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Client Alert: Considerations on Criminal Background Checks & Tenancy Restrictions

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Numerous condominiums and homeowner associations have Governing Documents, or rules and regulations that regulate leasing, including restriction to whom owners may rent. Many associations base their decisions on the results of a criminal background check or on a potential renter's disclosure of criminal history on a rental application. If an association considers criminal backgrounds in determining whether to approve a lease, then the association needs to ensure it complies with the Fair Housing Act (FHA).

Pursuant to 42 U.S.C. § 3604, the FHA prohibits the refusal to lease a residence to any person because of race, color, religion, sex, handicap, familial status, or national origin. In 2016, the U.S. Department of Housing and Urban Development (HUD) published guidance on the use of criminal records, noting that:

> African Americans and Hispanics are arrested, convicted, and incarcerated at rates disproportionate to their share of the general population. Consequently, criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers.[1]

As such, HUD discourages against blanket policies that would prohibit leasing to any individual with any criminal record. Should an association's policy come under challenge, a court will test whether the policy is necessary to serve a substantial, legitimate, nondiscriminatory interest. To meet this standard, associations should take a holistic and individualistic approach and craft an objective policy that considers, among other things, the date of the conviction, the underlying conduct, the nature and severity of the offense, and what the convicted person has done since then. For instance, an association may seek to prohibit tenants who were convicted of certain violent felony offenses or released from incarceration on the offense within the past six or seven years. Any leasing policy that would reject an applicant based on a criminal conviction should limit the conviction history to a maximum look-back of six to seven years.[2] Moreover, HUD clarified that an arrest record (absent a conviction) is insufficient to constitute proof of past unlawful conduct and should not form the basis for excluding an individual from housing. *See also United States v. Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006) ("[A] mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct."). Importantly, the FHA specifically allows a provider to deny housing because the applicant has been convicted of the illegal manufacture or distribution of controlled substances, whereas a conviction for *drug possession* may be correlated with sex and race and may be found to be a discriminatory basis for denying housing. *See* 42 U.S.C. § 3607(b)(4); *see, e.g.,*

Kimbrough v. United States, 552 U.S. 85, 98 (2007) (discussing the racial disparity in convictions for crack cocaine offenses). While there is no exhaustive list of offenses, which may form the basis for an applicant's denial, an association should consider how the offense relates to its nondiscriminatory interest and narrow its determinations to those such convictions.

While an association's background check policy should not place a blanket prohibition on any particular offenses, the criteria and screening requirement should be applied equally and universally among all applicants. One useful tactic to minimize the risk of discrimination in the application review process is to install a procedure of blindly reviewing each rental application, without consideration of the applicant's biographical information. However, to the extent a criminal conviction is identified in a criminal background check or disclosed on a leasing application, the association should provide the potential renter an opportunity to disclose the facts and circumstances regarding the conviction.

If the applicant is handicapped or disabled,[3] then a court may nonetheless uphold an association's decision to reject the tenant's application if the reviewing body deems the applicant to be a direct threat to health, safety, or property. 42 U.S.C. § 3604(f)(9) ("Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.") *See, e.g. Talley v. Lane*, 13 F.3d 1031 (7th Cir. 1994) (affirming dismissal of discrimination action brought by disabled person where the housing provider denied housing due to prior convictions for theft, rape, and unlawful use of a weapon).

There are numerous facets of the FHA to consider when enacting a leasing policy that is based in part on the results of a criminal background check or disclosure. In order to ensure compliance with the FHA and mitigate any future claims of discrimination, an association should confer with counsel on the appropriate form and application for considering a tenant's prior convictions and instituting a fair and non-discriminatory practice.

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[1] https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF

[2] HUD's 2016 memorandum adopts criminological research showing that over time, the likelihood of a convicted person reoffending decreases until that likelihood equals the same risk as a person with no criminal history. *See* Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 Criminology and Pub. Pol'y 483 (2006) (reporting that after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record).

[3] The FHA also prohibits discrimination on the basis of a handicap, including making representations "that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." 42 U.S.C.§ 3604(d).

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