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Via Federal eRulemaking Portal, www.regulations.gov

Damon Smith
General Counsel
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Department of Housing and Urban Development
Office of General Counsel
451 7th Street SW, Room 10276
Washington, DC 20410-0500

RE: Comments on Proposed Rule Regarding Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. 25,332 (Apr. 10, 2024), Docket No. FR-6362-P-01, RIN 2501-AE08

Dear Mr. Smith:

The undersigned Attorneys General of Colorado, Delaware, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, and Vermont (“the States”) support the U.S. Department of Housing and Urban Development’s (“HUD”) proposed rule, Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. 25,332 (Apr. 10, 2024) (“Proposed Rule”). We are responsible for the enforcement of state anti-discrimination and fair housing laws¹ and see the impact of discrimination in public and private housing. Low-income and Black, Brown, and Native communities have been devastated by broken criminal legal and housing systems for generations. Indeed, Black, Brown, and Native communities face disproportionately high rates of arrest and incarceration in our nation.² Housing instability is a known driver of the likelihood of recidivism, but securing safe, decent, and affordable housing remains to be a daunting and futile process to those with criminal records.³ As is discussed in greater detail in these comments, the Proposed Rule will not only improve access to housing, it will reduce disparate impact based on race while at the same time promoting public safety.

Thus, we welcome HUD’s much-needed action aimed at reducing criminal history-based barriers that disproportionately impact Black, Brown, and Native home seekers. The Proposed

¹ See Law Atlas, Map of State Fair Housing Protections (Aug. 1, 2019), <https://shorturl.at/JWqVY>.

² HUD, *Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (April 4, 2016) (“2016 Guideline”), available at <https://shorturl.at/5gkpN>; see also The Pew Charitable Trusts, *Racial Disparities Persist in Many U.S. Jails* (May 16, 2023), <https://shorturl.at/GPnzg>.

³ See Couloute Lucius, *Nowhere to Go: Homelessness among Formerly Incarcerated People*, Prison Policy Initiative (August 2018), <https://shorturl.at/aXXzA>.

Rule effectuates HUD’s statutory mandate to affirmatively further fair housing⁴ and ensures that individuals with criminal records have a fair shot at accessing safe and affordable housing to provide the stability needed to rebuild their lives. We strongly support the Proposed Rule and offer suggestions to further enhance its protections against housing discrimination and discriminatory practices.

I. The Proposed Rule Effectuates HUD’s Statutory Mandate.

Congress has long recognized the adverse effects of inadequate housing and lack of decent, safe, and affordable living environments, principally for low-income individuals and Black, Brown, and Native communities.⁵ When enacting the Fair Housing Act (“FHA”) in 1968, Congress required HUD to “affirmatively further” fair housing⁶ so that the agency and “its program participants will proactively take meaningful actions to overcome patterns of segregation, promote fair housing choices, eliminate disparities in housing-related opportunities, and foster safe and inclusive communities that are free from discrimination.”⁷

The FHA specifically prohibits discrimination in the sale, rental, or other housing-related transactions “on the basis of race, color, . . . or national origin.”⁸ In 2013, HUD promulgated a regulation recognizing liability under the FHA when housing policies and practices have discriminatory impacts on a protected class.⁹ The U.S. Supreme Court subsequently agreed, concluding that the FHA encompasses disparate impact claims.¹⁰ Consistent with its regulation and the Supreme Court’s holding, HUD issued 2016 Guidance warning all housing providers that exclusions based on criminal records may implicate disparate impact claims under the FHA.¹¹ Courts have since recognized disparate impact claims challenging criminal history policies as potentially viable FHA claims.¹²

Despite HUD’s 2016 Guidance and well-established jurisprudence providing disparate impact liability based on discriminatory criminal history screening policies and practices, many

⁴ Fair Housing Act (“FHA”), 42 U.S.C. §§ 3601, *et seq.*

⁵ *See generally* Housing and Community Development Act of 1974, 42 U.S.C. § 5301, *et seq.*

⁶ *See* 42 U.S.C. § 3608(e)(5).

⁷ *Affirmatively Furthering Fair Housing*, 88 Fed. Reg. 8,516 (Feb. 9, 2023); *see also NAACP v. Secretary of HUD*, 817 F.2d 149, 155 (1st Cir. 1987) (finding that legislative history directs HUD to “use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases”).

⁸ *See* 42 U.S.C. § 3604.

⁹ *See* 24 C.F.R. 100.500 (“Liability may be established under the [FHA] based on a practice’s discriminatory effect . . . even if the practice was not motivated by a discriminatory intent.”). This 2013 regulation was reversed during the Trump Administration, but reinstated during the Biden Administration. The reinstatement decision is currently being challenged in the D.C. Circuit Court of Appeals. *See Nat’l Ass’n of Mutual Insurance Cos. v. HUD*, No. 23-5275 (D.C. Cir.).

¹⁰ *See Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015) (holding that disparate impact claims are cognizable under the FHA).

¹¹ *See* 2016 Guidance; 89 Fed. Reg. 25,332.

¹² *See, e.g., Sams v. GA West Gate, LLC*, 2017 U.S. Dist. LEXIS 13168 (S.D. Ga. Jan. 30, 2017) (finding that plaintiffs sufficiently alleged a disparate impact claim against defendants’ criminal history policy); *Alexander v. Edgewood Mgmt. Cor.*, 2016 U.S. Dist. LEXIS 145787 (D.D.C. July 25, 2016) (same); *Jackson v. Tryon Park Apts., Inc.*, 2019 U.S. Dist. LEXIS 12473 (W.D.N.Y. Jan. 25, 2019); *La. Fair Hous. Action Ctr. v. Azalea Garden Props., LLC*, 2022 U.S. Dist. LEXIS 77083 (E.D. La. Apr. 27, 2022) (same); *Lyman v. Montclair at Partridge Creek, LLC*, 2023 U.S. Dist. LEXIS 166464 (E.D. Mich. Sept. 18, 2023) (same).

public housing authorities (“PHAs”) and HUD-assisted housing owners continuously use a wide range of restrictive policies and practices to exclude individuals with criminal records.¹³ This is partly due to the lack of standard practice.¹⁴

The 2016 Guidance highlighted the need for housing providers to avoid relying simply on criminal records to exclude individuals with criminal records, without establishing that their policies accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not. Moreover, HUD’s June 2022 implementation memorandum reinforced and further explained these principles.¹⁵

The Proposed Rule goes further and provides well-reasoned, common-sense standards for PHAs and HUD-assisted housing owners to follow in complying with existing law. The codification of these principles reinforces HUD’s longstanding commitment to fair housing practices, ensuring a consistent and equitable approach to housing decisions.

In sum, the Proposed Rule further effectuates the FHA’s prohibition of housing discrimination and the FHA mandate to affirmatively further fair housing by eliminating unnecessary barriers that have disproportionately impacted historically marginalized populations. Additionally, the Proposed Rule establishes much-needed regulatory requirements and clear guidelines for market participants and reduces legal disputes and discriminatory practices.

II. The Proposed Rule Aligns with the Efforts of the States to Further Fair Housing and Combat Housing Discrimination.

The States are committed to dismantling systemic racial disparities in our housing market as the ongoing deleterious impacts of structural racism continue to plague historically marginalized and underserved communities. The Proposed Rule builds in meaningful ways on the efforts States have already made to combat housing discrimination.

For example, New Jersey has implemented a rigorous framework to combat housing discrimination and affirmatively further fair housing at all levels of state and local government. In 2021, recognizing the overlap between discriminatory policies within the criminal legal system and racial disparities in housing, New Jersey became the first state in the country to enact a law to address discrimination against persons with prior criminal histories. That law, called the Fair Chance in Housing Act (“FCHA”), generally prohibits the consideration of an applicant’s criminal history before a housing provider extends a conditional offer to an applicant, and carefully limits the circumstances in which an individual can be denied housing based on a prior criminal history.¹⁶ Since the law’s inception, the New Jersey Office of the Attorney General and Division on Civil Rights have taken enforcement action against over 200 housing providers

¹³ 89 Fed. Reg. 25,336.

¹⁴ See, e.g., 89 Fed. Reg. 25,345 (acknowledging PHAs and owners’ discretion over lookback periods in the absence of standard of practice).

¹⁵ Demetria L. McClain, Principal Deputy Assistant, HUD, Sec’y for Fair Housing and Fair Opportunity, *Implementation of the Office of General Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, <https://shorturl.at/b2cc3> (last visited May 31, 2024).

¹⁶ N.J. Stat. Ann. §§ 46:8-25 to -64.

across the state for violating the FCHA. Many of those enforcement actions have resulted in settlements that require housing providers to ensure they do not deny housing opportunities to people based on prior criminal history, and that require ongoing monitoring of their practices by the Division on Civil Rights. The Division on Civil Rights has also issued regulations to implement the FCHA,¹⁷ and has conducted dozens of trainings to educate housing providers and reentering persons across the state about the law's requirements and protections.¹⁸

Those efforts are part of New Jersey's comprehensive approach to tackling discrimination in the housing market and expand access to affordable housing. New Jersey has launched a home appraisal discrimination initiative to combat discrimination in the home-buying and home mortgage refinance process.¹⁹ It has entered into agreements with major online real estate and rental platforms to prevent New Jersey housing providers from discriminating against prospective tenants seeking to pay rent with federal, state or local rental assistance, or to address discrimination against prospective tenants with criminal histories. It has taken dozens of enforcement actions against housing providers for discriminating on the basis of source of lawful income.²⁰ And New Jersey has long led the nation in creating affordable housing, and has long recognized crucial to establishing integrated communities and addressing racial and economic disparities. Hence, in March 2024, New Jersey enacted landmark affordable housing legislation to support local townships in complying with affordable housing obligations.²¹

Maryland also has a history of facilitating housing integration, particularly for those with criminal records. Notably, in 2012, the Maryland Court of Appeals issued the landmark decision in *Unger v. Maryland*, which led to the safe release of approximately 200 individuals who served long-term prison sentences. As a result of this decision, the Open Society Institute – Baltimore and the University of Maryland Carey School of Law launched the Unger Project to ensure the safe reentry of those individuals into their respective communities.²² The Unger Report continues to serve as an important case study for policymakers on how to effectively implement reentry strategies for post-conviction release, while simultaneously demonstrating the effects of racial discrimination on the imposition of long-term criminal sentences.²³

The Commonwealth of Massachusetts has a robust anti-discrimination statute, M.G.L. c. 151B, as well as more targeted laws that limit how most employers, housing providers, and licensers may use criminal history information to screen applicants—and particularly restricts the

¹⁷ N.J. Admin. Code §§ 13:5-1.1 to -2.7.

¹⁸ See, e.g., <https://www.njoag.gov/wp-content/uploads/2022/01/R.2021-d.150-54-N.J.R.-76a.pdf>.

¹⁹ See New Jersey Office of the Attorney General, *AG Platkin Announces Initiative to Address Discrimination in Home Appraisals* (Jan. 12, 2024), <https://shorturl.at/C7CnO>. This initiative ensures the NJLAD applies to the home appraisal process and creates a subcommittee dedicated to reducing barriers to entry in to the appraisal profession and encourage a diverse workforce.

²⁰ See, e.g., New Jersey Office of the Attorney General, *AG Platkin, Division on Civil Rights Announce Enforcement Actions to Combat Housing Discrimination* (Jan. 16, 2024) (NJ DCR initiating 14 enforcement actions to tackle housing discrimination under NJLAD), <https://shorturl.at/ybPC8>.

²¹ New Jersey townships are bound by the “Mount Laurel Doctrine,” a half-century old judicial mandate requiring municipalities to affirmatively use their zoning powers to develop affordable housing for low-income residents within their towns.

²² Justice Policy Institute, *The Ungers, 5 Years and Counting* (Nov. 2018), <https://shorturl.at/Hatzq>.

²³ *Id.*

use of much information outside of convictions and pending, “open” cases. *See* M.G.L. c. 6, §§ 167-175.²⁴ The general anti-discrimination law prohibits any housing provider from discriminating against prospective occupants because of race, receipt of public assistance or housing subsidy, and other protected characteristics. M.G.L. c. 151B, § 4; *see* 804 CMR 2.00 (general administrative regulations for discrimination in housing). State administrative regulations further require that housing providers make individualized determinations before refusing any prospective occupant based on their criminal records, and provide procedural protections and limitations on the access, use, and dissemination of criminal history information to make adverse housing decisions. *See* 803 CMR 5.00. In 2024, the Massachusetts Attorney General’s Office launched a new Housing Affordability Unit, tasked in part with ensuring compliance with existing fair housing laws, and combating discriminatory housing practices.²⁵

The Commonwealth of Pennsylvania has been a leader among states in decreasing criminal records as barriers. In 2018, Pennsylvania was the first state in the nation to pass a “Clean Slate Law,” by which the state now automatically seals certain criminal records.²⁶ Lawmakers on both sides of the political aisle saw that people with old, minor, or irrelevant criminal records were being unfairly denied housing, jobs, education, and other life opportunities. As a testament to the success of the law, Pennsylvania expanded it in late 2023, again on a bipartisan basis.²⁷ To date, tens of millions of criminal records have been sealed in Pennsylvania – improving lives, families, and communities in the commonwealth.

The Proposed Rule complements the States’ substantial interests and ongoing efforts in eliminating discriminatory barriers to fair housing and creating stronger, fairer, and more affordable living environments for our state residents.

III. HUD’s Proposed Rule Addresses Longstanding Racial Injustice, Promotes Public Safety, and Further Ensures Access to Fair Housing.

A. HUD’s Proposed Rule Address the Impact of Racial Inequities in the Criminal Legal System on Housing Access.

Discrimination in the administration of justice in the form of discriminatory drug laws and disproportionate policing of Black, Brown, and Native and low-income communities has resulted in “mass incarceration” that disproportionately affects Black and Latino communities. As of 2015, Black and Latino individuals made up only 30% of the U.S. population, but comprised 77% of those incarcerated in federal prison for drug law violations.²⁸ Black individuals are more likely to be arrested for drug offenses despite similar usage rates across

²⁴ Relatively recent reform legislation has also restricted public access to individuals’ criminal history information and eased barriers to sealing and expungement of prior records. *See* Massachusetts 2010 C.O.R.I. Reform Law (“An Act Reforming the Administrative Procedures Relative to Criminal Offender Record Information”); 2018 Criminal Justice Reform Law (“An Act Relative to Criminal Justice Reform”).

²⁵ *See* Massachusetts Office of the Attorney General, *AG Campbell Announces Esme Caramello As Director Of New Housing Affordability Unit* (May 28, 2024), <https://www.mass.gov/news/ag-campbell-announces-esme-caramello-as-director-of-new-housing-affordability-unit>.

²⁶ *See* 18 P.S. § 9122.2.

²⁷ *See* Community Legal Services of Philadelphia, *Clean Slate Summary* (Dec. 2023), <https://shorturl.at/1JxM2>.

²⁸ Drug Policy Alliance, *The Drug War, Mass Incarceration and Race* (June 2015), <https://shorturl.at/1fhrU>.

racial groups.²⁹ The disproportionate policing of Black individuals leads them to face significant housing barriers disproportionately, meaning that similarly situated white individuals are less likely to face such obstacles.

Criminal records-based housing barriers exacerbate and compound poverty-based housing insecurity, which also disproportionately affects Black, Latino, and Native people. According to a study by the University of California-Berkeley, more than 80% of large metropolitan areas in the United States were more segregated in 2019 than they were in 1990.³⁰ Poverty rates are highest in segregated Black, Brown, and Native communities – coming in at 21% compared to 7% in segregated white neighborhoods.³¹ Thus, race, poverty, and inequitable criminal justice policy are dynamically linked in a way that systemically perpetuates housing insecurity.

Currently, PHAs and HUD-assisted housing owners contribute to this cycle rather than combat it. The shortage of affordable housing units in racially concentrated impoverished neighborhoods has only exacerbated housing disparities,³² especially when criminal records are regularly used by public housing authorities and other HUD-assisted housing programs to deny applicants from obtaining affordable housing. Federal legislation such as the Quality Housing and Work Responsibility Act of 1998 and the Cranston-Gonzalez National Affordable Housing Act of 1990 even permit PHAs to evict current residents and/or exclude applicants based on certain prior criminal records.³³ Because of the permissive nature of exclusion based on criminal history, many PHAs and HUD-assisted housing owners across the nation have developed their own criteria for housing approvals, which often include additional and more stringent barriers for individuals with criminal records to obtain affordable housing.³⁴

HUD's Proposed Rule is thus a welcome step to address this vicious cycle of systemic incarceration and housing insecurity that continues to destabilize Black and other communities of color.

B. Increasing Access to Fair Housing Promotes Public Safety

Shelter is a basic human right providing stability for individuals to meet basic needs and build their lives. Without that stability, individuals and families are likely to experience negative health outcomes, both physical and mental, and have difficulties forming long-lasting social ties and attachments to communities.³⁵ This is particularly true for children without stable housing, as it can significantly affect their educational achievement, social development, mental health,

²⁹ The Hamilton Project, *Rates of Drug Use and Sales by Race; Rates of Drug-Related Criminal Justice Measures by Race*, <https://shorturl.at/IBTyf> (last visited May 31, 2024).

³⁰ Stephen Menendian, *Twenty-First Century Racial Residential Segregation in the United States* (June 21, 2021), Othering and Belonging Institute, <https://shorturl.at/n5HD3>.

³¹ *Id.*

³² Paul Jargowsky, *The Fair Housing Act at 50: Successes, Failures, and Future Directions* (Aug. 19, 2019), <https://shorturl.at/uRaXS>.

³³ Elayne Weiss, *Housing Access for People with Criminal Records*, National Low Income Housing Coalition, <https://shorturl.at/1flmX> at 6-21.

³⁴ *Id.* at 6-22

³⁵ U.S. Dep't of Health and Human Serv., *Housing Instability*, <https://shorturl.at/QVkcw> (last visited May 23, 2024).

and increase their likelihood of involvement in the criminal or juvenile justice systems.³⁶ The States' experiences also show that recidivism becomes more likely when persons with a criminal conviction are unable to find stable housing.³⁷ One in 10 prisoners in the United States face homelessness upon release,³⁸ which is 10 times more than the general public.³⁹ Restricting the use of criminal records in evaluating housing applications will not only help close the revolving door of criminal system involvement and housing insecurity, it will help achieve the States' overall goal of promoting healthy communities and ensuring public safety.

Given that one in three Americans has some form of criminal record and that 650,000 Americans return from incarceration each year, it is imperative to mitigate the barriers they encounter.⁴⁰ Studies indicate that people impacted by the criminal legal system face legal and practical barriers to meaningful reentry, including significant obstacles in accessing housing.⁴¹ The impact of these barriers is profound. Nearly 70 to 100 million Americans with criminal records encounter unnecessary structural barriers to employment, education, and housing.⁴² Specifically in the realm of housing, these barriers include extensive background checks, denial of fair housing protections, eviction, housing forfeiture, and denial of rental or sale applications.⁴³ With four in five landlords conducting background checks and PHAs exercising broad discretion in screening applicants, individuals impacted by the criminal legal system are disproportionately affected. This often leads to discrimination, increased rejections, and additional financial burdens in the form of housing application fees. Consequently, people impacted by the criminal legal system are 10 times more likely to experience homelessness, which further perpetuates cycles of recidivism and intergenerational poverty.⁴⁴

Additionally, the intersectional impact of these barriers is particularly severe for women. Research shows that women who have been incarcerated face significantly higher rates of homelessness compared to their male counterparts. A study by the Prison Policy Initiative highlights that formerly incarcerated women, particularly Black women, are at a higher risk of housing instability post-incarceration.⁴⁵ This vulnerability is compounded by the fact that women returning from prison often resume caregiving responsibilities, which adds to their housing challenges. The National Institute of Justice notes that women are more likely to be primary caregivers, impacting their housing stability and increasing their need for supportive housing policies that address these specific needs.⁴⁶ This rule addresses these gender disparities by promoting fairer housing practices that support women's reintegration into society with their

³⁶ Kimberly Burrowes, *Can Housing Interventions Reduce Incarceration and Recidivism?* (Feb. 27, 2019), Housing Matters, <https://shorturl.at/t7GB7>.

³⁷ N.J. Stat. Ann. § 46:8-53(b), (c).

³⁸ *Id.*

³⁹ *See* Lucius, *supra*.

⁴⁰ The White House, *A proclamation on Second Chance Month, 2024* (Mar. 29, 2024), <https://shorturl.at/Iu1PR>.

⁴¹ Mensah M. Dean, *For Formerly Incarcerated People, the Challenges of Reentry Make 'Every Move an Emergency,'* The Trace (June 27, 2023), <https://shorturl.at/M3Q6e>.

⁴² Half in Ten, *Americans with Criminal Records*, <https://shorturl.at/WvKbE> (last visited May 21, 2024).

⁴³ *Id.*

⁴⁴ *See* Lucius, *supra*.

⁴⁵ *Id.*

⁴⁶ Holly Ventura Miller, *Female Reentry and Gender-Responsive Programming*, National Institute of Justice, <https://nij.ojp.gov/topics/articles/female-reentry-and-gender-responsive-programming>.

families. Further, as many women are the primary caretakers of children in our society, the impact of housing instability for women is inextricably linked to housing instability for children.⁴⁷ As a result, children are the most likely population to face eviction. Lack of housing also may impact a parent's ability to regain custody of her children from child protection services. Expanding access to PHA and Section 8 housing will be extremely beneficial to rectify these injustices.

Moreover, the anticipated reduction in crime from furthering fair housing access would allow the States and their law enforcement agencies to better allocate public safety resources elsewhere.⁴⁸ For example, when individuals have access to safe and affordable housing, they are less likely to engage in criminal activity; thus reducing the need for over-policing neighborhoods.⁴⁹ It would also reduce the focus on creating and maintaining reactive public safety measures such as judicial and corrections systems. This shift would allow resources to be redirected towards community investment programs.⁵⁰ These programs can help stabilize and strengthen low-income and Black, Brown, and Native communities by improving the quality of housing structures, enhancing public education, and creating small business opportunities.

Overall, the Proposed Rule aligns with HUD's mission to build safe communities and further fair housing,⁵¹ and promotes public safety by recognizing individuals with criminal records as equal members of our communities who deserve to find safe and secure housing as they work to rebuild meaningful lives and become productive members of society.

IV. Recommendations to Enhance HUD's Proposed Rule to Reduce Barriers in HUD-Assisted Housing

The Proposed Rule would help ensure that housing providers do not engage in overbroad or discriminatory denials of housing. Standardizing practices across HUD programs and clarifying the legal landscape will contribute to consistent, fair, and effective housing policies. We recommend several changes to further enhance the Proposed Rule. HUD should provide additional guidance on the application of individual assessments and the unreasonable presumption, clarify and limit the extent to which evidence of criminal activity, without a conviction can be used in a screening, require individualized assessments for all denials and termination decisions, and end the process of denying housing based on non-disclosed criminal records unless those records would have been materially relevant to the admission decision. By addressing these areas, the rule will promote more equitable and just housing practices, providing transparency and fairness in housing policies, and benefiting applicants with criminal records.

⁴⁷ Habitat for Humanity, *A conversation with Matthew Desmond*, <https://www.habitat.org/stories/a-conversation-with-matthew-desmond> (last visited June 6, 2024).

⁴⁸ Pallet, *Housing is Public Safety* (Nov. 14, 2023), <https://shorturl.at/7NXAQ>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 88 Fed. Reg. 8,516.

A. The States Endorse a Reasonable Standard Lookback Period.

Establishing a standard lookback period is essential to achieve fairness, transparency, and consistency in the tenant screening process. It is crucial that any lookback focuses on relevant criminal activity and is supported by empirical evidence rather than allowing PHAs to impose indefinite or overly long lookback periods that serve no meaningful purpose in evaluating an applicant's current risk or suitability for housing. Unnecessarily long lookback periods disproportionately affect Black, Brown, and Native communities, whose members are more likely to be impacted by the criminal legal system. By setting a reasonable and evidence-based lookback period, HUD can help mitigate these disparities and promote fair housing practices that do not unjustly exclude individuals based on outdated criminal records.

The authority to deny housing admission to individuals impacted by the criminal legal system is detailed in 42 U.S.C. § 13661(c), which requires that decisions be based on relevant criminal activity that occurred within a "reasonable time" prior to the application. Specifically, the statute stipulates:

Except as provided in subsections (a) and (b) of this section and in addition to any other authority to screen applicants, in selecting among applicants for admission to the program or to federally assisted housing, if the public housing agency or owner of such housing (as applicable) determines that an applicant or any member of the applicant's household is or was, during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents.

By defining a "reasonable time" with a standard lookback period, the Proposed Rule advances fairness and transparency, and is also consistent with Congress's intent to maintain safe and secure housing environments without imposing unjustly prolonged penalties on individuals with older convictions.

A criminal record is of limited use in determining whether someone will be a good tenant and neighbor. Research consistently shows that older convictions are poor predictors of future behavior. The Council of State Governments Justice Center found that after three years, the rate of recidivism significantly decreases. Additionally, the likelihood that someone with a conviction older than three years will commit a new crime is similar to that of someone without any criminal history, indicating that the further back the conviction, the less it predicts future criminal behavior.⁵² This suggests that relying on older convictions may not accurately reflect an individual's current risk or suitability for tenancy. Other studies have also shown that the likelihood of recidivism significantly decreases over time, particularly after three years.⁵³ For

⁵² CSG Justice Center, *50 States, 1 Goal: Examining State-Level Recidivism Trends in the Second Chance Act Era* (April 2024), <https://csgjusticecenter.org/publications/50-states-1-goal/>.

⁵³ Bureau of Justice Statistics, *Recidivism and Reentry*, <https://bjs.ojp.gov/topics/recidivism-and-reentry> (last visited May 31, 2024).

instance, a Minnesota study examining the relationship between criminal conviction history and housing outcomes among more than 10,000 households found that the impact of a prior criminal offense on residents' housing outcomes significantly declines over time. Housing outcomes, defined as the likelihood of lease violations, leaving without notice, or nonpayment of rent, improve as more time passes since the offense.⁵⁴ This data illustrates that as time passes, the predictive value of a record of conviction diminishes, underscoring the appropriateness of limited lookback periods for housing assessments. In recognition of this fact, some of the States have already mandated by law that PHAs and/or assisted-housing owners within their respective jurisdictions cannot consider a conviction older than a certain period - sometimes 180 days unless mandated by federal law.⁵⁵

Moreover, people previously convicted of violent offenses have among the lowest rates of recidivism, illustrating that individuals who have committed a prior violent act are not inherently violent and can still succeed in the community.⁵⁶ A prior act of violence represents a single moment in a person's life and should not be the sole determinant of their future freedom. The Bureau of Justice Statistics recently released studies on 400,000 people released in 30 states in 2005, finding that while re-arrest rates are high for all people released from prison, those convicted of violent offenses are less likely to be re-arrested within three years for any offense than those convicted of nonviolent offenses.⁵⁷

Further research indicates that while 71% of state prisoners are arrested within five years of their release, nearly half of these arrests are for non-criminal technical infractions.⁵⁸ Most of these offenses fall outside of the relevant criminal activity category outlined in the Proposed Rule. The high rate of re-arrest for minor offenses demonstrates that the nature of many post-release infractions does not necessarily correlate with a threat to public safety or housing stability. Therefore, focusing on more recent and relevant criminal activity within a limited timeframe aligns with the goals of the statute and ensures fairer treatment of applicants.

The risk of recidivism is influenced by various factors, including the availability of supportive services and the stability of the individual's environment. High-risk environments, characterized by a lack of affordable, accessible housing and positive social supports, increase the likelihood of re-offending. Conversely, stable housing provides a critical platform for accessing employment, education, and community resources, essential for successful reintegration.

The States thus recognize many benefits that reasonable lookback periods would provide, and therefore support HUD in exercising its statutory authority and taking important steps to create a reasonable lookback period. However, the States believe HUD could improve the

⁵⁴ Cael Warren, *How Much Does Criminal Background Matter?*, Wilder Research (2019), <https://shorturl.at/XXYHs>.

⁵⁵ See, e.g., Fed. Reg. at 25,344 (listing a range of lookback periods allowed in the District of Columbia, Illinois, New Jersey, and New York).

⁵⁶ Alexi Jones, *Reforms Without Results: Why States Should Stop Excluding Violent Offenses from Criminal Justice Reforms*, Prison Policy Initiative (April 2020), <https://shorturl.at/rPUs6>.

⁵⁷ *Id.*

⁵⁸ See *Recidivism and Reentry*, *supra*. (noting that non-criminal technical infractions include public disorder offenses, probation or parole violations, failure to appear, obstruction of justice, contempt of court, commercialized vice, and disorderly conduct)

Proposed Rule by providing more guidance to PHAs and HUD-assisted housing providers on how the individual assessment process and the presumption apply in practice. The States recommend that HUD provide guidance on how PHA's and HUD-assisted owners can develop a lookback framework that would explain how these concepts work in the run of cases. For example, whatever reasonable lookback period is established, HUD might provide guidance on the expected application of the pre-lookback-period individual assessment, and the post-lookback-period presumption of unreasonableness, on the most common non-criminal technical infractions, the most common crimes directly relevant to residents' health, safety, or enjoyment, and selected crimes falling in between. The framework a housing provider develops can rely on local data on recidivism and housing success, but it should be justified by statistical evidence. The guidance from HUD should include standards for the consideration of recidivism and housing success data.

Lastly, if HUD adopts the proposed 3-year lookback period, the States request that it further clarify in the Final Rule how the 3-year lookback period would align with existing state and local laws or regulations that currently provide housing providers with discretion to adopt longer lookback periods. That clarification is necessary to facilitate compliance and prevent any inadvertent violations by PHAs and owners.

B. The States Support Restrictions on the Use of Arrest and Related Records

The reliance on arrest records and related documents for housing decisions is fundamentally flawed, perpetuates structural inequities, and runs counter to general principles of fairness and due process. The Proposed Rule's restriction on the use of such records in determining housing eligibility is vital for ensuring fair access to housing and preventing discrimination. In addition, arrest and other non-conviction records are often unreliable indicators of actual criminal activity and suitability for housing.

Currently, PHAs and owners of HUD-assisted housing have significant discretion in setting admission, termination of assistance, and eviction policies. However, there are only three statutory exclusions that must be enforced: convictions for methamphetamine production in public housing, evictions for drug-related criminal activity, and lifetime registration on a state sex offender registry. All other offenses fall within HUD's rulemaking authority, allowing for flexibility and discretion in the development of housing policies.

Despite this, many PHAs and HUD-assisted owners treat arrests as sufficient evidence of criminal activity even when these arrests do not result in charges or convictions. But arrest records are notoriously unreliable indicators of actual criminal behavior. An arrest merely signifies that there was suspicion of wrongdoing, not that any crime was committed. Many arrests do not lead to charges, and even when they do, a significant portion of these charges are either dismissed or do not result in conviction. For instance, one national study found that only 53% of charges led to conviction, leaving nearly half of charges resulted in non-conviction.⁵⁹ These statistics illustrate the potential for unjust denials of housing based on unsubstantiated

⁵⁹ Martin Wells, *Criminal Record Inaccuracies and the Impact of Record Education Intervention on Employment-Related Outcomes*, U.S. Department of Labor (Jan. 20, 2020); Ariel Nelson, *Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing*, National Consumer Law Center (Dec. 2019), at 17.

criminal activity. Additionally, arrest records are often incomplete, failing to indicate the final outcomes of cases.

Arrest records and pre-trial proceedings represent unverified allegations that have not been subjected to the rigors of the judicial process. These records are based on the lowest standards of proof, often involving only a suspicion of wrongdoing without any formal finding of guilt. At the arrest stage, individuals do not have the opportunity to present their side of the story, cross-examine witnesses, or benefit from the protections afforded during a trial. Consequently, using arrest records as a basis for housing decisions is fundamentally unjust, as it relies on incomplete and potentially misleading information. This practice undermines the principles of due process and fairness that are cornerstones of our legal system. As the Supreme Court has recognized, the mere fact that someone has been arrested has very little, if any, probative value in showing that they have engaged in any misconduct.⁶⁰ By contrast, a conviction involves a thorough legal process where the accused has the chance to defend themselves, ensuring a higher degree of reliability and fairness. Therefore, it is crucial to differentiate between mere arrests and proven criminal conduct when making housing eligibility determinations.

Furthermore, reliance on arrest records has a disparate impact on Black, Brown, and Native communities, who are disproportionately arrested compared to the general population. This practice not only contravenes the principles of the Fair Housing Act but also undermines public safety by fostering housing instability. Housing providers often justify the use of arrest records by citing public safety concerns. However, there is little evidence to support the claim that excluding individuals based on arrests enhances safety. Recognizing these unreasonable barriers to public housing, some of the States already place limits on housing providers' ability to inquire about arrests and expunged criminal records.⁶¹

The proposed rule, specifically § 5.851(a) and § 882.518(a), provides that an arrest record alone may not be the basis for a determination that an individual has engaged in criminal activity that warrants denial of admission. But it still allows evidence underlying an arrest or criminal charge—even in the absence of any conviction—to be used for that purpose, as long as there is sufficient independent evidence that the alleged actions occurred, and other mitigating factors are considered. In broad terms, this is a welcome move in the right direction. However, the Proposed Rule should more rigorously circumscribe the use of evidence short of criminal convictions, in order to limit the arbitrary, unfair, and discriminatory effects that are likely to follow from the use and consideration of criminal activity as envisioned.

As noted in the Proposed Rule, “HUD recognizes that housing providers often lack resources to investigate and adjudicate whether criminal conduct occurred in the absence of a conviction, and that a number of PHAs have faced legal costs and liability for terminating tenants based on their use of unreliable hearsay.”⁶² Accordingly, HUD seeks comment on whether it should further clarify “what evidence may or may not be used to determine that

⁶⁰ *Schwabe v. Bd. of Bar Exam'rs*, 353 U.S. 232 (1957).

⁶¹ See 89 Fed. Reg. at 25,344 (noting prohibitions implemented by the District of Columbia, Colorado, and New Jersey).

⁶² 89 Fed. Reg. at 25,342.

criminal activity occurred for admission, denials, terminations, and evictions, whether in this rule or in subsequent guidance.”⁶³ Such clarification is undoubtedly needed, and the answers to that question could be drawn from recent HUD guidance.

On April 28, 2024, HUD’s Office of Fair Housing and Equal Opportunity (FHEO) issued its guidance on the screening of applicants for rental housing,⁶⁴ which explains, among other things:

Persons who have been involved with the criminal legal system are disproportionately individuals with disabilities and Black and Brown persons, and therefore overbroad criminal records screening policies are likely to have an unjustified discriminatory effect. . . . As discussed at length in prior guidance from HUD, overbroad criminal records screenings are likely to have an unjustified discriminatory effect because of these disparities; the principles discussed in these prior documents apply to tenant screening companies, as well as to housing providers.

*Overbroad criminal records screenings include those that do not differentiate between offenses based on their nature, severity, or how long ago they occurred; those that consider records, such as arrest records, that did not result in a conviction; and those that do not provide an opportunity for the applicant to provide evidence of rehabilitation or other mitigating factors.*⁶⁵

Nothing in the proposed rule prevents HUD or housing providers from evicting tenants for violating their lease agreements due to misconduct, whether criminal or otherwise. Housing providers retain the authority to address lease violations promptly and effectively, ensuring that all residents can enjoy a safe and peaceful living environment.

Given this existing HUD guidance, the Proposed Rule should clarify and limit the extent to which evidence of criminal activity, without a conviction, may be considered at all in screening determinations without prompting serious concerns under the FHA. We propose that arrest and related records, including underlying substantive evidence of criminal activity that did not result in a conviction, should not be considered unless they relate directly to (i) criminal charges that are currently pending; or (ii) particularly violent activity resulting in substantial risk of death or serious bodily injury that PHAs have an especially heightened interest in addressing and preventing. This approach would tailor and limit criminal history screenings to circumstances in which PHAs have a core, legitimate regulatory interest, while avoiding overbroad screening determinations that would raise serious disparate impact issues under the FHA.

⁶³ *Id.* (Question #7 for public comment).

⁶⁴ Office of Fair Hous. And Equal Opp., Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing, HUD (April 28, 2024), <https://shorturl.at/WR8Ga>.

⁶⁵ *Id.* at 21.

C. The States Support Individualized Assessments in Housing Eligibility and Termination Decisions.

Current practices allow PHAs and owners of HUD-assisted housing excessive discretion in setting admission and eviction policies, often leading to unjust outcomes based on incomplete evaluations of an individual's circumstances. Such determinations are sometimes based on prior criminal activity that is not even attributed to an affected individual, but to a family or household member. These policies perpetuate systemic discrimination and fail to account for mitigating circumstances that demonstrate an individual's rehabilitation and suitability for housing.

The Proposed Rule requires an individualized assessment for all admission denials, in which tenants can present mitigating information ensures fairness, reduces discriminatory practices, and recognizes the unique circumstances of each applicant. This provision is essential for ensuring that decisions to deny housing based on one's involvement with the criminal legal system are grounded in a comprehensive review of each applicant's circumstances, promoting fairness and helping to mitigate the adverse effects of discriminatory practices.

Requiring individualized assessments in housing eligibility decisions is a necessary step toward ensuring fair and equitable housing practices. By also requiring individualized assessments for termination decisions, including impacts on uninvolved family or household members, HUD can further reduce housing insecurity, promote public safety, and uphold the principles of the Fair Housing Act. Indeed, to allow an entire household to be evicted based on the activity of one household member, where there is no evidence that other household members themselves were involved, would be unjust and contrary to the principles espoused in the Proposed Rule. Even in the limited circumstances where a family or household member is determined to be engaging in criminal activity that would pose a threat to resident safety and peaceful enjoyment, housing providers can elect to remove that member from the tenancy and/or transfer the lease to another family member in lieu of complete termination and eviction of the entire household.

The States endorse a shift away from automatic eviction and toward individualized assessment for termination as well as admission decisions. We urge HUD to adopt this recommendation and provide further clarification and guidance to ensure these provisions are effectively implemented and understood by all stakeholders.

D. Support for Prohibiting Denials Based on Non-Disclosure of Prior History with the Criminal Legal System

Current practices often penalize applicants for non-disclosure even when no extensive background checks are conducted, leading to unnecessary barriers for individuals seeking stable housing. Individuals with a criminal record may fail to disclose their past for various reasons, such as the record being sealed, failure to understand the question on an housing application, disagreements about whether a prior disposition was a "conviction," or the criminal history being outdated or from another jurisdiction whose records may not be easily accessible. When a prior record does not impact the admission decision, excluding an applicant solely for non-disclosure serves no practical purpose. The Proposed Rule sensibly delineates the circumstances under which non-disclosure of a criminal history record can be considered.

Prohibiting denials for non-disclosure of prior history with the criminal legal system is crucial. Applicants should not be denied housing solely for failing to disclose their criminal history. This approach aligns with principles of fairness and equity, recognizing that many applicants may not fully understand the requirements or fear repercussions from disclosure.

Furthermore, we suggest that even without a background check, applicants should not be denied unless the non-disclosed criminal record would have been materially relevant to the admissions decision. This criterion ensures that decisions are based on the relevance and materiality of the information rather than punitive measures for non-disclosure. By focusing on the material impact of a criminal history record, housing providers can make more informed and just decisions, ultimately fostering a more inclusive and equitable housing system.

V. Conclusion

In conclusion, we urge HUD to adopt the Proposed Rule. To further enhance the rule, we recommend providing additional guidance on the individual assessment process and its application to the lookback period. HUD should offer clear guidance on how the presumption of unreasonableness can be overcome or addressed in practice. Additionally, HUD should also clarify and restrict the use of criminal activity evidence that lacks a conviction in screening determinations. Furthermore, we advocate for a shift from automatic evictions to individualized assessments for both termination and admission decisions. Finally, we suggest that applicants should not be denied housing based on non-disclosed criminal records unless those records would have been materially relevant to the admission decision. By implementing these recommendations and offering detailed procedural guidance for denials, the rule will better promote transparency, consistency, and fairness in housing policies.



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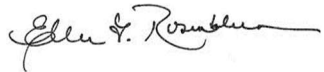
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