

# The Fair Housing Act and the use of Criminal History.

—

# Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions

- HUD--April 4, 2016 Office of General Counsel Guidance (“HUD Guidance”).
- Available at:  
[https://portal.hud.gov/hudportal/documents/huddoc?id=HUD\\_OGCGuidAppFHASandCR.pdf](https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf)

# Fair Housing Act (FHA) (42 U.S.C. § 3601)

- Prohibits discrimination in the sale, rental, or financing of dwellings and in other housing related activities on the basis of:
  - Race
  - Color
  - Religion
  - Sex
  - Disability
  - Family Status
  - National Origin

# Background

As many as 100 million U.S. adults have some a criminal record of some sort. Bureau of Justice Statistics, U.S. Dep't of Justice, *Survey of Criminal History Information Systems, 2012*, 3 (Jan. 2014) available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>

African American and Hispanic individuals are arrested, convicted and incarcerated at rates disproportionate to their share of the general population. HUD Guidance, 2.

Criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers.

# Discriminatory Effects– Use of Criminal History

Discriminatory effects: when a housing provider violates the FHA when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate. HUD Guidance, 2; 24 C.F.R. 1005.500

Three Step Analysis is applied to assess if the challenged policy violates the FHA:

- 1) Discriminatory effect?
- 2) Substantial, legitimate, non-discriminatory interest?
- 3) Less discriminatory alternative?

# Step 1: Does using criminal history have a discriminatory effect?

- Complainant/HUD in administrative adjudication must prove the criminal history policy has a discriminatory effect.
- Burden must be shown by providing evidence
- National/Local Statistics
- Determining disparate impact is fact intensive and case-specific.

## Step 2: Is there a substantial, legitimate, nondiscriminatory interest?

- Cannot be hypothetical or speculative. 24 C.F.R 100.500(b)(2), see also 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013).
- Burden is on housing provider to provide evidence to support it has a substantial, legitimate, non-discriminatory interest and the challenged policy achieves that interest.

# Prior Arrests?

- Arrest shows nothing more than someone probably suspected of an offense was apprehended.
- “A housing provider with a policy or practice of excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate non-discriminatory interest.” HUD Guidance, p. 5.
  - Equal Employment Opportunity Commission has explained barring applicants from employment on the basis of arrests not resulting in a conviction is not consistent with business necessity under Title VII because arrest does not establish that the criminal conduct occurred. EEOC Enforcement Guidance, Number 915.002, 12 (Apr. 25, 2012)

# Prior Convictions?

- Generally, a conviction will serve as sufficient evidence to prove that an individual engaged in criminal conduct. HUD Guidance, 6.
- Housing provider must still show that the policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest.
- “A housing provider that imposes a blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – will be unable to meet this burden.” HUD Guidance, 6.
- Housing provider must show that the policy accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property.

# Step 3: Is there a less discriminatory alternative?

Individualized assessment of relevant mitigating factors:

- Facts/circumstances surrounding criminal conduct
- Age of the individual at the time of the conduct
- Evidence that the individual has maintained a good tenant history (before/after conviction)
- Rehabilitation efforts

# Statutory exemption– 42 U.S.C. 3607(b)(4)

- Illegal Manufacture or Distribution of a Controlled Substance
- Section 807(b)(4) does not prohibit “conduct against a person because such person has been convicted . . . of the illegal manufacture or distribution of a controlled substance as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802).
- Please note: There is no exemption from the FHA for arrests, but no corresponding conviction. Additionally, this exemption is only for the manufacturing or distribution of Controlled Substances– this exemption from FHA liability does not apply to convictions based on drug possession.

# Intentional discrimination and use of criminal history

- Treating an applicant/renter differently because of race, national origin, or other protected characteristic.
- Housing discrimination can occur even before an application for housing. Discouraging individuals from applying for housing on the basis of a protected class is a type of housing discrimination.

# Agencies Where a Fair Housing Complaint can be Filed:

Arizona Attorney General's Office:

- <https://www.azag.gov/fair-housing>
- 602-542-5263

U.S. Department of Housing and Urban Development:

- [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp)
- 800-347-3739