relegated to housing instability as a result of such practices.¹⁴ Relatedly, housing provider use of tenant application fees often creates unfair and deceptive barriers to housing, especially for those with criminal records. Addressing these matters under the Fair Housing Act is essential because such tenant screening practices disproportionately injure certain protected classes. But unnecessarily excluding those with records from rental housing injures all consumers kept out of housing due to such practices, irrespective of protected class status.

Here, the suggested regulations and guidance target several practices regarding use of criminal history reports in rental transactions:

- Overly broad exclusions of tenant applicants based on criminal history reports;
- Unfair and deceptive practices regarding the use of application fees, such as:
 - using rental application fees to extract a profit from applicants;
 - lack of transparency in landlord admission criteria in advance of applicants paying rental application fees;
 - failing to refund rental applications fees when the landlord fails to evaluate the application.

The attached suggested guidance and regulations seek to combat these practices both directly and through prophylactic measures. These unfair and deceptive practices are further elaborated upon below.

a. Overbroad exclusions of those with criminal records

Consumer protection agencies can take action to prevent landlords from unfairly and unjustifiably excluding tenants and tenant applicants from housing based upon criminal records.¹⁵

¹⁴ See, e.g., HUD Criminal Records Guidance, *supra*, at 1-2 (“Yet many formerly incarcerated individuals, as well as individuals who were convicted but not incarcerated, encounter significant barriers to securing housing . . . because of their criminal history. In some cases, even individuals who were arrested but not convicted face difficulty in securing housing based on their prior arrest.”); Tex Pasley et al., Screened Out, Shriver Center on Poverty Law, pp. 2-3, 9 (Jan. 2021), www.povertylaw.org/report/tenant-screening-report/.

¹⁵ See Chopra, at *supra*; see also Jillson, at *supra*; Stephen Hayes, partner at Relman Colfax, et al., Discrimination is Unfair: Interpreting UDA(A)P to Prohibit Discrimination, pp. 14-18, April 2021, https://protectborrowers.org/wp-content/uploads/2021/04/Discrimination_is_Unfair.pdf.

Two landlord practices which are particularly injurious to consumers are (i) the exclusion of consumers based upon arrest records and other criminal records not resulting in a conviction and (ii) broad exclusions based on convictions with no individualized analysis of the relationship between such convictions and the likelihood of housing success.¹⁶ Consideration of arrest and other pre-conviction records excludes tenants merely because they have been accused of a crime without any determination that the crime was actually committed. Further, pre-conviction records on screening reports are especially likely to be misleading or incomplete and thus subject consumers to housing instability based on inaccurate or incomplete data.¹⁷ Similarly, broad exclusion of those with criminal convictions harms large swaths of people based on generalizations and stereotypes.¹⁸ Both practices make consumers with criminal records more likely to face homelessness and an ongoing cycle of poverty and incarceration.¹⁹

There is no countervailing benefit which outweighs these harms, as these practices are not reasonably linked to enhanced tenant safety, the likelihood of housing success or other legitimate goals, and are, in fact, counterproductive to most legitimate outcomes.²⁰ As stated, the mere existence of an arrest does not demonstrate that the tenant or applicant engaged in any criminal activity. Similarly, excluding consumers from housing based upon records of convictions which have been overturned, pardoned, or vacated, or based on juvenile records, similarly harm consumers without a substantial countervailing benefit.²¹ Further, even standard conviction records only rarely indicate a likelihood of an unsuccessful tenancy.²²

¹⁶ See HUD Criminal Records Guidance, at pp. 4-7.

¹⁷ *Id.*, at 5.

¹⁸ *Id.*, at 5 (“Bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record are not sufficient to satisfy this burden); see also Jillson, at *supra* (use of racially biased algorithms may constitute an unfair practice under the FTC Act).

¹⁹ Matthew Doherty, Incarceration and Homelessness: Breaking the Cycle, COPS OFF. NEWSLETTER (Dept. of Justice/U.S. Interagency Council on Homelessness, Wash., D.C.), Dec. 2015, www.cops.usdoj.gov/html/dispatch/12-2015/incarceration_and_homelessness.asp.

²⁰ See, e.g., Doherty, at *id.*; Zenger at *infra*; Patrick Smith, Report: Stable Housing For Former Prisoners Could Save Illinois \$100M A Year, NPR, Jul. 31, 2019, <https://www.npr.org/local/309/2019/07/31/746909431/report-stable-housing-for-former-prisoners-could-save-illinois-100-m-a-year>; 2016 HUD Guidance, at *supra*, discussing how excluding applicants from housing based on arrest records or based on convictions with no individual assessment do not serve a substantial legitimate interest or embrace a reasonable less discriminatory alternative.

²¹ Excluding applicants based on juvenile records, publicly unavailable records, or pardoned records also does not confer a significant benefit to society. *Miller v. Alabama*, 567 U.S. 460, 471-73 (2012) (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003), with quotations and other citations omitted). Again, this citation speaks to the problems of using juvenile criminal history but does not imply or speak to what may constitute a proper criminal records history ‘lookback period.’ Andrea R. Coleman, *Expunging Juvenile Records: Misconceptions, Collateral Consequences, and Emerging Practices*, Dept. of Justice Office of Juvenile and Delinquency Prevention December 2020, pp.2, 8-9 <https://ojjdp.ojp.gov/publications/expunging-juvenile-records.pdf> (“criminal and juvenile justice systems, educational institutions, employers, landlords, and the public all have an ongoing role to play in ensuring that youthful transgressions do not lead to permanent collateral consequences.”). Andrea Coleman also notes on page 2 that “The goal of expungement is to make it as though the records never existed.” See *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (noting that pardons are often used to correct for incorrect convictions).

²² Warren, at *supra*. Suzanne Zenger, Q&A with Daniel Malone: Criminal History Does Not Predict Housing Retention, Homeless Hub, 2009, <https://www.homelesshub.ca/resource/qa-daniel-malone-criminal-history-does->

Further, where a landlord relies on a tenant screening company’s rental recommendations which, for example, factor in arrest records or broadly exclude applicants based on conviction records, both the landlord and the screening company are likely using and gaining from a discriminatory algorithm.²³ As stated in a recent FTC blog post, “The FTC Act prohibits unfair or deceptive practices. That would include the sale or use of – for example – racially biased algorithms.”²⁴

As such, landlords should not be permitted to exclude tenants in an overbroad way based upon their criminal histories. To ensure transparency in this process, and as a prophylactic measure, landlords should evaluate applications in the order they are received and disclose the basis for rejection when they do not choose to accept an applicant.

b. Unfair fees and lack of transparency

Tenant screening practices coupled with the use of rental application fees also leave tenants vulnerable to exploitation at early stages of the application process. Such practices may be both unfair and deceptive.

Landlords commonly charge tenants application fees, claiming that such fees are intended only to recoup their reasonable costs. However, landlords may also charge application fees in unfair and deceptive ways. One such unfair practice occurs when landlords profit from tenant application fees. In such instances, the “application fee” or “criminal background check fee” serves to extract additional money from often vulnerable applicants under the misleading pretense that such fees are only being used to pay for the background check.²⁵ Collecting application fees in excess of the landlord’s actual costs are just as unfair and misleading as any other charge imposed under false pretenses.

Unlike fees linked to a valuable service, a landlord does not provide an applicant a service merely by evaluating their application. Rental screening benefits only landlords, not applicants--and rental decisions are subject to the wide discretion of landlords. The practice of using application fees to turn a profit is especially harmful and misleading where the applicant will almost certainly be rejected based on criteria the applicant has no way of knowing or in instances where the landlord does not actually evaluate the subject application. Tellingly, several states and municipalities have enacted laws regulating use of application fees.²⁶

not-predict-housing-retention, referencing Malone DK, Assessing criminal history as a predictor of future housing success for homeless adults with behavioral health disorders. *Psychiatr Serv.* 2009;60(2):224–230.

²³ See *Corelogic*, 2020 WL 4570110, at *16-17.

²⁴ Jillson, at *supra*.

²⁵ See Consumer’s Edge: Rental Application Fees, Maryland Office of the Attorney General, <https://www.marylandattorneygeneral.gov/CPD%20Documents/Tips-Publications/86.pdf>.

²⁶ See, e.g., Stephen Michael White, A Landlord’s Guide Rental Application Fees (50 States), RentPrep, August 13, 2020, <https://rentprep.com/tenant-screening-news/the-landlord-guide-to-charging-rental-application-fees/#state> (noting that Alaska, California, Massachusetts, Minnesota, New York, Vermont, Virginia, Washington, and Wisconsin have states laws regulating the use of rental application fees and that multiple states either prohibit fees in excessive of the actual cost of a report or prohibit application fees entirely).

As a check against such unfair and deceptive practices, first, landlords should at minimum be prohibited from charging application fees which exceed actual costs.²⁷ Further, potential applicants should have access to the landlord's criteria in advance of paying a fee, in enough detail to enable an informed decision about whether to apply. Finally, to prevent discrimination, make the application process more transparent, and prevent landlords from disguising profits as application fees, landlords should be required to evaluate tenant rental applications in the order they are received and fully refund fees for applications that the landlord does not evaluate.

Rental application fees may also have the effect of deterring consumers with criminal history or other significant admission barriers from applying at properties they consider more selective. On a collective scale, charging rental application fees may contribute to residential segregation in the housing market if such deterrence disproportionately steers Black and Latinx renters toward less-desirable properties in lower-opportunity neighborhoods, which consumers may perceive as more likely to accept them. The FTC should investigate whether such steering occurs and, if so, consider further restrictions on rental application fees as necessary to lessen or avoid its segregative effects.

c. Rejection of portable screening reports

Portable screening reports allow applicants to pay a one-time cost for a report which can be used to apply to multiple housing providers.²⁸ This allows tenants of limited means to apply for housing repeatedly, which may be necessary if they have criminal history or eviction records. Yet many housing providers refuse to accept such reports and require applicants to pay additional fees to apply even if they have portable screening reports available.

Housing providers who prefer to order the tenant-screening report of their choice should be free to do so. But charging an application fee to a consumer who supplies access to a recent and reasonably complete and portable report is unjustifiably injurious. Not only does this practice frustrate the efforts of tenants with difficult background information to secure needed housing, but the refusal to waive application fees for persons with portable tenant screening reports is deeply anticompetitive. By refusing to accept such products, landlords undermine the incentive for tenants to purchase them--and, by extension, the incentive for suppliers to market them.

²⁷ See Andrea Collatz, "The Do's and Don'ts of Rental Application Fees," TransUnion, June 5, 2018, <https://www.mysmartmove.com/SmartMove/blog/dos-donts-collecting-rental-application-fees.page>. States are also beginning to regulate application fees. See, e.g., Changes in New York State Rent Law: What You Need to Know, New York Office of the Attorney General, p. 4, <https://ag.ny.gov/sites/default/files/changes-in-nys-rent-law.pdf>. Some countries, like England, have outlawed them. See, e.g., Tenant Fees Act, available at <https://www.gov.uk/government/collections/tenant-fees-act>.

²⁸ Marin Scott, How to Avoid Hidden Rental and Application Fees as a Renter, Avail, Sept. 17, 2021, <https://www.avail.co/education/articles/how-to-avoid-hidden-rental-fees-and-application-fees-as-a-renter>.

2. Regulation of Tenant Screening Companies under Section 5 and the FCRA

While the CFPB generally has rulemaking authority under the FCRA, the FTC may still issue guidance and regulations regarding tenant screening companies under Section 5.²⁹ Further, as the primary agency tasked with FCRA enforcement with respect to tenant screening CRAs, FTC FCRA guidance can signal its enforcement agenda. As cited throughout this document, the FTC has, on multiple instances, issued guidance aimed at screening companies and data sellers.

a. *Tenant Screening Companies' Obligation to Take Measures to Guard Against Discrimination*

As stated by the FTC's January 2016 report on big data,³⁰ "[under the FTC Act,] at a minimum, companies must not sell their big data analytics products to customers if they know or have reason to know that those customers will use the products for fraudulent or discriminatory purposes." Similarly, "The FTC Act prohibits unfair or deceptive practices. That would include the sale or use of – for example – racially biased algorithms."³¹ Such a principle is readily applicable to tenant screening companies' use of criminal records data and use of algorithms to generate rental recommendations. Per, for example, HUD's 2016 Criminal Records Guidance, tenant screening companies are on sufficient notice that use of criminal records information in their algorithms is prone to effectuate discrimination in the housing market. Screening companies must thus take all reasonable steps to guard against such unjustified consumer injury. As such, at the very least, tenant screening companies' algorithms should not factor in arrests and other pre-conviction records for cases not resulting in convictions, overturned or otherwise vacated convictions, juvenile records, or records sealed, expunged or otherwise made unavailable to the public. Further, algorithms should not create de facto blanket or overly broad exclusions on those with felony convictions. Overwhelming data makes clear that such practices perpetuate discrimination and thus unjustified consumer injury. Further, regardless of whether such exclusions discriminate against protected classes, such exclusions, by definition, cause unjustified consumer injury where they are not reasonably and sufficiently linked to future housing success.

The FCRA implies similar dictates, which the FTC should state explicitly as the agency primarily tasked with enforcing the FCRA with respect to tenant screening CRAs. Per § 1681e(b) of the FCRA, CRAs must "follow reasonable procedures to assure maximum possible

²⁹ The FTC does not lose its general Section 5 authority over an industry or practice because another agency has more specific regulatory authority over that industry or practice. *See, e.g., U.S. v. Philip Morris Inc.*, 263 F.Supp.2d 72, 76, 79 (D.D.C. 2003) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (quoting *F.C.C. v. NextWave Personal Communications Inc.*, 537 U.S. 293, 303 (2003)); *L. Heller & Son v. Federal Trade Commission*, 191 F.2d 954, 957 (7th Cir. 1951) (FTC may exercise its general Section 5 authority regarding marks to amended Tariff Act as "Tariff Act discloses no language expressing an intention on the part of Congress to repeal § 5 of the Federal Trade Commission Act, or to diminish the authority or the power of the Commission to prevent deceptive trade practices,"); *U. S. v. Various Quantities of Articles of Drug Labeled in Part: "Instant Albery Food * * *"*, 83 F.Supp. 882, 887 (D.D.C. 1949); *see also Chopra, supra*, fn. 5.

³⁰ "Big Data," *supra*, at iii.

³¹ Jillson, at *supra*.

accuracy of the information concerning the individual about whom the report relates.” By making rental recommendations without adequate precautions to ensure that the underlying algorithm avoids racial bias or data of little relevance to housing success, tenant screening companies fail to adhere to this central mandate.

b. Ensuring transparency in the use of tenant screening algorithms

The FTC should interpret the FTC Act to ensure that tenant screening companies make adequate disclosures to consumers regarding the data and information used in their algorithms and in generating their rental recommendations. More specifically, tenant screening companies must make available to consumers algorithmic inputs plugged into the algorithm and all sources of such inputs. Otherwise, “if a consumer is denied” housing “based on an error, . . . the consumer can be harmed without knowing why.”³²

The FTC can also make clear that it reads the FCRA to require similar disclosures. The Fair Credit Reporting Act requires credit reporting agencies to disclose most contents of consumers files upon consumer request.³³ This provides for essential transparency and allows consumers to hold such CRAs accountable. However, application of these requirements to tenant screening companies requires additional clarification. Specifically, tenant screening companies often provide an algorithm-generated recommendation about whether to rent to a given applicant. Such recommendations may be outcome determinative.³⁴ In order to ensure the transparency and accountability required by the FCRA, the FCRA should be interpreted to require screening companies to disclose algorithmic inputs in sufficient detail for consumers to determine whether their criminal history information, eviction records, and other consumer data was properly sorted, classified, filtered and produced a “recommendation” or other analytical outcome consistent with the housing provider’s admission criteria. Such information should already be considered “on file” about a consumer and thus subject to disclosure under 15 U.S.C. § 1681g, but information of this nature is seldom disclosed to consumers outside formal litigation discovery. As such, the FTC should make clear that it intends to enforce the FCRA against tenant screening companies when they fail to make such adequate disclosures.

Requested Course of Action

We request that the FTC issue interpretive regulations and/or subregulatory guidance clarifying the prohibited tenant screening practices of housing providers and the obligations of tenant screening companies under the FTC Act. The FTC should also issue guidance to tenant screening companies regarding their disclosure obligations under the FCRA. Thank you so much for your continued attention to this matter. We would be very interested in speaking further. Please feel free to reach out to Eric Sirota, Director of Housing Justice at the Shriver Center on Poverty Law, at ericsirota@povertylaw.org or (847)903-1930.

³² Data Brokers: A Call for Transparency and Accountability, FTC May 2014, p. v, at <https://www.ftc.gov/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014>.

³³ 15 U.S.C. 1681g

³⁴ See, e.g., See Connecticut Fair Housing Center v. Corelogic Rental, 369 F.Supp.3d362, § IV(A)1 (D. Conn. 2019).

Best Regards,

Formerly Incarcerated Convicted People and Families Movement
National Housing Law Project
National Low Income Housing Coalition
National Consumer Law Center (on behalf of its low-income clients)
Operation Restoration
Shriver Center on Poverty Law
Sponsors, Inc.
Uptown People's Law Center
Voice of the Experienced (VOTE) – Louisiana

DRAFT FTC TENANT SCREENING REGULATION

§ 1. Definitions

- (a) “Tenant screening report” means any consumer report made to a landlord which is prepared, used, or expected to be used in whole or in part for the purpose of serving as a factor in deciding whether to admit a consumer as a tenant or occupant of residential property.
- (b) “Consumer” means an individual.
- (c) “Consumer report” has the same meaning as in 15 U.S.C. § 1681d(1).
- (d) “Residential property” means any property leased for residential purposes, including any room, house, building, mobile home or land in a mobile home park, or other dwelling leased for residential purposes.
- (e) “Landlord” means the owner or lessor of a residential property and includes any representative of the owner or lessor, including but not limited to any property manager, realtor, or other agent, vendor, contractor, or other person or entity working on behalf of the owner or lessor.
- (f) “Rental application fee” means any amount, however denominated, which is paid by a consumer to a landlord for the purpose of being considered as a tenant for a dwelling unit, including any amounts paid as reimbursement for the purchase of tenant screening reports or to obtain other background information about the consumer.
- (g) “Portable tenant screening report” means a tenant screening report prepared within 30 days before an application for admission to residential property and made available to a landlord at no charge.
- (h) “Rental recommendation” means any consumer report which states an opinion, recommendation, determination, score, analytical result, or other information relating to whether a consumer meets a landlord’s admission criteria or otherwise as to whether a landlord should or should not admit a consumer as a tenant or occupant of residential property.

§ 2. Unfair practices with respect to rental applications and fees

(a) Prior to collecting any rental application fees, a landlord should first notify the consumer of:

- (1) All types of information that will be considered in deciding whether to admit the consumer as a tenant or occupant;
- (2) The sources from which all such information will be obtained;
- (3) The landlord's admission criteria, in sufficient detail for a consumer to make a reasonably informed decision about whether an application would likely be accepted; and
- (4) Whether any procedure is available for appealing or seeking reconsideration of a rejected application and, if so, a description of that procedure.

Such disclosures should be made to potential applicants as much in advance of collection of the application as is reasonably possible and, where applicable, access to such admissions practices should be clearly and conspicuously featured on the landlord's website and in rental advertisements.

(b) No rental application fee should exceed a landlord's actual costs in purchasing a tenant screening report or otherwise obtaining background information about a consumer. If a landlord obtains background information on a consumer other than through the purchase of a tenant screening report, the rental application fees should not exceed the average cost of a tenant screening report in the area where the residential property is located.

(c) If a landlord receives multiple applications for a rental property, the landlord should consider the applications in the chronological order in which they were received unless good cause exists to consider them in a different order. Any rental application fee collected from a consumer who was not actually considered for the residential property should be refunded.

(d) No application fee should be charged to a consumer who provides the landlord with access to a commercially reasonable portable tenant screening report. A portable tenant screening report is commercially reasonable when it (i) contains the information from which to determine whether the consumer meets the legitimate rental admission criteria the landlord has established for admission as a tenant or occupant of the residential property and (ii) does not contain any information that would be unlawful for a landlord to consider in deciding whether to admit a consumer as a tenant or occupant of the residential property.

(e) A landlord who denies a consumer's application for admission as a tenant or occupant of residential property should disclose the reason(s) for such denial.

(f) A landlord shall not deny a consumer's application for admission based, in whole or in part, upon any arrest, indictment, criminal charge, or other pre-conviction event that did not result in a criminal conviction, any conviction that has been reversed, vacated, pardoned, or sealed, or any juvenile record or upon any rental recommendation which factors in any of the same;

(g) A landlord shall not deny a consumer's application for admission, in whole or in part, based upon any criminal conviction in such a way that does not consider the nature, severity, relevance and recency of the criminal conduct, or based on any adverse rental recommendation which is in whole or in part based upon any criminal conviction in such a way that does not consider the nature, severity, relevance and recency of the criminal conduct, unless otherwise required by federal law;

(h) A landlord shall not request that a consumer applicant or prospective consumer applicant or member of the consumer applicant's or prospective consumer applicant's household make any representations about the criminal background information of the consumer or any member of the consumer's household. For purposes of this subsection, "criminal background information" shall refer to any information about contact or involvement with the criminal justice system, including but not limited to any arrest, complaint, indictment, conviction or any disposition arising therefrom. Nothing in this subsection should be read to prohibit a landlord from obtaining a tenant screening report otherwise compliant with these regulations.

(i) Advertisement, collection, or retention of a rental application fee in a manner inconsistent with the procedures set forth in this section is an unfair trade practice.

§ 3. Unfair practices regarding portable tenant screening reports

(a) It is an unfair trade practice for a consumer reporting agency that furnishes consumer reports to resellers generally not to furnish consumer reports to resellers that intend to use such consumer reports in creating or furnishing portable tenant screening reports.

(b) It is an unfair trade practice for a landlord to deny admission a consumer's application for admission as a tenant or occupant of residential property, or otherwise treat such consumer less favorably, because the consumer avoids a rental application fee by providing the landlord with access to a portable tenant screening report.

§ 4. Regarding consumer disclosures of rental recommendations

- (a) It is an unfair practice for any consumer reporting agency that makes rental recommendations to fail to timely disclose the following to a consumer upon request:
- (1) All text and images of the rental recommendation;
 - (2) All information about the consumer used in generating the rental recommendation and all sources from which it obtained such information;
 - (3) All admission criteria or scoring rules to which the background information was applied in connection with the rental recommendation;
 - (4) All filters, classifications, tags, descriptions, or other markers or categorizations applied to specific background information items in making the rental recommendation; and
 - (5) When necessary to determine whether background information was correctly filtered, classified, or scored in making a rental recommendation, the complete list of categories or markers that might have been applied to background information that was filtered, classified, or scored in a particular way.
- (b) It is an unfair trade practice for a consumer reporting agency that has made a past rental recommendation about a consumer not to disclose the past rental recommendation along with sufficient accompanying information from which to determine whether the recommendation reflected an accurate application of the landlord's rental admission policies to the consumer's background information.
- (c) It is an unfair trade practice for a consumer reporting agency to make a rental recommendation in whole or in part based upon arrests and other pre-conviction records for cases not resulting in convictions, convictions overturned, vacated, or set aside, juvenile records, or records sealed, expunged or otherwise unavailable to the public.
- (d) It is an unfair practice for a consumer reporting agency to make an adverse rental recommendation based upon data or factors unless, and only to the extent that, such data or factors have been substantiated to cause a significant increased likelihood of negative housing outcomes.

When you use consumer reports to make tenant decisions, the Fair Credit Reporting Act requires you to take important compliance steps and the FTC Act requires you to refrain from the use of unfair and deceptive acts and practices. Find out more about keeping your actions within the law.

You're looking at housing applicants or deciding whether to renew a current tenant's lease. You decide to run a tenant background check through a company that compiles background information.

These tenant background checks can include a variety of information, including rental and eviction history, credit, or criminal records. They also are known as consumer reports.

When you use consumer reports to make tenant decisions, you must comply with the FTC Act and Fair Credit Reporting Act (FCRA). The Federal Trade Commission (FTC) enforces both of these laws.

COMPLYING WITH THE FTC ACT

As entities that engage in methods of competition, acts, or practices in or affecting commerce, landlords must comply with Section 5 of the FTC Act in evaluating and soliciting rental applications and otherwise. This guidance focuses upon steps landlords should take, and practices landlords should avoid, in the process of screening residents or potential residents for criminal history.

Collection of Rental Application Fees

Landlords often collect rental application fees and fees for criminal background checks from tenants. Such fees should not be used as a way to extract profit from rental applicants. Further landlord practices should enable rental applicants to make an informed choice about whether to pay such fees. As such:

Prior to collecting any rental application fees, the landlord should first notify the consumer of: all types of information that will be considered in deciding whether to admit the consumer as a tenant or occupant; the sources from which all such information will be obtained; the landlord's admission criteria, in sufficient detail for a consumer to make a reasonably informed decision about whether an application would likely be accepted; and whether any procedure is available for appealing or seeking reconsideration of a rejected application and, if so, a description of that procedure. Landlords should make their admission criteria available to potential applicants at the earliest possible stage. For example, landlords should post their admission criteria to their website where possible and link to this criteria in advertisements.

Rental application fees should not exceed the actual cost to the landlord of purchasing a tenant screening report on the applicant. If the landlord gets background information on the tenant through other means, the rental application fees should not exceed the normal price of a tenant screening report in the area.

Any rental application fee collected from a consumer who was not actually considered for the residential property should be refunded.

No application fee should be charged to a consumer who provides the landlord with access to a commercially reasonable portable tenant screening report, i.e., a tenant screening report, generally prepared within 30 days before an application for admission to residential property and made available to a landlord at no charge. A landlord should not deny admission to an applicant or otherwise disadvantage an applicant because that applicant chooses to utilize a portable tenant screening report instead of paying a rental application fee.

Evaluation of Rental Applications and the Use of Criminal History Screening Reports:

If a landlord receives multiple applications for a rental property, the landlord should consider the applications in the chronological order in which they were received unless good cause exists to consider them in a different order.

A landlord who denies a consumer's application for admission as a tenant or occupant of residential property should disclose the reason(s) for such denial.

While a landlord may evaluate a rental applicant's or tenant's criminal history:

A landlord should not request that an applicant disclose information about their criminal background on the application, beyond enabling the landlord to obtain a tenant screening report or the like, as discussed above.

A landlord should not deny or otherwise disadvantage an applicant because of an arrest or other criminal record not resulting in a conviction, for a conviction that has been overturned, reversed, vacated, pardoned, expunged, sealed or where the public record of the conviction is otherwise made unavailable to the public. A landlord also should not deny or otherwise disadvantage an applicant because of a juvenile record. Landlords should not seek to avoid these obligations by using the recommendation of a tenant screening company which takes into account any of the records just listed.

While landlords are not prohibited from making application determinations based upon past convictions, a landlord should not do so without first providing an individualized assessment which looks at, for example, the nature, severity, relevance, and recency of the conviction. Landlords should not seek to avoid these obligations by using the recommendation of a tenant screening company which accounts for convictions without conducting an individualized assessment.

Landlords should not advertise their properties in a way that circumvents or contravenes this guidance, by stating, for example, "no felons," "no criminal history" or other representations which indicate the landlord's intent not to follow this guidance.

COMPLYING WITH THE FCRA

You must take certain steps before you can get a consumer report and after you take an adverse action based on that report.

What is a Consumer Report?

A consumer report may contain information about a person's credit characteristics, rental history, or criminal history. Consumer reports are prepared by a CRA — a business that assembles such reports for other businesses—and are covered by the FCRA. Examples of these reports include:

A credit report from a credit bureau, such as Trans Union, Experian, and Equifax or an affiliate company;

A report from a tenant screening service that describes the applicant's rental history based on reports from previous landlords or housing court records;

A report from a tenant screening service that describes the applicant's rental history, and also includes a credit report the service got from a credit bureau;

A report from a reference checking service that contacts previous landlords or other parties listed on the rental application on behalf of the rental property owner; and

A report from a background check company about an applicant or tenant's criminal history.

Before You Get a Consumer Report

You can only obtain a consumer report if you have a permissible purpose. Landlords may obtain consumer reports on applicants and tenants who apply to rent housing or renew a lease. You may obtain written permission from applicants or tenants to show that you have a permissible purpose.

You must certify to the company from which you are getting the consumer report that you will only use the report for housing purposes. You may not use the consumer report for another purpose.

It's also a good idea to review other applicable federal and state laws related to consumer reports. For example, a blanket policy of refusing to rent to anyone with a criminal record may violate the Fair Housing Act.

What is an Adverse Action?

An adverse action is any action by a landlord that is unfavorable to the interests of a rental applicant or tenant. Examples of common adverse actions by landlords include:

Denying the application;
Requiring a co-signer on the lease;
Requiring a deposit that would not be required for another applicant;
Requiring a larger deposit than might be required for another applicant; and
Raising the rent to a higher amount than for another applicant.

After You Take an Adverse Action

If you reject an applicant, increase the rent or deposit, require a co-signer, or take any other adverse action based partly or completely on information in a consumer report, you must give the applicant or tenant a notice of that fact – orally, in writing, or electronically.

An adverse action notice tells people about their rights to see information being reported about them and to correct inaccurate information. The notice must include:

the name, address, and phone number of the consumer reporting company that supplied the report;
a statement that the company that supplied the report did not make the decision to take the unfavorable action and can't give specific reasons for it; and
a notice of the person's right to dispute the accuracy or completeness of any information the consumer reporting company furnished, and to get a free report from the company if the person asks for it within 60 days.

The adverse action notice is required even if information in the consumer report wasn't the primary reason for the decision. Even if the information in the report played only a small part in the overall decision, the applicant or tenant must be notified.

While oral adverse action notices are allowed, written notices provide proof of FCRA compliance.

Take the Case of...

1. *A landlord who orders a consumer report from a CRA. Information contained in the report leads to further investigation of the applicant. The rental application is denied because of that investigation.*

Since information in the report prompted the adverse action in this case, an adverse action

notice must be sent to the consumer.

1. *A person with an unfavorable credit history, like a bankruptcy, but no other negative indicators, who applies for an apartment. Rather than deny the application, the landlord offers to rent the apartment, requiring a security deposit that is double the normal amount.*

The applicant is entitled to an adverse action notice because the credit report influenced the landlord's decision to require a higher security deposit from the applicant.

1. *A landlord who hires a reference checking service to verify information included on a rental application. Because the service reports that the applicant does not work for the employer listed on the application, the rental application is denied.*

The applicant is entitled to an adverse action notice. The report is a consumer report from a CRA (the agency checking the references provided by the consumer on the application), and its report influenced the landlord's decision to deny the application.

1. *A landlord who makes it a practice to approve an application if the prospective tenant shows an adequate income or has a favorable credit report, is dealing with an applicant who has an inadequate income and a bad credit report.*

The applicant is entitled to an adverse action notice because the credit report influenced the denial, even though income was another factor.

1. *A landlord who orders a criminal history report on a prospective tenant. Because the report shows that the applicant has a felony conviction, the landlord denies the rental application.*

The applicant is entitled to an adverse action notice. The report is a consumer report and it influenced the landlord's decision to deny the application.

INVESTIGATIVE REPORTS

Landlords who use "investigative reports" – reports based on personal interviews concerning a person's character, general reputation, personal characteristics, and lifestyle – have additional obligations under the FCRA. These obligations include giving written notice that you may request or have requested an

investigative consumer report, and giving a statement that the person has a right to request additional disclosures and a summary of the scope and substance of the report. (See 15 U.S.C. section 1681d(a), (b)).

DISPOSING OF CONSUMER REPORTS

When you're done using a consumer report, you must securely dispose of the report and any information you gathered from it. That can include burning, pulverizing, or shredding paper documents and disposing of electronic information so that it can't be read or reconstructed. For more information, see [Disposing of Consumer Report Information? Rule Tells How](#).

Other Considerations

If you report information, like late rent payments or evictions, to a company who compiles background information, you have legal obligations under the FCRA's Furnisher Rule. Your responsibilities include:

furnishing information that is accurate and complete, and
investigating consumer disputes about the accuracy of information you provide.

For more information, see [Consumer Reports: What Information Furnishers Need to Know](#).

FOR MORE INFORMATION

Find [specific FCRA information](#) on:

Getting consumer reports (see Section 604(a)(3)(F), 15 U.S.C. § 1681b(a)(3)(F), and Section 607(a), 15 U.S.C. § 1681e(a));

Taking an adverse action (see Section 615(a)), 15 U.S.C. § 1681m(a));

Using investigative consumer reports (see Section 606, 15 U.S.C. § 1681d).

When is a tenant background screening company a “consumer reporting agency”?

Background screening reports are “consumer reports” under the FCRA when they serve as a factor in determining a person’s eligibility for housing, employment, credit, insurance, or other purposes and they include information “bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.” Companies that sell or provide those reports are “consumer reporting agencies” under the FCRA. So even if you don’t think of your company as a consumer reporting agency, it may be one if it provides information about people to landlords for use in housing decisions.

If your tenant background screening company is a consumer reporting agency under the FCRA, what does the law require you to do?

Follow reasonable procedures to assure accuracy. Among other things, the FCRA requires you to establish and follow “reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.” Certain practices may be indicators that a background screening company isn’t following reasonable procedures. For example, if a report lists criminal convictions for people other than the applicant or tenant – for instance, a person with a middle name or date of birth different from the applicant’s – that raises FCRA compliance concerns. Other examples that raise FCRA compliance concerns include screening reports with multiple entries for the same offense or that list criminal records that have been expunged or otherwise sealed. Another indication that a company’s procedures might not be reasonable are reports that list housing court actions, but do not include the outcome of the action – for instance, that a case was resolved in the tenant’s favor.

Similarly, tenant screening companies which provide rental recommendations to their customers likely do not adhere to reasonable procedures to ensure maximum possible accuracy when they make adverse recommendations based on information with no significant substantiated relationship to housing outcomes or which is likely to be incomplete or contain inaccuracies. Thus, where tenant screening companies make rental recommendations based on, for example, arrest records or indictment records not resulting in convictions, expunged, sealed or publicly unavailable records, juvenile records or records of conviction that have been overturned or vacated, the screening company likely fails to employ reasonable procedures to ensure maximum possible accuracy. While this guidance focuses primarily on tenant screening company liability under the FCRA, it should be noted that Section 5 of the FTC Act necessitates a similar result, as denying

housing applicants based on such records causes significant unjustified injury to consumers, as discussed below.

Get certifications from your clients. Consumer reporting agencies may provide consumer reports only to those with a specific permissible purpose, like housing. So verify that your clients are legitimate and get them to certify that they will use the reports only for housing purposes. Your clients may obtain written permission from the consumer that is the subject of the report to show that they have a permissible purpose.

Provide your clients with information about the FCRA. The FCRA requires you to provide your clients with information about their responsibilities under the statute ([Notice to Users of Consumer Reports](#)), which you can provide with the background screening report or before providing a report. This is a standard document available from the Consumer Financial Protection Bureau.

Provide Required Disclosures. The FCRA specifically provides that screening companies must disclose certain information in the consumer's file to consumers upon request. **When a tenant screening company has made a rental recommendation to a housing provider, the tenant screening company should, upon request from the consumer, and along with all other non-exempt information in the consumer's file, disclose: the information the screening company used in generating the recommendation and all sources of this information, any admission criteria and scoring rules and filters, classifications, tags or the like applied to this information, and the general list of classifications that can be applied to such information in generating a rental recommendation even if it was not applied in this instance, as well as all of these items regarding past rental recommendations made regarding the same consumer. Such disclosures are by no means exhaustive and should be provided along with all other information required to be disclosed under the FCRA.**

Honor the rights of applicants and tenants. The FCRA gives consumers certain rights with which you must comply. For example, you must give them access to their files when they ask for them, conduct a reasonable investigation when they dispute the accuracy of information, and give them written notice of the results of investigations. When providing consumers with a copy of their reports, you must include a summary of their rights under the FCRA ([A Summary of Your Rights Under the Fair Credit Reporting Act](#)), which is a standard document available from the Consumer Financial Protection Bureau. It's a violation of the FCRA not to respond in a timely way to consumers' inquiries and disputes. Another FCRA violation: creating unreasonable obstacles for consumers trying to exercise their rights under the FCRA.

A Note on FTC Act Compliance. In addition to the obligation of credit reporting agencies to comply with the FCRA, as entities that engage in methods of competition, acts, or practices in or affecting commerce, tenant screening companies must comply with Section 5 of the FTC Act. A

primary focus of the FTC Act is the prevention of substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. Tenant screening companies likely cause such consumer injury through “the sale or use of – for example – racially biased algorithms.” including instances where such rental recommendations factor in data which is likely to produce a racially biased result. To guard against such consumer injury, tenant screening companies’ rental recommendations should not factor in data such as arrests or indictments not resulting in conviction, juvenile records, expunged, sealed or publicly unavailable records, convictions which have been overturned or vacated, or other information which causes undue consumer injury or does not have a substantiated correlation with housing success. Further, the goals of the FTC Act can only be fulfilled through transparency and accountability. As such, tenant screening companies must make rental recommendations available to consumers along with the data and factors that went into its generating the rental recommendations which are reasonably necessary for the consumer to gain an understanding how the rental recommendation was generated and to ensure proper transparency, including any past recommendations for the consumer, inputs, the sources of information and inputs, data categorizations, scoring/recommending mechanism used in generating the rental recommendation, and admissions criteria.

Where can I find citations to relevant portions of the Fair Credit Reporting Act?

Here are cites to some of the provisions mentioned in this publication.

CITATION	FCRA SECTION	FAIR CREDIT REPORTING ACT PROVISION
15 U.S.C. § 1681a(d)	Section 603	definition of a “consumer report”
15 U.S.C. § 1681b(a)(3)(F)	Section 604	permissible purpose for consumer reports

15 U.S.C. § 1681c	Section 605	information excluded from consumer reports
15 U.S.C. § 1681e(a)	Section 607	required user identity verification and permissible purpose certification
15 U.S.C. § 1681e(b)	Section 607	consumer reporting agencies' obligation to follow reasonable procedures to assure maximum possible accuracy of information
15 U.S.C. § 1681e(d)	Section 607	required notice of user responsibilities
15 U.S.C. § 1681g(a)	Section 609	consumer reporting agencies' obligation to disclose to consumers all information in their file
15 U.S.C. § 1681g(c)(2)	Section 609	consumer reporting agencies' obligation to provide consumers with a summary of rights
15 U.S.C. § 1681h	Section 610	form of disclosure to consumers of their file

15 U.S.C. § 1681i	Section 611	consumers' right to challenge information they believe is inaccurate and consumer reporting agencies' obligation to reinvestigate
15 U.S.C. § 1681j	Section 612	charges for disclosures to consumers of information in their files

Resources for Business

To find out more about federal laws relating to background reports, visit www.business.ftc.gov, or call the FTC toll-free, 1-877-FTC-HELP (1-877382-4357); TTY: 1-866-653-4261.

For additional information on tenant background reports, read:

[Using Consumer Reports: What Landlords Need to Know](#)

YOUR OPPORTUNITY TO COMMENT

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to sba.gov/ombudsman.

ABOUT THE FTC

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair practices in the marketplace and to provide information to businesses to help them comply with the law. To file a complaint or to get free information on consumer issues, visit ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. Watch a video, [How to File a Complaint](#), to learn more. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.