GRAND RAPIDS AREA
COALITION TO END
HOMELESSNESS

Grand Rapids/Wyoming/Kent County – MI 506
Continuum of Care Membership Meeting Agenda
February 27, 2025 ▫ 9:30-11:00 am
Zoom

1. Call to Order

2. Approval of December 19, 2024 Minutes*

3. 100 in 100

4. Community Partner Update – VITA Program

5. Federal Updates

6. PIT Count

   a. 2024 PIT Count Review

   b. 2025 PIT Count Preliminary Analysis

7. Community Partner Announcements and Updates

8. Adjournment

*indicates potential action item

CoC MEMBER MEETING
MEETING MINUTES - DRAFT
December 19, 2024
9:30-11:00am

Facilitator:	Kate Berens
Meeting Attendees:	**Members:** • Elizabeth Stoddard - Fair Housing Center • Liz Keegan - Fair Housing Center • Erin Banchoff - City of Grand Rapids • Stephanie Gingerich - Genesis Nonprofit Housing • Bill Weld Wallis - Individual Member • Emily Madsen - ENTF • Lindsey Reames - GR Housing Commission • Shelby Sichta - Mel Trotter Ministries • Alyssa Bryan - United Way • Sabrina Slenk - Grand Rapids Public Library • Maranda VanZegeren - Community Rebuilders • Tyler Kregel - Mel Trotter Ministries • John Wynbeek - Genesis Nonprofit Housing • Zenaida Jimenez - Safe Haven Ministries • Paul Smith - City of Wyoming • Lauren VanKeulen - AYA Youth Collective • Sam Westhouse - The Salvation Army • Katherine Besaw - Genesis Nonprofit Housing • Dave Gantz - Genesis Nonprofit Housing • Ryan VerWys - ICCF • Bryan Holt - Pine Rest • Christie White - Pine Rest • Monique Carter - Arbor Circle • Stacey Datena - Covenant House • Molly Perez - Kent County Health Department • Tenisa Frye - Safe Haven • Casey Gordon - Kent ISD • Caity Young - Family Promise • Amy Lloyd - YWCA • Jeff Dashner - Mel Trotter Ministries • Carolyn Allen - Covenant House **Community members:** • John Constandine - Fountain Street Church • Brad Miller - Fountain Street Church • Gordie Moeller - Double Up Food Bucks • Frieda Campos - The Other Way Ministries

	• Kate Hultquist - In the Image • Angela Rincones - The Source Staff: Courtney Myers-Keaton, Ronan Parmenter, Alyssa Anten, Brianne Robach, Craig Heerema

Time Convened:	9:30am	Time Adjourned:	11:00am

Approval of Minutes		October 24, 2024	
Motion by:	Ryan VerWys	Support from:	Lauren VanKeulen
Discussion			
Amendments			
Conclusion	All in favor, motion carries		

Steering Council Elections	
Discussion	

Erin Banchoff from the Nominating Committee shared the five open seats to be filled, and a slate was prepared and displayed on the screen. No nominations came from the floor. Erin shared election results: Monique Carter, Mark Contreras, Casey Gordon, Elizabeth Stoddard, and Ryan VerWys. Courtney encouraged member involvement in other committees as well, including Funding, Youth, Nominating.

Fair Housing Training	
Discussion	

Presentation included with the minutes

MSHDA HCVs	
Discussion	

Courtney gave context around HCVs, noting this community has advocated for prioritization of those vouchers for a significant amount of time. She overviewed the previous process for the waitlist and noted challenges, and noted an interim prioritization process must be determined and submitted to MSHDA by January 31. The intent is to prioritize those vouchers for chronically homeless households dependent on case management services available, and Courtney anticipates this process will be temporary through the first quarter of 2025, after which we will seek community feedback and feedback from people with lived experience while determining a permanent policy. Courtney encouraged attendees to join Coordinated Entry meetings to stay informed on this process. She anticipates this will require heavy administrative work at the beginning to operationalize this process. There was a question on who is notifying individuals on the waitlist, and this group identified that as a gap. Sam Westhouse noted HAP will have a script and post information in the lobby to help communicate this. There was a question of whether there are plans to secure more case management, and Courtney noted some agencies have case management services that still have capacity through 100 in 100 funding, and a joint application was submitted to MDHHS to secure

additional funding for case management. Additional information will be shared with providers as available.	
100 in 100 Update	
Discussion	
The latest numbers show 42 households have moved into housing, and 70 are in process (have a referral and are working with a provider to complete documentation and move in). Case management services have been secured with funding through the County, and this is expected to be sustainable beyond the one year mark, with hopes to have it available for a few years at least. A joint letter of intent was sent to MDHHS looking for additional funding. Courtney reaffirmed the goal of the CoC's strategic plan to end chronic homelessness in 2025. As 100 in 100 continues, the lessons learned from the initative will be applied to other populations and will not stop after 100 are housed. A more robust update will be provided at the February General Membership meeting to provide data outcomes and next steps. An update will also be provided for YHDP at that time. Courtney encouraged anyone to reach out with questions and attend planning meetings if interested.	
Community Partner Updates and Announcements	
Discussion	
- Lindsey Reames shared that Grand Rapids Housing Commission is launching their annual planning process and there will be further communication around providing feedback on updates, including policy and procedures related to the HCV program and other programs administered by GRHC.	
Adjournment	

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Office of Fair Housing and Equal Opportunity

Guidance on Application of the Fair Housing Act to the Advertising of Housing, Credit, and Other Real Estate-Related Transactions through Digital Platforms

I.   Introduction

This guidance from HUD's Office of Fair Housing and Equal Opportunity explains how the Fair Housing Act ("Act") applies to the advertising of housing, credit, and other real estate-related transactions through digital platforms. In particular, it addresses the increasingly common use of automated systems, such as algorithmic processes and Artificial Intelligence ("AI"),[1] to facilitate advertisement targeting and delivery.

New technologies can be used to target advertising toward some consumers and away from others.[2] This can be done deliberately—for example, when advertisers choose to have their ads directed in a particular way—but it can also can occur through the operation of complex automated systems designed to make ad delivery more efficient in accomplishing an advertiser or ad platform's purposes.[3] These systems may conclude, for example, that women are more likely than men to click on advertising for certain products, and so direct such ads only to women (or, more precisely, to people they have estimated to be women). Or they may conclude that Black people respond more frequently to certain ad variants than others, and so direct only those ads to Black people.[4] Importantly, this can happen without the advertiser's direction or knowledge, and can even frustrate an advertiser's intention that an ad be distributed more broadly.[5]

Such targeting and delivery, which may be permissible in other contexts, risks violating the Act when used for housing-related ads. As described further below, the Act prohibits discrimination in a variety of housing-related transactions based on seven protected classes— race, color, religion, sex (including sexual orientation and gender identity), national origin, familial status (children under eighteen being present, seeking of legal custody, or pregnancy),

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[1] *See* Exec. Order No. 14,110, Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, 88 Fed. Reg. 75,191 (Oct. 30, 2023). The EO sets forth the definition of "artificial intelligence" or "AI," pursuant to 15 U.S.C. § 9401(3), as "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Artificial intelligence systems use machine- and human-based inputs to (A) perceive real and virtual environments; (B) abstract such perceptions into models through analysis in an automated manner; and (C) use model inference to formulate options for information or action."

[2] *See* Thomas Beauvisage, Jean-Samuel Beuscart, Samuel Coavoux & Kevin Mellet, *How Online Advertising Targets Consumers: The Uses of Categories and Algorithmic Tools by Audience Planners*, New Media & Soc'y 1, 1–3 (2023) [hereinafter, Beauvisage et al., *How Online Advertising Targets Consumers*].

[3] *See* Levi Kaplan, Nicole Gerzon, Alan Mislove & Piotr Sapienzynski, *Measurement and Analysis of Implied Identity in Ad Delivery Optimization*, Proc. of 22nd ACM Int. Measurement Conf. 195, 195–96 (2022) [hereinafter, Kaplan et al., *Measurement and Analysis*].

[4] *Id.* at 205.

[5] *Id.* at 207.

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or disability.[6] Ad targeting risks discriminating on the basis of protected characteristics in violation of the Act in multiple ways, including: denying consumers information about housing opportunities; targeting vulnerable consumers for predatory products or services; discouraging or detering potential consumers; advertising different prices or conditions to consumers; steering home-seekers to particular neighborhoods; or charging advertisers higher amounts to show ads to some consumers.[7] Discriminatory advertising can contribute to, reinforce, and perpetuate residential segregation and other harms addressed by the Fair Housing Act.

This guidance describes the responsibilities and potential liability of both advertisers and ad platforms, and how ad targeting and delivery functions may risk violating the Act when deployed for housing-related ads. This guidance concludes with recommendations to avoid violations of the Act.

The term "advertiser," as used in this guidance, refers to entities or individuals placing advertisements for any one of the full range of products and services covered by the Act, which includes rental housing and property management services, residential real estate and related services, mortgages and mortgage broker services, home insurance, and more.[8] The term "ad platform," as used in this guidance, refers to products or systems used to direct and deliver advertisements to consumers in digital spaces—sometimes on a single website or mobile application, such as a social media or real estate website, and other times across many websites, mobile applications, or other channels. Ad platforms can be highly complex systems that may employ a wide range of tools to determine which ads are delivered to which users. These tools often include audience categorization and selection tools, custom and mirror audience tools, and ad delivery models, ad auctions, and other algorithmic systems.[9]

II.   Legal Background

The Fair Housing Act prohibits discrimination in the sale, rental, and financing of dwellings and in other housing-related services because of race, color, religion, sex, national origin, familial status, or disability.[10] The Act prohibits intentionally discriminatory practices, as well as those with an unjustified discriminatory effect.[11] The Act also prohibits discriminatory statements.[12] Any entity that "play[s] a substantial role" in a discriminatory housing decision or

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[6] 42 U.S.C. §§ 3601–19.

[7] *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 368 (1982) (steering); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 93–96 (1979) (steering); Clark v. Universal Builders, Inc., 501 F.2d 324, 333–334 (7th Cir. 1974) (pricing); Horne v. Harbour Portfolio VI, LP, 304 F. Supp. 3d 1332, 1341–42 (N.D. Ga. 2018) (predatory targeting). *See generally* Varun Nagaraj Rao & Aleksandra Korolova, *Discrimination Through Image Selection by Job Advertisers on Facebook*, Proc. of 23rd ACM Conf. on Fairness, Accountability, & Transparency 1772, 1772 (2023); *see also, e.g.*, *Factsheet: Surveillance Advertising: What About Discrimination*, Consumer Fed. of Am. (Aug. 26, 2021), https://consumerfed.org/consumer_info/factsheet-surveillance-advertising-discrimination/.

[8] *See, e.g.*, Swanson v. Citibank, N.A., 614 F.3d 400, 406 (7th Cir. 2010) (applying the Act to lenders); Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1166–1175 (9th Cir. 2008) (en banc) (housing search website); NAACP v. Am. Fam. Mut. Ins. Co., 978 F.2d 287, 290 (7th Cir. 1992) (insurers); United States v. Am. Inst. of Real Estate Appraisers, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977) (appraisers).

[9] *See generally* Beauvisage et al., *How Online Advertising Targets Consumers*.

[10] 42 U.S.C. §§ 3601–19.

[11] See 24 C.F.R. § 100.500; Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 540 (2015).

[12] 42 U.S.C. §§ 3604(c).

outcome can be liable under the Act, even if that entity or person is not the provider of housing or housing-related services.[13]

Intentional discrimination can include using a protected characteristic—or a proxy for a protected characteristic[14] —as the basis for the decision to offer, not offer, or provide different terms for housing or a housing-related transaction. This is true even if that decision is made in whole or in part by an automated system, including a system using machine learning or another form of AI.

Even when there is no intent to discriminate, a policy or practice violates the Act if it has a discriminatory effect and (i) the policy or practice is not necessary to achieve a substantial, legitimate, non-discriminatory interest or (ii) the interest can be served by a less discriminatory alternative.[15] Discriminatory effects liability is assessed using a three-step burden-shifting framework and requires a fact-specific analysis. In the first step of the analysis, a plaintiff (or HUD in an administrative enforcement action) has the burden to prove that a policy or practice has a discriminatory effect, meaning that it has a disparate impact based on one or more of the characteristics protected by the Act or it perpetuates segregation.[16] If such a discriminatory effect is proven, the burden shifts to the defendant (or respondent in an administrative action) to prove that the policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.[17] If a defendant or respondent successfully meets this burden, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another practice that has a less discriminatory effect.[18]

The Act also explicitly forbids discriminatory statements and advertising practices. The Act specifically prohibits making, printing, or publishing any housing-related advertisement which indicates any preference, limitation or discrimination because of a protected characteristic.[19] HUD's regulations implementing the Act prohibit "[u]sing words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons because of [protected characteristics]"[20]; "[s]electing media or locations for [housing-related advertising] which deny particular segments of the

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[13] Commonwealth v. Priority Home Sols., LLC, CL20000688-00, at 6 (Va. Cir. Ct. Dec. 6, 2021); Sabal Palm Condos. of Pine Ridge Ass'n, Inc. v. Fischer, 6 F. Supp. 3d 1272, 1293 (S.D. Fla. 2014).

[14] A proxy is a variable that is highly correlated with a protected class, as for example ZIP Code of residence can be highly correlated with race.

[15] 24 C.F.R. § 100.500; *see also Inclusive Cmtys. Project, Inc.*, 576 U.S. at 541 (2015) (citing HUD's 2013 rule). HUD's 2023 Discriminatory Effects Rule formally restores, with minor unrelated modifications, HUD's 2013 Discriminatory Effects Rule. An intervening version of the Rule published in 2020 was enjoined before it took effect, so the framework established by the 2013 Rule has been in effect without interruption since it was issued. *See* Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urb. Dev., 496 F. Supp. 3d 600 (D. Mass. 2020).

[16] 24 C.F.R. § 100.500(a), (c)(1).

[17] *See* 24 C.F.R. § 100.500(c)(2); *see also Inclusive Cmtys. Project*, 576 U.S. at 541.

[18] 24 C.F.R. § 100.500(c)(3); *accord Inclusive Cmtys. Project*, 576 U.S. at 527.

[19] 42 U.S.C. § 3604(c); 24 C.F.R. § 100.75(a). Courts consistently interpret this to mean that a defendant can violate 42 U.S.C. § 3604(c) if the notice, statement, or advertisement indicates discrimination to an "ordinary reader" or "ordinary listener," regardless of whether the defendant intended to discriminate. *See, e.g.,* Rodriguez v. Vill. Green Realty, Inc., 788 F.3d 31, 41, 52–54 (2d Cir. 2015); Corey v. Sec'y, Dep't of Hous. & Urb. Dev. *ex rel.* Walker, 719 F.3d 322, 326 (4th Cir. 2013); White v. Dep't of Hous. & Urb. Dev., 475 F.3d 898, 905–06 (7th Cir. 2007).

[20] 24 C.F.R. § 100.75(c)(1).

housing market information about housing opportunities because of [protected characteristics]"[21]; and "[r]efusing to publish [housing-related advertising] or requiring different charges or terms for such advertising because of [protected characteristics]."[22]

III. Audience Targeting Tools

Ad platforms have provided a range of tools for advertisers to select their intended target audience for ads, including audience categorization, custom audience, and mirror audience tools.

A. Audience Categorization Tools

"Audience categorization tools" refers to tools that ad platforms offer advertisers to segment and select potential audiences by category, such as gender, age, income, location, interests, activities, or connections. These audience categorization tools may take different forms, such as drop-down menus, toggle buttons, search boxes, or maps, and may allow both inclusion and exclusion functions. An example of how categorization tools may work is the display of a toggle button in an ad placement interface that prompts an advertiser to select "men" or "women" as the potential audience for ad delivery. Other examples of categorization tools would be the display of a dropdown menu that prompts advertisers to select potential audience members by field of employment, or a map that prompts advertisers to select residents of certain neighborhoods as potential audience members.

In some instances, consumers may self-identify and disclose their gender, location, or other characteristics when they sign up for a product, make a purchase, or even sign into their browser. For example, consumers may disclose their gender in response to question prompts when creating and filling out a profile on a social media site, or consumers may disclose their address when signing up for a company's mailing list. In other instances, ad platforms infer consumers' characteristics from available data such as their purchase or browsing history, activities, and movements. Often such inferences are drawn not just from information about the consumer, but also from information about people with whom the consumer interacts. Examples of this would be a platform inferring a consumer is female based in part on past purchases of women's clothing; inferring a consumer resides on a particular block based in part on their phone's regular nighttime presence in that location; or inferring a consumer's sexual orientation based in part on friend groups, associations, or the content of social media posts.

Advertisers and ad platforms may violate the Act by segmenting and selecting audiences for housing-related ads based in part on protected characteristics or proxies, whether self-disclosed or inferred. For example, some categorization tools have directly

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[21] 24 C.F.R. § 100.75(c)(3).
[22] 24 C.F.R. § 100.75(c)(4).

segmented potential audiences by protected characteristics, such as gender, parental status, country of origin, religion, or affiliation with disability-rights groups.[23] Other categorization tools have segmented audiences based on proxies for protected characteristics.[24] Examples of such proxies are precise geographic location (*e.g.*, census blocks), language spoken, purchases of diapers, cribs, or other child-needs, or engagement with culturally-specific media.[25]

One way that ad platforms' and advertisers' use of these tools for housing-related ads may violate the Act is by limiting protected class groups from accessing information about housing opportunities. For example, they may do so when used to exclude families with children or people with service animals from the eligible audience for a rental ad, or when used to exclude residents of predominately Black and Hispanic neighborhoods from the eligible audience for a home insurance ad. Such exclusion risks violating the Act even if done for purportedly 'benign' purposes—such as an advertiser's belief that a particular property is inappropriate for children because it has potentially hazardous features like stairs or pools.[26]

The use of categorization tools to target housing-related ads may also violate the Act by subjecting vulnerable protected class groups to targeting of predatory products or harmful housing practices, also known as 'reverse redlining.' For example, a lender may violate the Act by targeting ads for high-cost loans only to consumers who have limited English-proficiency, or a company running a housing-related scam may violate the act by targeting ads to immigrants from a particular country (and using cultural markers to build trust to perpetrate the scam).

Finally, the use of categorization tools to target housing-related ads may violate the Act when used to show different content to different groups on the basis of protected characteristics—which may result in steering, pricing discrimination, or other discriminatory outcomes.[27] Advertisers may frame an ad in one way to one group, and a different way to another group, based on their own views on the efficacy of doing so or relying on tools intended to predict which ads perform better with which groups (such as A/B testing or machine learning). A well-publicized example of this from a non-housing context has been movie trailers tailored differently for White or Black audiences.[28] In the housing context, this customization may violate the Fair Housing Act if, for example, it results in meaningfully different information about housing opportunities being made available to consumers on the

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[23] *See e.g.*, Complaint ¶¶ 2–5, United States v. Meta Platforms, Inc., No. 1:22-cv-05187 (S.D.N.Y. filed June 21, 2022), https://www.justice.gov/crt/case-document/file/1514111/dl; *see also* Beauvisage et al., *How Online Advertising Targets Consumers* at 7–9.

[24] *See e.g.*, Complaint ¶¶ 32, 34, 49–58, *Meta Platforms, Inc.*; Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES MAG. (Feb. 16, 2012), https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html.

[25] In complex models, combinations of a number of factors, each of which may be weighted differently, can also function as proxies for protected characteristics.

[26] *See e.g.*, Community Svcs., Inc. v. Wind Gap Mun. Auth., 421 F.3d 170, 177 (3d Cir. 2005); United States v. Reece, 457 F. Supp. 43, 48 (D. Mont. 1978).

[27] *See, e.g.*, *Clark*, 501 F.2d 324, 333-334 (7th Cir. 1974) (pricing); *Havens Realty Corp.*, 455 U.S. 363 (1982) (steering); *Gladstone Realtors*, 441 U.S. 91 (1979) (steering).

[28] *See e.g.*, Chi Chi Inzundu, *Straight Outta Compton had 'different trailers for different races'*, BBC (Mar. 18, 2016), https://www.bbc.com/news/newsbeat-35841138.

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basis of a protected characteristic, serves to deter consumers from seeking housing opportunities on the basis of a protected characteristic, [29] or serves to steer consumers to housing opportunities in specific neighborhoods on the basis of a protected characteristic.[30]

For example, it may violate the Act to for a property management company to target a rental ad to predominately Black neighborhoods that includes prominent disclaimers stating "no criminal records!" and "good credit only!," while targeting an otherwise similar ad for the same property to White neighborhoods that does not contain those disclaimers. Such an ad could deter or discourage applicants on the basis of race. It may also violate the Act to target a mortgage ad to men that includes details about available interest rates, while an otherwise similar ad targeted to women instead contains the phrase "getting a mortgage is easy!." Recipients of the second ad would be given less information to make a home purchase decision because of their gender.

Advertisers and ad platforms should be alert to the risk of using categorization tools for housing-related ads and take steps to avoid discriminatory delivery through these features. Advertisers should not utilize categorization tools for housing-related ads that segment audiences on the basis of protected characteristics or close proxies, and ad platforms should consider disabling some or all categorization functions for housing-related ads. Notably, some platforms have already taken steps to limit audience categorization tools for housing-related ads to avoid enabling ad placements that may violate the Act.[31] These efforts often rely on a combination of machine learning and advertiser self-certification to flag ads as pertaining to content covered by the Act before audience selection options are offered to an advertiser placing an ad. Advertisers should be alert to this flagging function and accurately certify as to whether an ad being posted is a housing-related ad and so covered by the Act. Ad platforms should regularly audit the accuracy of advertiser certification and machine learning-based flagging tools, and take corrective action when necessary to ensure housing-related ads are being identified.

Ad platforms that offer categorization tools for housing-related ads should audit the categorization tools offered to advertisers and identify any resulting differences in ad delivery based on protected class to determine which categorization tools should not be offered for housing ads. Performing such audits can ensure that the ad platform provides the least discriminatory option among those that satisfy a legitimate need. It should be kept in mind that ad platforms may regularly generate new targeting categories, in part based on machine learning techniques. Newly derived targeting options may operate effectively as proxies for

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[29] Hous. Rts. Ctr. v. Sterling, 404 F. Supp. 2d 1179, 1190–92 (C.D. Cal. 2004) (discussing some of the mechanisms by which housing providers may unlawfully deter consumers).

[30] *Havens Realty Corp.*, 455 U.S. 363 (1982) (steering); *Gladstone Realtors*, 441 U.S. 91 (1979) (steering).

[31] *See e.g.*, *An Update on Our Ads Fairness Efforts*, FACEBOOK.COM, https://about.fb.com/news/2023/01/an-update-on-our-ads-fairness-efforts/ (last visited April 26, 2024); *Update to Personalized advertising policies: Housing, employment, and credit (October 2020)*, GOOGLE, https://support.google.com/adspolicy/answer/9917652?hl=en (last visited April 26, 2024).

protected classes, [32] so ad platforms should regularly test that any targeting options provided to advertisers for housing-related ads do not result in discriminatory delivery. [33]

While these practices can help minimize one form of risk, both advertisers and ad platforms should be aware that limiting explicit categorization options does not protect against potential discrimination in downstream delivery functions like those described in section IV below.

B. Custom and Mirror Audience Tools

A number of platforms have also offered features that deliver ads only to a specified "custom" audience or to an audience estimated to be similar to a custom audience in interests, behaviors, or likelihood to interact with an ad.

Custom audience tools deliver ads to an audience specified by an advertiser. These tools may function by prompting an advertiser to upload a list of identifying information such as phone numbers, emails, or names, and then delivering ads only to members of that audience. Advertisers may acquire these lists from existing customer databases, data brokers, or other sources. Custom audience tools may also function by identifying consumers who have taken a specific action tracked by an advertiser or ad platform, such as visiting a particular website, making a particular purchase, attending a particular event, or interacting with a particular person or organization.

Mirror audience tools are designed to find consumers who are similar to or mirror consumers on a customized list—also called a 'source audience.'[34] After prompting advertisers to upload data that identifies specific consumers, the mirroring tools use algorithmic techniques to find an expanded audience of potential consumers who are similar to the source audience, which may include consideration of demographics, income, location, behaviors, interests, habits, associations, or other traits—potentially leading to discriminatory outcomes. [35]

The use of custom and mirror audience tools for housing-related ads may violate the Act when the source audience is limited by protected characteristics, and when mirroring functions to introduce, replicate, or enhance such limitations. Custom and mirror audiences

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[32] *See* Till Speicher, Muhammad Ali, Giridhari Venkatadri, Filipe Nunes Ribeiro, George Arvanitakis, Fabricio Benevenuto, Krishna P. Gummadi, Patrick Loiseau, Alan Mislove, *Potential for Discrimination in Online Targeted Advertising,* 81 PROC. OF MACHINE LEARNING RES. 1, 9–10 (2018) (highlighting how a malicious advertiser could use facially neutral online engagement activity data to exclude gay users from an advertisement); Valerie Schneider, *Locked Out by Big Data: How Big Data, Algorithms and Machine Learning May Undermine Housing Justice*, 52 COLUM. HUM. RTS. L. REV. 251, 267 (2020) (explaining how algorithms easily find proxies when they are not allowed to consider protected class status); *see also* Alice Xiang, *Reconciling Legal and Technical Approaches to Algorithmic Bias*, 88 TENN. L. REV. 649, 667 (explaining that, even if a system is trained to ignore protected classes as a variable, the system can recreate those variables).

[33] Valerie Schneider, *Locked Out by Big Data: How Big Data, Algorithms and Machine Learning May Undermine Housing Justice*, 52 COLUM. HUM. RTS. L. REV. 251, 299 (2020).

[34] *See* Piotr Spaiezynski, Avijit Ghosh, Levi Kaplan, Aaron Rieke & Alan Mislove, *Algorithms that "Don't See Color": Measuring Biases in Lookalike and Special Ad Audiences*, PROCEEDINGS OF THE AAAI/ACM CONFERENCE ON AI, ETHICS, AND SOCIETY 609 (2022), https://doi.org/10.1145/3514094.3534135.

[35] *Id.* at 610.

may be used to effectuate discriminatory intent, such as if a perpetrator of a housing scam uploads a list of consumers known to have limited English proficiency in order to target an ad for the scam, and the ad platform mirrors that list. But custom and mirror audience tools may also drive discriminatory delivery of housing-related ads even in the absence of discriminatory intent. For example, when placing an ad for a home, a real-estate agent may upload a custom audience from attendees at a recent open house held for a nearby home. If all the attendees at the open house were White, the new home ad will be eligible to be delivered only to White consumers. Using mirroring functions with this audience may replicate and expand biases in the source audience, resulting in delivery of the ad to people who did not attend the open house but who may also all be White (because of similarities identified by the algorithm based on the millions of data points described above covering interest, activities, and associations).

As another example, in order to attract new tenants, a property management company may post an ad and provide a source list of existing tenants, who are mostly White and childless, to an ad platform. The ad platform's mirroring function may generate an expanded audience of other White and childless people based on their shared online behavior. This would deny information about this housing opportunity based on the protected class characteristics of the source list, even though there would be high demand from other members of the community if they knew about the housing opportunity.

Advertisers and ad platforms should be alert to the risk posed by utilization of custom and mirror audience tools for housing-related ads and take steps to avoid discriminatory delivery through these features. Ad platforms should consider disabling custom and mirror audience functions altogether for housing-related ads.[36] When offering those features, ad platforms should present advertisers with clear guidance and prominent disclaimers about the appropriate use of custom and mirror audience tools for housing-related ads. Advertisers and ad platforms should audit source lists to ensure they are not unjustifiably limited on the basis of protected characteristics. Advertisers and ad platforms should also audit ad delivery outcomes to ensure they are non-discriminatory.

Again, following these best practices can be helpful but, as with categorization tools, limiting discrimination in source audiences and mirroring functions does not protect against potential discrimination in the downstream ad delivery functions described below.

IV.   **Algorithmic Delivery Functions**

In addition to eligible audience selection tools—such as the categorization, custom, and mirror audience tools described above—ad platforms may use machine learning and other forms of AI to decide which ads are actually delivered to which consumers, and at what location, time, and price. As there is limited space in which to place ads for any given

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[36] *See e.g.*, Settlement Agreement at 6, United States v. Meta Platforms, Inc., No. 1:22-cv-05187 (S.D.N.Y. filed June 27, 2022).

consumer, ad platforms employ sophisticated technologies to conduct complex calculations to determine which ads, from among the ads the consumer is eligible to receive, to actually deliver to the consumer.

Ad platforms may use machine learning and other forms of AI to determine which consumers within the targeted audience are most likely to achieve the advertiser's objective for a specific ad, such as clicking on it. This estimate may be combined with other information—such as how much particular advertisers are willing to pay to place an ad and an estimate of the quality of the ad and other factors—to determine which ad to show a particular consumer at a given moment.[37] Algorithmic delivery functions may violate the Act when they direct housing-related ads to or away from consumers based on protected characteristics—potentially resulting in steering, pricing discrimination, or other discriminatory outcomes.[38] As with audience selection functions, algorithmic delivery functions may operate to exclude protected groups from an ad's audience or to concentrate delivery to a protected group—an outcome particularly problematic for predatory products.

Consider the following illustration of how a delivery system might steer ads away from protected class groups in a manner that may run afoul of the Act, even where an advertiser has no intent to create that result. A mortgage lender, conscious of the need to avoid redlining, may specifically want to advertise evenly across a metropolitan area. The mortgage lender may therefore select consumers who live in an entire metropolitan area as the target audience for its ad for a residential mortgage product. However, an ad delivery system may not deliver the ad to every consumer in the selected area. Instead, relying on the mechanisms described above, the system may deliver the ad to a subset of consumers it determines most likely to engage with the ad. Thus, notwithstanding the mortgage lender's expressed intent to display the ad to consumers throughout the metropolitan area, the ad delivery system may actually deliver the ad only to consumers who live in wealthier and Whiter neighborhoods of the metropolitan area, because the system has predicted those consumers are most likely to engage with the ad based on factors such as their income or profession, past interactions with lending ads, or home purchase history of friends, family, and neighbors.

Similarly, if the same mortgage lender seeks to run several ads throughout the metropolitan area with images of various and diverse human models—*e.g.*, an ad with a White family, an ad with a Hispanic family, an ad with a single woman, and ad with a person in a wheelchair—the delivery system may steer particular versions of the ad to particular consumers, in part, based on protected characteristics. For example, research has shown ad

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[37] These estimates are often utilized in an instant "auction," where the ability to present an ad to the consumer is up for auction. As a result of each auction, the ad with the highest estimated value is delivered to the consumer, with a price determined by the outcome of the auction and the advertiser's specified objective. On large platforms, there may be millions of ad auctions running at any moment.

[38] *See, e.g.*, *Clark*, 501 F.2d at 333-334 (7th Cir. 1974) (pricing); *Havens Realty Corp.*, 455 U.S. 363 (1982) (steering); *Gladstone Realtors*, 441 U.S. 91 (1979) (steering).

delivery systems may deliver an ad with an image of a White family more often to White consumers and an ad with an image of a Black family more often to Black consumers in part because of people's tendency to click on them.[39] Research has also indicated ad delivery systems function likewise along lines of other protected classes such as gender.[40] Additional research has shown that the text content, the content of the destination link of the ad, and image content (beyond images of people) may similarly influence the outcomes. [41] Advertisers and ad platforms should be alert to the potential operation and consequences of this steering for housing-related ads.

Relatedly, systems that incorporate pricing may discriminate by charging advertisers higher amounts to show ads on the basis of protected characteristics. Research shows, for example, it often costs more to advertise to women than men (because of prior purchasing or ad engagement histories).[42] Ad platforms may react to such higher prices by showing the ad only to consumers the platform is charging less to deliver ads to. For example, advertisers who want to pay less per ad view may end up inadvertently advertising only to men. Differential pricing may have additional implications, like effectively charging advertisers more to show ads to consumers on the basis of a protected characteristic.[43]

Finally, discriminatory delivery on the basis of protected characteristics may occur because of differences in the level of confidence a delivery system has about its predictions for consumers—which in turn can be based on disparities in the number and type of past interactions, as well as disparities in data the system was trained on.[44] If an algorithm has greater confidence in its predictions about White consumers relative to housing ads, that may cause it to deliver certain ads much more frequently to White consumers.[45]

Advertisers and ad platforms should be alert to the risk of utilization of ad delivery technologies and consider the recommendations below to reduce the risk of violating the Act.

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[39] Kaplan et al., *Measurement and Analysis* at 196.

[40] *See generally id.* at 195.

[41] *See e.g.,* Muhammad Ali, Piotr Sapienzynski, Miranda Bogen, Aleksandra Korolova, Alan Mislove, Aaron Rieke, *Discrimination through Optimization: How Facebook's Ad Delivery Can Lead to Bias*, 3 PROC. OF ACM ON HUMAN-COMPUTER INTERACTION 199 (2019), https://www.khoury.northeastern.edu/~amislove/publications/FacebookDelivery-CSCW.pdf.

[42] *Men are Cheap: Efficient Gender Targeting with Facebook Ads*, RESOLUTION MEDIA & KENSHOO SOC., (2012), https://skai.io/wp-content/uploads/2013/02/Social-Media-Insights-from-Resolution-Media-and-Kenshoo-Social-Part-3-Men-Are-Cheap.pdf; Dina Fine Maron, *Science Career Ads Are Disproportionately Seen by Men*, SCI. AM. (July 25, 2018), https://www.scientificamerican.com/article/science-career-ads-are-disproportionately-seen-by-men/.

[43] *See e.g.*, Anja Lambrecht & Catherine Tucker, *Algorithm-Based Advertising: Unintended Effects and the Tricky Business of Mitigating Adverse Outcomes*¸13 NIM MKT. INTELLIGENCE REV. 24, 27 (2021), https://www.nim.org/fileadmin/PUBLIC/12_NIM_MIR_Issues/MIR_Die_dunklen_Seiten_des_digitalen_Marketings/MIR_Die_dunklen_Seiten_des_digitalen_Marketings_EN/lambrecht_tucker_vol_13_no_1_eng.pdf.

[44] Anja Lambrecht, Catherine Tucker, Apparent Algorithmic Discrimination and Real-Time Algorithmic Learning in Digital Search Advertising 1, 26-28 (Mar. 29, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3570076.

[45] *See generally id.*; *see also* Catherine Tucker, *Algorithmic Exclusion: the Fragility of Algorithms to Sparse and Missing Data*, (Brookings Ctr. for Regs. & Mkts., Working Paper), https://www.brookings.edu/wp-content/uploads/2023/02/Algorithmic-exclusion-FINAL.pdf.

V. Conclusion and Recommendations

The ad targeting and delivery functions described above may violate the Act when they unlawfully deny consumers information about housing opportunities based on the consumers' protected characteristics. They may also violate the Act when used to target vulnerable consumers for predatory products or services on the basis of a protected characeristic, display content that could discourage or deter potential consumers on the basis of a proteced characteristic, steer home-seekers to particular neighborhoods, or offer different terms and conditions on the basis of a protected characteristic—among other discriminatory outcomes Advertisers and platforms should be alert to the risks of deploying targeted advertising tools for ads covered by the Act.

Advertisers and platforms should consider the following potential recommendations to reduce the risk of violating the Act.

Advertisers should:

- Utilize ad platforms that are taking steps to manage the risk of discriminatory delivery of housing-related ads through audience selection tools and algorithmic functions. Before using an ad platform, advertisers should ensure that they obtain necessary information and disclosures from the ad platform regarding how the platform mitigates these risks, such as through the steps below.

- Follow ad platform instructions to ensure that advertisements related to housing are identified as such to the ad platform, enabling the appropriate treatment.

- Carefully consider the source, and analyze the composition, of audience datasets used for custom and mirror audience tools for housing-related ads to mitigate risk of generating discriminatory target audiences, and make considered use of any tools provided by the ad platform for evaluating the projected demographics of a targeted audience.

- Monitor outcomes of advertising campaigns for housing-related ads, to the extent possible, to identify and mitigate discriminatory outcomes.

Ad platforms should:

- Ensure that housing-related ads are run in a separate process and specialized interface designed to avoid discrimination in audience selection and ad delivery.

- Avoid providing targeting options for housing-related advertisements that directly describe or relate to FHA-protected characteristics, or that are effectively proxies for FHA-protected characteristics, either alone or in combination.

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- Conduct regular end-to-end testing of advertising systems to ensure that any discriminatory outcomes are detected, such as by running pairs of ads for equivalent housing opportunities at the same time and comparing the demographics of the delivery audience.

- Proactively identify and adopt less discriminatory alternatives for AI models and algorithmic systems, including by assessing data used to train AI models and verifying that the technologies measure lawful attributes that predict valid outcomes.

- Ensure that algorithms are similarly predictive across protected class groups and make adjustments to correct for any disparities in predictiveness or direct the algorithm to develop additional information that will enhance predictiveness for certain groups.

- Ensure that ad delivery systems are not resulting in differential charges on the basis of protected characteristic, or charging more to advertisers to deliver ads to a non-discriminatory audience.

- Document, retain, or publicly release in-depth information about ad targeting functions and internal auditing.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Office of Fair Housing and Equal Opportunity

Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing

I.   Introduction

This guidance from HUD's Office of Fair Housing and Equal Opportunity explains how the Fair Housing Act protects certain rights of applicants for rental housing.[1] It discusses how housing providers and companies that offer tenant screening services can screen applicants for rental housing in a nondiscriminatory way and recommends best practices for complying with the Fair Housing Act. This guidance may also help applicants understand their rights and recognize when they might have been denied housing unlawfully.

Housing providers have a legitimate interest in selecting tenants who will pay their rent and otherwise comply with lawful requirements of their lease. However, some tenant screening practices do not in fact serve these goals. Tenant screening based on imprecise or overbroad criteria may unjustifiably exclude people from housing opportunities in discriminatory ways.

These issues have been magnified in recent years by the increasing reliance by housing providers on tenant screening companies to drive tenant selection decisions. An increasing number of tenant screening companies claim that they use advanced technologies, such as machine learning and other forms of artificial intelligence ("AI"). These technologies can increase these companies' capacity to access and analyze information about applicants that has not been widely used for rental decisions until recently but may have little bearing on whether someone will comply with their lease. These technologies can also lead to a less transparent process by obscuring the precise reasons for a denial from the housing provider and applicant.

The Fair Housing Act applies to housing decisions regardless of what technology is used. Both housing providers and tenant screening companies have a responsibility to avoid using these technologies in a discriminatory manner.

This guidance first provides background on tenant screening companies. It then

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[1] Additional civil rights laws apply to recipients of Federal financial assistance, such as Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). Although those laws are not directly addressed by this guidance, similar considerations apply under those authorities as under the Fair Housing Act. In addition, some tenant screening practices are governed by other Federal laws, such as the Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x, the obligations under which are not covered by this guidance but are addressed in guidance from other agencies. *See, e.g., Credit reporting requirements (FCRA) Resources to help industry understand, implement, and comply with the Fair Credit Reporting Act and Regulation V*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/compliance/compliance-resources/other-applicable-requirements/fair-credit-reporting-act/ (last visited April 26, 2024); *What Tenant Background Screening Companies Need to Know About the Fair Credit Reporting Act,* FED. TRADE COMM'N (Oct. 2016), https://www.ftc.gov/business-guidance/resources/what-tenant-background-screening-companies-need-know-about-fair-credit-reporting-act; *Using Consumer Reports: What Landlords Need to Know*, FED. TRADE COMM'N (July 2023), https://www.ftc.gov/business-guidance/resources/using-consumer-reports-what-landlords-need-know.

explains how the Fair Housing Act applies to both housing providers and tenant screening companies, describes common fair housing issues, and suggests how to avoid discriminatory screenings. This guidance covers screening practices with varying levels of human involvement and automation, including machine learning and other forms of AI.

II.   Background

A.   Tenant Screening Companies

Hundreds of companies offer tenant screening services in an industry that earns about one billion dollars per year.[2] Tenant screening companies obtain and analyze information about applicants from many sources and then generate a report about the person being screened, often including a recommendation for whether to accept the applicant. Housing providers then use these reports to determine which applicants to accept, deny, or accept with an additional fee or some other condition. Some housing providers also use these reports to determine whether to decline to renew the leases of any existing tenants (e.g., when a new owner or management company takes over a property).[3]

Tenant screening companies often market their services as a necessary, efficient, and effective tool to screen out problem tenants.[4] In their marketing materials, tenant screening companies often advise housing providers to screen for credit, eviction, and criminal records, along with other items in applicants' backgrounds that the companies claim cannot be assessed effectively without access to the software and data sources the screening company can provide.[5] Some tenant screening companies also advertise that automated screenings are less likely to be discriminatory and that their services can help housing providers comply with the law.[6]

B.   Tenant Screening Reports

Tenant screening reports vary in features, content, and price. Many companies offer basic screening reports that include information from credit reports and court records.[7] These court records tend to include eviction records regardless of the case disposition, as well as a broad swath of criminal records (e.g., administrative citations, bench warrants, and traffic tickets, along with misdemeanors and felonies). Some companies also offer screening reports with additional details, such as medical debt, foreclosures, student loans, and even the number

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[2] CONSUMER FIN. PROT. BUREAU, TENANT BACKGROUND CHECKS MARKET 10 (2022) [hereinafter, CFPB TENANT BACKGROUND CHECKS MARKET], https://files.consumerfinance.gov/f/documents/cfpb_tenant-background-checks-market_report_2022-11.pdf.

[3] *See, e.g.,* Charge of Discrimination ¶¶ 14–16, Sec'y of Dep't of Hous. & Urb. Dev. *ex rel.* Loveless v. Wesley Apt. Homes, LLC, No. 17-AF-0046-FH-004 (H.U.D. O.H.A. filed Jan. 18, 2017).

[4] CFPB TENANT BACKGROUND CHECKS MARKET at 13.

[5] *Id.* at 11.

[6] *See, e.g.,* Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC, 478 F. Supp. 3d 259, 275 (D. Conn. 2020).

[7] *Tech, Bias, and Housing Initiative: Tenant Screening*, TECHEQUITY COLLABORATIVE (Feb. 23, 2022), https://techequitycollaborative.org/2022/02/23/tech-bias-and-housing-initiative-tenant-screening/.

of phone numbers an applicant has had.[8] Some reports include a recommendation to accept or deny the applicant or provide a numerical score or grade. Some reports detail the records found, while others simply state if the applicant "passed" or "failed" in various areas.[9] Sample tenant screening reports are appended to the end of this guidance.

Generally, automated software is used to generate these screening reports, and companies tend not to disclose how this software works, including the extent to which it uses advanced technologies, such as AI. Companies typically input a prospective tenant's self-disclosed personal information into a computer program that then matches this information to records in numerous data sources. Companies utilize public databases of records and may also purchase additional datasets from court systems or data aggregators.[10] Some of these datasets are fixed at the time they are purchased, meaning that screening reports will not reflect updates made afterwards to the underlying records.[11]

The level of involvement by housing providers in setting the criteria and standards used for screening reports varies. The specific criteria that are part of the screening process (e.g., credit score) and the specific standards set for a positive recommendation (e.g., over 700) may be set by the housing provider, the tenant screening company, or both, depending on the company and services offered. Tenant screening companies decide whether to have default settings and control the range of options they make available to housing providers.

Tenant screening companies have increasingly begun advertising that they rely on advanced technologies, including machine learning and other forms of AI.[12] However, companies tend to disclose few details about which specific functions these technologies perform and what safeguards are in place. Some systems might rely on technology simply to gather and synthesize data from a variety of sources.[13] For example, these systems could comb through thousands of court records and report that a prospective tenant has three misdemeanors, leaving it to an employee of the screening company or the housing provider to set the standard for whether that is a reason to reject the applicant. Other systems might go a step further, by also relying on technology to determine which criteria and standards are

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[8] Erin Smith & Heather Vogell, *How Your Shadow Credit Score Could Decide Whether You Get an Apartment*, PROPUBLICA (Mar. 29, 2022, 6:00 AM), https://www.propublica.org/article/how-your-shadow-credit-score-could-decide-whether-you-get-an-apartment.

[9] Lauren Kirchner & Matthew Goldstein, *Access Denied: Faulty Automated Background Checks Freeze Out Renters*, MARKUP (May 28, 2020, 5:00 AM), https://themarkup.org/locked-out/2020/05/28/access-denied-faulty-automated-background-checks-freeze-out-renters; *see also Tenant Screening. Why It's Important and How We Do It.*, WEICHERT, REALTORS – LILAC PROPS., https://www.weichertlilac.com/tenant-screening-why-its-important-and-how-we-do-it/ (last visited Apr. 22, 2024).

[10] CFPB TENANT BACKGROUND CHECKS MARKET at 19.

[11] *Id.* (citing NAT'L CONSUMER L. CTR., BROKEN RECORDS REDUX: HOW ERRORS BY CRIMINAL BACKGROUND CHECK COMPANIES CONTINUE TO HARM CONSUMERS SEEKING JOBS AND HOUSING 17 (2019), https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf). Under the Fair Credit Reporting Act, tenant screening companies must have procedures in place to include any existing disposition information for court filings. *See* Advisory Opinion, Fair Credit Reporting; Background Screening, 89 Fed. Reg. 4171, 4172 (Jan. 23, 2024).

[12] CFPB TENANT BACKGROUND CHECKS MARKET at 11–13.

[13] Valerie Schneider, *Locked Out by Big Data: How Big Data, Algorithms and Machine Learning May Undermine Housing Justice*, 52 COLUM. HUM. RTS. L. REV. 251, 267 (2020) [hereinafter, *Locked Out by Big Data*].

relevant.[14] For example, a model could be given information about a group of people, some of whom were evicted and some of whom were not, and be directed to "learn" which variables correlate with whether an individual was evicted. The model would then use those variables as criteria for screening prospective applicants going forward.[15]

III.   Legal Responsibilities Under the Fair Housing Act

The Fair Housing Act ("Act") prohibits discrimination in the sale, rental, and financing of dwellings and in other housing-related services because of race, color, religion, sex (including sexual orientation and gender identity), national origin, disability or familial status (children under eighteen being present, seeking legal custody of minor children, or pregnancy).[16] The Act prohibits intentionally discriminatory practices, as well as those with an unjustified discriminatory effect.[17]

"By drafting the Act in the passive voice, Congress 'bann[ed] an outcome while not saying who the actor is.'"[18] Thus, any entity that "play[s] a substantial role" in a housing decision can be liable under the Fair Housing Act, even if that entity or person is not the ultimate or sole decisionmaker.[19] This includes those with input into what variables are considered or what standards should be used in making a housing decision.[20]

A.   Liability of Housing Providers

Under principles of direct liability, housing providers are responsible for ensuring their rental decisions comply with the Fair Housing Act even if they have largely outsourced the task of screening applicants to a tenant screening company.[21] The screening company may be responsible too, but housing providers retain authority over screening practices and decisions at their properties.

In addition, under principles of vicarious liability, a principal is liable for the actions of

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[14] CHI CHI WU, ARIEL NELSON, APRIL KUEHNHOFF & CAROLINE COHN, NAT'L CONSUMER L. CTR., DIGITAL DENIALS: HOW ABUSE, BIAS, AND LACK OF TRANSPARENCY IN TENANT SCREENING HARM RENTERS 8 (2023) [hereinafter, NAT'L CONSUMER L. CTR. DIGITAL DENIALS], https://www.nclc.org/wp-content/uploads/2023/09/202309_Report_Digital-Denials.pdf.

[15] See, e.g., Locked Out by Big Data, at 275–278.

[16] 42 U.S.C. §§ 3601–19.

[17] See 24 C.F.R. § 100.500; Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 540 (2015).

[18] Conn. Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC, 369 F. Supp. 3d 362, 370 (D. Conn. 2019) (quoting NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 298 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993)).

[19] Commonwealth v. Priority Home Sols., LLC, CL20000688-00, at 6 (Va. Cir. Ct. Dec. 6, 2021); Sabal Palm Condos. of Pine Ridge Ass'n, Inc. v. Fischer, 6 F. Supp. 3d 1272, 1293 (S.D. Fla. 2014).

[20] Louis v. SafeRent Sols., LLC, Civ. No. 22-CV-10800-AK, 2023 WL 4766192, at *8–*10 (D. Mass. July 26, 2023); Conn. Fair Hous. Ctr., 369 F. Supp. 3d at 374–76; see also Conn. Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC, No. 3:18-cv-705-VLB, 2023 WL 4669482, at *19 (D. Conn. July 20, 2023), appeal docketed No. 23-1166 (2d Cir. Aug. 14, 2023) (appealed on other grounds).

[21] See 24 C.F.R. 100.7(a).

their agent done within the scope of the agent's authority.[22] A principal can be liable if the agency relationship is actual or if it is apparent.[23] "A person is vicariously liable for a discriminatory housing practice by the person's agent or employee, regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice."[24] If a tenant screening company is an actual or apparent agent of a housing provider, any discriminatory action taken by the company can also be attributed to the housing provider.

B.   Liability of Tenant Screening Companies

Tenant screening companies can be held liable for discriminatory decisions caused by their practices.[25] The Fair Housing Act provides exceptions from liability for a notably small selection of entities, and otherwise "focuses on prohibited acts," not specific actors.[26] The Act broadly permits entities to "be held liable when they have personally committed or contributed to a Fair Housing Act violation,"[27] in other words if their "conduct . . . results in a discriminatory housing practice."[28] This view of the Act's coverage is consistent with decades of judicial precedent interpreting the Act to apply to a wide range of persons and entities that provide services in connection with housing but do not directly provide housing themselves or make final housing decisions.[29] In fact, two courts have adopted this argument to find that in certain circumstances tenant screening companies can be liable under the Act.[30]

Thus, a tenant screening company can be held liable under the Act for facilitating a discriminatory decision, even if the housing provider makes the ultimate decision as a formal

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[22] Meyer v. Holley, 537 U.S. 280, 282, 285–86 (2003); City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc., 982 F.2d 1086, 1096–97 (7th Cir. 1992). A principal is also vicariously liable for the actions of their agents taken outside the scope of their relationship when the agent is aided in the commission of such acts by the existence of the agency relationship. *See* Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,072 (Sept. 14, 2016) (collecting cases).

[23] *See, e.g.*, Pinchback v Armistead Homes Corp., 689 F. Supp. 541, 550-51 (D. Md. 1988) *judgment aff'd in part, vacated in part on other grounds*, 907 F.2d 1447 (4th Cir. 1990); United States v. Balistrieri, 981 F.2d 916, 930 (7th Cir. 1992).

[24] 24 C.F.R § 100.7(b); *see also Meyer*, 537 U.S. at 282, 285-86; *Matchmaker Real Estate Sales Ctr.*, 982 F.2d at 1096.

[25] *See* FED. TRADE COMM'N, CONSUMER FIN. PROT. BUREAU, DEP'T OF HOUS. & URB. DEV. & DEP'T OF JUSTICE, TENANT BACKGROUND CHECK AND YOUR RIGHTS 4 (2024), https://www.hud.gov/sites/dfiles/FHEO/documents/HUD_Tenant_Background_Checks_and_Your_Rights.pdf ("The Fair Housing Act makes it illegal for tenant background check companies . . . to discriminate against you."); DEP'T OF HOUS. & URB. DEV. OFF. OF FAIR HOUS. & EQUAL OPPORTUNITY, IMPLEMENTATION OF THE OFFICE OF GENERAL COUNSEL'S GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 3 (2022) [hereinafter, HUD 2022 Criminal Records Guidance], https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf (noting applicability of Fair Housing Act guidance to third-party screening companies).

[26] *Meyer*, 537 U.S. at 285.

[27] Sabal Palm Condos. of Pine Island Ridge Ass'n, Inc. v. Fischer, 6 F. Supp. 3d 1272, 1293 (S.D. Fla. 2014).

[28] 24 C.F.R. § 100.7(a)(1)(i).

[29] *See, e.g.*, Swanson v. Citibank, N.A., 614 F.3d 400, 406 (7th Cir. 2010) (applying the Act to lenders); Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1166–1175 (9th Cir. 2008) (en banc) (housing search website); NAACP v. Am. Fam. Mut. Ins. Co., 978 F.2d 287, 290 (7th Cir. 1992) (insurers); United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974) (state and municipal bodies); Balt. Neighborhoods, Inc. v. Rommel Builders, Inc., 3 F. Supp. 2d 661, 665 (D. Md. 1998) (developers); United States v. Am. Inst. of Real Estate Appraisers, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977) (appraisers); Rivera v. Mora Dev. Corp., 624 F. Supp. 3d 80, 88–92 (D.P.R. 2022) (condominium associations).

[30] Louis v. SafeRent Sols., LLC, Civ. No. 22-CV-10800-AK, 2023 WL 4766192, at *8–*10 (D. Mass. July 26, 2023); Conn. Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC, 369 F. Supp. 3d 362 (D. Conn. 2019). *But see* Conn. Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC, No. 3:18-cv-705-VLB, 2023 WL 4669482, at *20 (D. Conn. July 20, 2023), *appeal docketed* No. 23-1166 (2d Cir. Aug. 14, 2023) (finding that the plaintiff had not proven the tenant screening company made housing unavailable in this instance).

matter.[31] The screening report does not need to direct the housing provider explicitly to accept or deny the applicant to have such influence; as a practical matter, it often is sufficient that the report provides a score, a recommendation, or any other sort of explicit or implicit opinion as to the relevance of the information gathered to the disposition of the application. That is particularly true where the screening company contributed to the decision of what criteria to include, what standards to set for those criteria, or how to weigh them.[32] Tenant screening companies also bear responsibility for policies and practices related to the accuracy or completeness of their records that cause discriminatory results.[33] In general, disclaimers of liability cannot shield a party from potential liability under the Act.[34]

IV. Proving Discrimination

A. Discriminatory Intent

Intentionally discriminatory tenant screening policies and practices violate the Fair Housing Act. Direct evidence of discriminatory intent (e.g., statements) may exist, or intent can be proven by circumstantial evidence using one of several well-established frameworks.[35]

A housing provider or a tenant screening company can violate the Fair Housing Act by using a protected characteristic – or a proxy for a protected characteristic – as a screening criterion.[36] This is true even if the decision for how to screen applicants is made in whole or in part by an automated system, including a system using machine learning or another form of AI.

Intentional discrimination also includes screening applicants in a particular way in order to exclude members of a protected class or discourage them from applying. For example, if a housing provider adopts an overbroad criminal records screening policy as a way of preventing "too many" Black people from living at the property, that constitutes intentional discrimination even if some Black applicants are admitted and some White applicants are denied.[37]

Applying screening criteria inconsistently across protected classes is another form of intentional discrimination. For example, intentional discrimination includes making exceptions to a purported substantive requirement for White applicants but not similarly situated Black

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[31] *See SafeRent*, 2023 WL 4766192, at *8–*10; Vargas v. Facebook, Inc., No. 21-16499, 2023 WL 6784359, at *1–*3 (9th Cir. Oct. 13, 2023); *Roommates.com, LLC*, 666 F.3d at 1219.

[32] *Conn. Fair Hous. Ctr.*, 2023 WL 4669482, at *2–*8, *19–*20.

[33] *See* HUD 2022 Criminal Records Guidance at 3; *see also* 15 U.S.C. § 1681e.

[34] *See* Smith v. Hillsdale Village, Civ. No. 17-0883(KM), 2018 WL 588923, at *8 (D.N.J. Jan. 26, 2018).

[35] *See, e.g.,* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–68 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1973); *see also*, Budnick v. Town of Carefree, 518 F.3d 1109, 1114 (9th Cir. 2008) (discriminatory intent may be proven by "simply produc[ing] direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the challenged decision.").

[36] A proxy is a variable that is highly correlated with a protected class, as for example ZIP Code can be highly correlated with race.

[37] *See* Pac. Shores Props., LLC v. City of Newport Beach, 730 F.3d 1142, 1161 (9th Cir. 2013) ("[W]illingness to discriminate against both minorities *and* White citizens . . . d[oes] not cleanse [a party] of any discriminatory intent that it may have harbored.").

applicants.[38] Providing more help to applicants with negative records from some groups than to those from others can also be intentional discrimination (e.g., only advising White applicants to pay down their debt and reapply).[39]

B.   Unjustified Discriminatory Effect

Even when there is no intent to discriminate, a policy or practice violates the Fair Housing Act if it has a discriminatory effect and (i) the policy or practice is not necessary to achieve a substantial, legitimate, non-discriminatory interest or (ii) the interest can be served by a less discriminatory alternative.[40] Courts have recognized discriminatory effects claims related to tenant screening practices.[41] Discriminatory effects liability is assessed using a three-step burden-shifting framework and requires a fact-specific analysis.[42]

In the first step of the analysis, a plaintiff (or HUD in an administrative enforcement action[43]) has the burden to prove that a screening policy or practice has a discriminatory effect. In other words, they must show that (i) it causes or predictably will cause a disparate impact based on one or more of the characteristics protected by the Fair Housing Act, or (ii) it creates, perpetuates, increases, or reinforces segregation.[44] National, state, or local statistics can be used to show that the policy or practice causes or predictably will cause a discriminatory effect.[45] Certain screening practices will likely have a disparate impact based on race, national origin, sex, or disability because of systemic inequalities in areas such as credit, housing, and criminal justice (as discussed in Section V.C below). Screening practices perpetuate segregation if they cause Black or Brown applicants to be excluded or displaced from an area that is, or is becoming, predominantly White.

If a plaintiff or HUD proves the tenant screening policy or practice has a discriminatory effect, the burden shifts to the defendant (or respondent in an administrative action) to prove

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[38] *See, e.g.*, Watson v. Pathway Fin.*, 702 F. Supp. 186, 188–89 (N.D. Ill. 1988).

[39] *See, e.g.*, United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037, 1041, 1045 (N.D. Ohio 1998); Hobson v. George Humphreys, Inc.*, 563 F. Supp. 344 (W.D. Tenn. 1982).

[40] *See* 24 C.F.R. § 100.500; *see also* Tex. Dep't of Hous. & Cmty. Aff. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 541 (2015) (citing HUD's 2013 rule). HUD's 2023 Discriminatory Effects Rule formally restores, with minor unrelated modifications, HUD's 2013 Discriminatory Effects Rule. An intervening version of the Rule published in 2020 was enjoined before it took effect, so the framework established by the 2013 Rule has been in effect without interruption since it was issued. *See* Mass. Fair Hous. Ctr. v. Dep't of Hous. & Urb. Dev., 496 F. Supp. 3d 600 (D. Mass. 2020).

[41] *See, e.g.*, Louis v. SafeRent Sol.s., LLC, Civ. No. 22-CV-10800-AK, 2023 WL 4766192, at *8–*10 (D. Mass. July 26, 2023); La. Fair Hous. Action Ctr. v. Azalea Garden Props., LLC, Civ. No. 22-74, 2022 WL 1262642, at *6 (E.D. La. Apr. 28, 2022), *rev'd on other grounds*, 82 F.4th 345 (5th Cir. 2023); Jones v. City of Faribault, Civ. No. 18-1643 (JRT/HB), 2021 WL 1192466, at *19 (D. Minn. Feb. 18, 2021); Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC, 478 F. Supp. 3d 259, 291–93 (D. Conn. 2020).

[42] 24 C.F.R. § 100.500. While HUD's discriminatory effects rule is largely consistent with that of the Federal Courts of Appeals, some circuits may analyze discriminatory effects claims under a different framework.

[43] Anyone who has experienced discrimination can file a complaint with HUD at no cost. HUD's administrative process for these complaints is explained on HUD's website*. See also* 24 C.F.R. pts. 103, 180.

[44] 24 C.F.R. § 100.500(a), (c)(1). The seven characteristics protected by the Fair Housing Act are race, color, national origin, religion, sex (including sexual orientation and gender identity) disability, and familial status.

[45] *See, e.g.*, DEP'T OF HOUS. & URB. DEV. OFF. OF GEN. 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 (2016) [hereinafter, HUD 2016 Criminal Records Guidance], https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

that the policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.[46] This interest may not be hypothetical or speculative.[47] Only screening criteria and standards – including complex models – that are well-tailored to predict future behavior relevant to tenancy can be considered necessary to achieving a legitimate interest.

If a defendant or respondent successfully meets this burden, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another practice that has a less discriminatory effect.[48] If a screening policy is overbroad (i.e., it screens out unproblematic applicants), a more targeted screening policy could be a less discriminatory alternative.

V.   Requirements and Recommendations for Fair Housing Act Compliance

This section discusses best practices that can help housing providers and tenant screening companies comply with the Fair Housing Act. Some practices discussed in this section may be required by other Federal laws, such as the Fair Credit Reporting Act,[49] or by state or local laws. Screening practices prohibited by any applicable law will not be considered necessary to achieve a substantial, legitimate, nondiscriminatory interest under the Fair Housing Act.[50]

A.   The Relationship Between Housing Providers and Screening Companies

1.   The Role of Housing Providers

Housing providers should remember that they are responsible for avoiding discriminatory housing decisions, even when they use a tenant screening company to assist in the process. They should develop policies and practices to ensure that all denials reflect their own sound judgment.

Housing providers should adopt screening policies that are clear, detailed, and publicly available, and only use tenant screening services that will help them implement these policies.[51] Customizing the criteria, standards, and weights being used, rather than purchasing an "off the shelf" product, can help ensure screenings conform to stated policies.

When a housing provider receives a screening report with a denial recommendation, the housing provider should make an independent determination whether, under their screening policies, the information in the report is in fact disqualifying. If not, the housing provider should accept an applicant notwithstanding the denial recommendation and consider

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[46] See 24 C.F.R. § 100.500(c)(2); see also Inclusive Cmtys. Project, 576 U.S. at 541.
[47] 24 C.F.R. § 100.500(c)(2).
[48] 24 C.F.R. § 100.500(c)(3); accord Inclusive Cmtys. Project, 576 U.S. at 527.
[49] 15 U.S.C. §§ 1681–1681x; see generally Advisory Opinion, Fair Credit Reporting; Background Screening, 89 Fed. Reg. 4171 (Jan. 23, 2024).
[50] See Langolis v. Abington Hous. Auth., 234 F. Supp. 2d 33, 69 (D. Mass. 2002) ("If the justification is in tension with other laws, it is difficult to see how it can qualify as 'legitimate' in order to justify a measure with a racially disparate impact.").
[51] See HUD 2022 Criminal Records Guidance at 9–10.

contacting the screening company to adjust the grounds for denial recommendations going forward.

Regardless of whether the housing provider used a screening company or found the negative information themselves, applicants should be given the same opportunity to dispute the accuracy or relevance of any negative information.[52] Housing providers that use a screening company ultimately bear any responsibility they otherwise would have for ensuring applicants have a full opportunity to contest the accuracy or relevance of any potential ground for denial.[53] (This process is discussed further in Section V.B.5 below.)

In selecting a tenant screening company, housing providers should inquire into the ways in which the company ensures its screenings are accurate and nondiscriminatory.[54] Housing providers should select screening services that (a) offer customizability; (b) frequently update their data; (c) monitor for unjustified discriminatory effects; (d) report clear and specific reasons for denials; (e) allow individuals to correct inaccuracies; (f) publicly disclose key details about their screening systems; and (g) comply with all applicable Federal, state, and local laws.

2.   The Role of Tenant Screening Companies

As technology continues to evolve, all parties subject to the Fair Housing Act have an obligation to ensure that tenant screening models comply with the law. The more information a tenant screening company discloses, the easier it will be for housing providers to assess whether using a particular tenant screening service meets their needs and promotes compliance with their fair housing responsibilities. This information could include what, if any, advanced technologies the screening company uses, what functions these technologies perform, and what safeguards are in place; the sources from which the screening company draws records and how they ensure those records are complete and accurate; and how decisions are made about criteria, standards, and weights.

As a best practice, tenant screening companies should conduct civil rights monitoring – akin to that done routinely by mortgage lenders and others that rely on complex models – to ensure their models comply with the Act. This includes checking inputs for protected characteristics and their close proxies, as well as ensuring they are not being replicated by constellations of factors.[55] Even if specific protected characteristics (and their more obvious proxies) are removed from a model's inputs, machine learning and other forms of AI — without corrective adjustments — may compensate for their removal by altering the weights of the

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[52] *Id.* at 7.

[53] The dispute process provided by some screening companies might be more limited (i.e., designed to meet the minimum requirements of consumer protection laws) in which case the housing provider should engage with the applicant and consider all mitigating information themselves.

[54] *See* HUD 2022 Criminal Records Guidance at 9–10.

[55] In complex models, a very large number of factors, each of which may be weighted differently, can function as a proxy for a protected characteristic. *See* Alice Xiang, *Reconciling Legal and Technical Approaches to Algorithmic Bias*, 88 TENN. L. REV. 649, 667 (2021).

remaining factors, thereby recreating the same discriminatory outcomes.[56] Monitoring should also look at whether any datasets used are more inaccurate or incomplete for certain groups than others. It also includes evaluating the model's outputs to ensure the model is not having an unjustified discriminatory effect. Even complex models should be interpretable enough that adjustments can be made to fix any fair housing problems that are found.

As a general matter, tenant screening companies should serve to help implement, rather than effectively set, a housing provider's screening policies. To that end, screening companies should offer customizability, for example as to criteria, standards, and weights. Screening companies should not offer options likely to pose fair housing concerns (e.g., unlimited or lifetime lookback periods for criminal records). Screening companies should either not provide default standards (i.e., they instead should prompt housing providers to choose standards without any pre-selected) or they should set defaults to the options that are least exclusionary.

Denial recommendations or low "grades" should not be provided to housing providers in a conclusory fashion. Rather, screening reports should include all available relevant details about the basis for the determination (e.g., dates, locations, case numbers, and dispositions). Screening reports should also list all sources from which data about the applicant was drawn and state the standard that would have been needed for a positive result. These details should be in plain language, so a lay person can easily understand the reasons for the denial.[57]

Under the Fair Credit Reporting Act, tenant screening companies must provide a mechanism for individuals to dispute inaccuracies and have them corrected.[58] To promote compliance with the Fair Housing Act, this process should also enable applicants to dispute whether a record should be included in their file as a potential grounds for denial of tenancy even if the record is accurate (e.g., an eviction related to domestic violence). The screening company should send corrected reports, scores, and recommendations to the housing provider and applicant, and carry forward corrections to all future screenings the screening company does of that individual. This process should be relatively quick, so that housing providers do not have to choose between holding a unit open indefinitely and unjustifiably denying a particular applicant.

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[56] *Id.*

[57] Highly complex models – such as those that use machine learning or other forms of AI – can make the precise reasons for a denial difficult to discern and disclose. Additional considerations for such models are discussed in Section V.B.6 below. *See generally* CONSUMER FIN. PROT. BUREAU, CIRCULAR 2023-03, ADVERSE ACTION NOTIFICATION REQUIREMENTS AND THE PROPER USE OF THE CFPB'S SAMPLE FORMS PROVIDED IN REGULATION B 3 (2023), https://files.consumerfinance.gov/f/documents/cfpb_adverse_action_notice_circular_2023-09.pdf.

[58] The Fair Credit Reporting Act ("FCRA") requires tenant screening companies to investigate claims by screened applicants that records are inaccurate or incomplete. 15 U.S.C. § 1681i(a)(1)(A). The recommendations herein that go beyond what FCRA requires can help ensure compliance with the Fair Housing Act by preventing further erroneous denials that may disproportionately harm certain groups.

B.   Guiding Principles for Non-Discriminatory Screenings

The principles in this section can be used by housing providers – those that conduct screenings themselves and those that outsource the task – as well as by tenant screening companies to help comply with the Fair Housing Act.

1.   Choose Relevant Screening Criteria

Screening applicants only for information relevant to the likelihood that they will comply with their tenancy obligations can help ensure that screenings are fair and nondiscriminatory. If a screening policy disproportionately excludes applicants of a certain race or other protected class, conducting the screening in a more precise way may be a less discriminatory alternative.

Past actions unrelated to tenancy and past incidents unlikely to recur (e.g., eviction due to job loss) should not be the basis for denials. Screening criteria should be waived if they are not relevant for an applicant's individual circumstances, even if the criteria might be relevant in general (e.g., minimum income for an applicant whose rent will be paid by someone else).

Some records are more relevant than others, and the most relevant records should be prioritized (e.g., recent records versus older ones), including when programming complex models. Housing providers should avoid screening existing tenants of a property who have lived there without incident because their behavior at that property is more relevant than a records-based screening.

Records without a negative outcome are not relevant. For example, the record of an eviction proceeding has no relevance if the tenant prevailed. If a court record does not provide enough information to determine who prevailed, it should be disregarded unless additional information about the disposition is obtained.

Whether done manually or by an automated system, all types of relevant information should be considered. For example, less common sources of income (e.g., SSDI) or other financial resources (e.g., Housing Choice Vouchers, formerly known as Section 8 vouchers) should be considered when assessing an applicant's ability to afford the rent.

2.   Use Only Accurate Records

Ensuring records are accurate can help avoid discriminatory screenings. Certain types of inaccuracies are more likely to occur for members of some demographic groups than others. Even if the rates of inaccuracies within a dataset are the same across demographic groups, groups that are overrepresented in that dataset will be disproportionately affected by any problems the dataset has. Screenings that have a discriminatory effect may not be considered legally justified if they are based on records rife with inaccuracies or if a more accurate option is

available.

Datasets used for tenant screenings are often incomplete, missing key personal identifiers, or updated infrequently.[59] Automated systems might miscategorize records with missing or unclear information if they are not programed to account for those scenarios. For example, a court record might not clearly state whether the record is for a felony versus a misdemeanor or a criminal violation versus a civil violation.

Often records of people bearing the same or similar names are erroneously attributed to the wrong person, a problem that is more common for last names more prevalent among Hispanic, Asian, or Black individuals.[60] This can happen when records are used that list only partial information (e.g., an initial instead of a first name) or that lack corroborating details (e.g., a name without a date of birth). This can also happen when a housing provider or screener puts less specific information into a search than is available to them (e.g., inputting a state instead of a full address). Records should match multiple pieces of identifying information, and "wildcard" or "name-only" matching should not be used.[61]

3.   Follow the Applicable Screening Policy

Records outside the scope of a housing provider's stated screening policy should not be considered.[62] For example, misdemeanors or civil violations should not be considered under a policy of screening for felony convictions. This can happen, for example, when a housing provider does not check whether their screening company is using the standards in the housing provider's policy or when a screening company does not properly limit its screening to conform to the housing provider's policy.[63] It can also happen if records are inaccurately categorized, as described above.

Housing providers should not ask applicants about any criminal, credit, or housing history that falls outside the scope of their screening policies.[64] Housing providers who use automated screenings should consider not asking applicants *any* questions about their history (i.e., not even within the scope of their policies) because such questions can confuse or discourage applicants while not giving the housing provider any information beyond that which

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[59] Chi Chi Wu & Ariel Nelson, Nat'l Consumer Law Ctr., Mission Creep: A Primer on Use of Credit Reports & Scores for Non-Credit Purposes 7 (2022), https://www.nclc.org/wp-content/uploads/2022/08/Mission_Creep_rpt.pdf; *see also* Ariel Nelson, Nat'l Consumer Law Ctr., Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs & Housing 15-23 (2019), https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf.

[60] Advisory Opinion, Fair Credit Reporting: Name-Only Matching Procedures, 86 Fed. Reg. 62,468, 62,469–70, (Nov. 10, 2021).

[61] *See* CFPB Tenant Background Checks Market at 26–28; Advisory Opinion, Fair Credit Reporting: Name-Only Matching Procedures, 86 Fed. Reg. at 62,469–70.

[62] *See* Dep't of Hous. & Urb. Dev. Off. of Fair Hous. & Equal Opportunity, Guidance on Compliance with Title VI of the Civil Rights Act in Marketing and Application Processing at Subsidized Multifamily Properties 7 (2022) [hereinafter, FHEO Title VI Marketing Guidance], https://archives.hud.gov/news/2022/HUD-Title-VI-Guidance-Multifamily-Marketing-and-Application-Processing.pdf.

[63] *See id.*

[64] *See id.*

they will learn from the automated screening.

4.   Be Transparent with Applicants

Transparency helps ensure consistent, nondiscriminatory results by making sure everyone has clear, complete information.[65] Applicants need to know how they will be screened to decide whether to pay an application fee and take the time to fill out an application. This challenge is particularly acute for low-income applicants who cannot afford to pay multiple application fees, as well as for applicants with inflexible work or caretaking schedules since some housing providers only accept applications in-person during business hours.[66] Moreover, systematically giving applicants complete, detailed information ensures that some applicants are not more likely to pass the screening than others simply because they are better informed about how to navigate the process. Transparency is important throughout the application process so that applicants know beforehand how they will be screened and afterwards why they were denied.

Tenant screening policies should be in writing, made public, and readily available to potential applicants. Prior to applying, potential applicants should be given a copy of the screening policies or told where they can find them (e.g., the link to a website). Screening policies should contain enough detail for an applicant to tell whether they are likely to qualify (e.g., what records will be considered, what incidents will be disqualifying, and how far back the screening will look). Applicants should also be given information about how evidence of mitigating circumstances can be submitted and will be treated, how to request a reasonable accommodation for a disability,[67] and how to contest an inaccurate, incomplete, or irrelevant record. Publicizing this information can increase the number of qualified applicants by attracting those who might have assumed different standards apply. Transparency up front can also reduce the number of unqualified applicants, saving housing providers and applicants time and expense.

Denial letters should contain as much detail as possible as to all reasons for the denial, including the specific standard(s) that the applicant did not meet and how they fell short. For example, rather than saying "you were denied because of your credit score," the letter should say "you were denied because we require a credit score of XXX and you have a credit score of XXX according to XXX service." If an applicant fails multiple screening criteria, all of those criteria should be included in the denial letter. All records relied on should be attached, including any screening reports. Denial notifications should also instruct applicants how to

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[65]*See id.* at 5–6.

[66] Accepting applications at a broad range of times and through a variety of means can help ensure equal access to housing opportunities because overly restrictive application procedures can be discriminatory. FHEO TITLE VI MARKETING GUIDANCE at 5.

[67] The Fair Housing Act makes it unlawful for any person to refuse to make reasonable accommodations (i.e., a change, exception, or adjustment) to a rule, policy, practice, or service, when such accommodations may be necessary to afford individuals with disabilities equal opportunity to use and enjoy a dwelling, including public spaces and common use areas. 24 CFR § 100.204(a).

submit an appeal if a record is inaccurate, incomplete, or irrelevant; mitigating circumstance exists; or a reasonable accommodation for a disability is needed.

5. Allow Applicants to Challenge Negative Information

Applicants should be allowed the opportunity to challenge any potentially disqualifying information. The applicant should be sent any information reviewed (e.g., their screening report) along with the precise standards at issue. This information should be provided in a way that makes it easy for the applicant to understand why they were denied.

The applicant should then be given the opportunity to dispute the accuracy or completeness of any negative information, for example by demonstrating that a record belongs to another person with a similar name or omits a court decision in their favor. The applicant should also get the chance to show – even if a negative record is accurate – that they will comply with their tenancy obligations regardless. Applicants may do this by disputing the relevance of a standard to their particular circumstance (e.g., minimum income requirements for those with Housing Choice Vouchers). Applicants may also demonstrate that any negative behavior is unlikely to recur by providing evidence of mitigating circumstances (e.g., participation in a rehabilitation or financial literacy program, a change in education or employment status, or a positive reference from a social service provider or another person who knows the applicant).[68]

6. Design and Test Complex Models for Fair Housing Compliance

The Fair Housing Act applies broadly, including to housing decisions made using machine learning and other forms of AI. Screeners that use complex models should choose types that are more interpretable, especially when doing so does not meaningfully reduce accuracy or fairness.[69] Housing providers and tenant screening companies may find it difficult to be sure they are complying with the Act when the reasoning behind automated decisions is not transparent. If a highly complex model has a discriminatory effect, the model's lack of transparency could make it hard to prove that a legally sufficient justification exists for the criteria used for a denial decision. Evaluating the data used by a model, creating test data, and rigorously testing to validate the model can reveal whether it has disparate outcomes and what less discriminatory alternatives might exist.[70]

Complex models, such as those that use machine learning or other forms of AI, should

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[68] Individualized assessments must be conducted in a nondiscriminatory way, including by treating similar mitigating circumstances the same way for all similarly situated applicants. *See* HUD 2022 Criminal Records Guidance at 10.

[69] *See, e.g.*, CONSUMER FIN. PROT. BUREAU, CIRCULAR 2022-03, ADVERSE ACTION NOTIFICATION REQUIREMENTS IN CONNECTION WITH CREDIT DECISIONS BASED ON COMPLEX ALGORITHMS, 3 (2022), https://files.consumerfinance.gov/f/documents/cfpb_2022-03_circular_2022-05.pdf.

[70] *See generally* Emily Black, John Logan Koepke, Pauline T. Kim, Pauline, Solon Barocas & Mingwei Hsu, *Less Discriminatory Algorithms*, 113 GEO. L. J. (forthcoming 2024) (manuscript at 1) [hereinafter, *Less Discriminatory Algorithms*].

be programmed following best practices for nondiscriminatory model design and with attention to aspects especially likely to pose fair housing concerns. For example, in designing the purpose of a model (also known as question or problem formulation), adding levels of precision can help avoid unjustified discriminatory effects.[71]

Training the model on demographically representative data can help ensure that the model does not erroneously learn that certain protected classes should be screened out at higher rates.[72] Demographic representation is important both in datasets intended to represent "good" tenants and those intended to represent "bad" tenants. Problems of over- and under-representation can arise when models are trained on real-world data because certain data for specific demographic groups can be limited.[73] These problems can also arise because real-world datasets are influenced by historic and ongoing discrimination, so datasets need to be selected and processed in a way that ensures the model does not perpetuate those effects.[74] Problems of representation can be addressed by using statistical techniques to adjust real-world data, carefully constructing synthetic data, or by using other standard validation tools.[75] In addition, models should be trained on data that includes all relevant features (e.g., all types of income).[76] Ongoing monitoring for these issues is important to ensure that changes over time (e.g., demographic shifts) do not cause a dataset to become unrepresentative or incomplete.

Improving the predictiveness of a model can help ensure a model is achieving its purpose in a nondiscriminatory way. Careful consideration should be given to the variables a model uses, how they are weighted, and how they might interrelate to ensure the model has comparable levels of predictiveness and error rates across demographic groups. Models should be validated as having accurately and equitably predicted behaviors in the past and reassessed to ensure they continue to do so.[77] Models that are not, in fact, predictive of future tenant behavior do not further a housing provider's interest in avoiding renting to unproblematic tenants.

C.   Additional Considerations for Three Particular Types of Screenings

The following are particular considerations for housing providers and tenant screening companies when conducting three types of screenings particularly likely to pose fair housing concerns: credit history, eviction history, and criminal records. Because of the particular disparities discussed below, overbroad screenings in these areas, including screenings that fail

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[71] In some circumstances, programming models to assess data in a continuous, rather than binary, way may yield more precise and less discriminatory outcomes. *Less Discriminatory Algorithms* at 37, 41.

[72] *Less Discriminatory Algorithms* at 37–39.

[73] *See* Lerman, Jonas, *Big Data and its Exclusions*, 66 STAN. L. REV. ONLINE 55, 57–58 (2013).

[74] *See, e.g.*, *Less Discriminatory Algorithms* at 37–39.

[75] *See, e.g., id.* at 37–39.

[76] *Id.* at 39–40.

[77] *Id.* at 41.

to account for individual circumstances, are especially likely to have an unjustified discriminatory effect based on race, national origin, sex, disability, or another protected characteristic.

1. Credit History

Credit scores are calculations made based on a consumer's credit report designed to assess the relative risk of consumers defaulting on a loan (i.e., not the risk that a tenant will fail to pay rent).[78] To construct this score, national credit bureaus assemble information about a consumer's credit history for their credit file, place information in the consumer's credit report, and then use that information to calculate a numerical score.[79] The vast majority of housing providers and tenant screening companies run credit checks on applicants.[80] Some tenant screening companies go a step further, incorporating credit information into models that obscure how the information is used.[81]

Black and Brown persons are more likely to have inaccurate credit reports or have had experiences that resulted in low or no credit scores.[82] Residents of majority-Black areas are more than twice as likely to dispute items in their credit report as errors than residents of majority-White areas.[83] As of August 2021, Native American, Black, and Hispanic individuals had median FICO credit scores of 612, 627, and 667 respectively, while White individuals had a median credit score of 727.[84] In fact, more than half of White households have FICO credit scores above 700 compared to 21% of Black households.[85] Additionally, individuals with disabilities are more likely to report they have a "bad" or a "very bad" credit score than individuals without disabilities.[86]

Racial disparities also exist among those who are credit invisible (i.e., they have minimal

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[78] CFPB TENANT BACKGROUND CHECKS MARKET at 38–39; CONSUMER FIN. PROT. BUREAU, KEY DIMENSIONS AND PROCESSES IN THE U.S. CREDIT REPORTING SYSTEM: A REVIEW OF HOW THE NATION'S LARGEST CREDIT BUREAUS MANAGE CONSUMER DATA 10 (2007), [hereinafter, CFPB KEY DIMENSIONS AND PROCESSES], https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

[79] CFPB KEY DIMENSIONS AND PROCESSES at 7, 9, 10.

[80] *See TransUnion Independent Landlord Survey Insights*, TRANSUNION (last updated Aug. 07, 2017), https://www.mysmartmove.com/blog/landlord-rental-market-survey-insights-infographic; CFPB TENANT BACKGROUND CHECKS MARKET at 10–11, 38.

[81] NAT'L CONSUMER L. CTR. DIGITAL DENIALS at 10.

[82] CONSUMER FIN. PROT. BUREAU, DISPUTES ON CONSUMER CREDIT REPORTS 8–9 (2021) [hereinafter, CFPB DISPUTES ON CONSUMER CREDIT REPORTS], https://files.consumerfinance.gov/f/documents/cfpb_disputes-on-consumer-credit-reports_report_2021-11.pdf; CONSUMER FIN. PROT. BUREAU, DATA POINT: CREDIT INVISIBLES 16–18 (2015), [hereinafter, CFPB DATA POINT: CREDIT INVISIBLES], https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf.

[83] CFPB DISPUTES ON CONSUMER CREDIT REPORTS at 8–9.

[84] Laura Swanson et al, *Credit Health during the COVID-19 Pandemic*, URB. INST. (Mar. 8, 2022), https://apps.urban.org/features/credit-health-during-pandemic/. FICO scores are a common credit scoring methodology developed by the Fair Isaac Corporation used by most lenders. The score is calculated based on data compiled by a consumer reporting agency in an individual's credit report, and used to predict how likely someone is to pay back a loan on time. *What is a FICO Score?*, CONSUMER FIN. PROT. BUREAU (Sept. 4, 2020), https://www.consumerfinance.gov/ask-cfpb/what-is-a-fico-score-en-1883/.

[85] JUNG HYUN CHOI ET AL., URB. INST., EXPLAINING THE BLACK-WHITE HOMEOWNERSHIP GAP 8 (last updated Nov. 2019), https://www.urban.org/sites/default/files/publication/101160/explaining_the_black-white_homeownership_gap_2.pdf.

[86] NANETTE GOODMAN, BONNIE O'DAY & MICHAEL MORRIS, NAT'L DISABILITY INST. & FINRA INV. EDU. FOUND., FINANCIAL CAPABILITY OF ADULTS WITH DISABILITIES: FINDINGS FROM THE NATIONAL FINANCIAL CAPABILITY STUDY 47 (2017), https://www.finrafoundation.org/files/financial-capability-adults-disabilities.

or no credit history). 16% of Hispanic individuals and 15% percent of Black individuals are credit invisible, compared to 9% of non-Hispanic White individuals.[87] Racial disparities in credit scoring exist, in part, because Black and Brown persons lack access to equitable credit and homeownership opportunities,[88] and credit scores generally do not capture timely rent, utility, or other bill payments.[89] Credit scores also do not capture timely payments to payday lenders and other non-traditional lenders,[90] which are disproportionately used by Black borrowers.[91] Those who are credit invisible, though often treated as having poor credit, may not have any history that suggests they are credit risks, let alone rental risks; they simply have no record one way or the other. For example, an applicant who recently immigrated to the United States might have a credit record that lacks information regardless of their financial history in their country of origin.[92]

Survivors of domestic violence, who are disproportionately women, are also more likely to have had experiences resulting in no or low credit scores.[93] A survivor might not have credit records because their partner prohibited them from opening their own accounts, or the survivor might have negative credit history from being forced to obtain credit for the perpetrator's benefit or assume the perpetrator's unpaid bills.

Because of these disparities, overbroad screenings for credit history may have an unjustified discriminatory effect based on race or other protected characteristics. HUD is unaware of any studies showing that credit reports and scores accurately predict a successful tenancy, and as mentioned above they were not designed for this purpose. Many households prioritize paying the rent over other debts during times of financial hardship, yet their choice to do so — which should indicate they will continue to prioritize paying rent — is generally not

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[87] CFPB DATA POINT: CREDIT INVISIBLES at 16–18, 33.

[88] NAT'L CONSUMER LAW CTR., PAST IMPERFECT: HOW CREDIT SCORES "BAKE IN" AND PERPETUATE PAST DISCRIMINATION 2 (2024), https://www.nclc.org/wp-content/uploads/2016/05/20240227_Issue-Brief_Past-Imperfect.pdf.

[89] See CFPB DATA POINT: CREDIT INVISIBLES at 5; CFPB TENANT BACKGROUND CHECKS MARKET at 38–39; Jim Akin, What Kinds of Bills Affect Credit Score?, EXPERIAN (Nov. 29, 2023), https://www.experian.com/blogs/ask-experian/what-kinds-of-bills-affect-credit-scores/; Brianna McGurran, How Utility Bills Can Boost Your Credit Score, EXPERIAN (Aug. 16, 2023), https://www.experian.com/blogs/ask-experian/does-paying-utility-bills-help-your-credit-score/. Even when rental debt is reported to credit bureaus, it often contains errors. See generally NAT'L CONSUMER LAW CTR., UNFAIR DEBTS WITH NO WAY OUT CONSUMERS SHARE THEIR EXPERIENCES WITH DEBT COLLECTORS (2022), https://www.nclc.org/wp-content/uploads/2022/10/UnfairDebts-Rpt.pdf.

[90] I Heard That Taking Out a Payday Loan Can Help Rebuild My Credit or Improve My Credit Score. Is This True?, CONSUMER FIN. PROT. BUREAU (last reviewed Sep. 1, 2020), https://www.consumerfinance.gov/ask-cfpb/i-heard-that-taking-out-a-payday-loan-can-help-rebuild-my-credit-or-improve-my-credit-score-is-this-true-en-1611/; Ana Staples, What is a Car Title Loan and How Does It Work?, CNBC (May 8, 2023), https://www.cnbc.com/select/car-title-loans/#:~:text=Most%20of%20the%20title%2C%20title,report%20them%20to%20credit%20bureaus.

[91] Mehrsa Baradaran, Jim Crow Credit, 9 U.C. IRVINE L. REV. 887, 938–39 (2019).

[92] See DEP'T OF HOUS. & URB. DEV. OFF. OF FAIR HOUS. & EQUAL OPPORTUNITY, FREQUENTLY ASKED QUESTIONS (FAQS) ON FAIR HOUSING ISSUES REGARDING EXCEPTIONS TO CREDIT CHECK POLICIES AND OCCUPANCY LIMITS, AFFIRMATIVE MARKETING, AND LANGUAGE ACCESS 1–2, [hereinafter, FHEO FAQ ON CREDIT CHECK POLICIES] https://www.hud.gov/sites/dfiles/FHEO/documents/General%20FAQ%20-%20Housing%20Providers%20and%20Fair%20Housing.pdf (last visited Apr. 26, 2024).

[93] See DEP'T OF HOUS. & URB. DEV. OFF. OF PUB. & INDIAN HOUS., PIH-2017-08, VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013 GUIDANCE 7 (2017), https://www.hud.gov/sites/documents/PIH-2017-08VAWRA2013.PDF; see also LEAH A. PLUNKETT & ERIKA A. SUSSMAN, NAT'L CONSUMER RIGHTS CTR., CONSUMER RIGHTS SCREENING TOOL FOR DOMESTIC VIOLENCE ADVOCATES AND LAWYERS 4 (2011), https://csaj.org/wp-content/uploads/2021/10/Consumer-Rights-Screening-Tool-for-Domestic-Violence-Advocates-and-Lawyers.pdf.

considered in their favor in the credit history analysis.[94]

Given these significant and recognized limitations of credit scores as a predictor of likelihood to pay rent and given the disparities noted above, overreliance on credit history poses a significant risk of having an unjustified discriminatory effect based on race or other protected characteristics.[95] Note that no HUD program *requires* screening rental applicants for their credit score, and previous HUD guidance has noted that housing providers may forgo credit checks as long as they do not discriminate because of a protected characteristic.[96]

Furthermore, housing providers and tenant screening companies should avoid denials and denial recommendations based on an applicant's credit score in circumstances when the applicant's financial background has especially little relevance. Limiting the use of credit scores when more relevant financial information is available may be a less discriminatory alternative to using credit scores in all instances. For example, a government agency or other entity guaranteeing a significant portion of an applicant's income should make it significantly more likely that the applicant's rent will be paid on time notwithstanding any negative credit history, particularly if that history predates the applicant's receipt of such assistance. Housing providers and tenant screening companies should keep in mind that under the Housing Choice Voucher program and other assisted housing programs, a public housing agency or other entity has already deemed the rent affordable based on the applicant's income and will increase the amount of assistance if the applicant's income decreases.[97]

Other circumstances in which an applicant's credit history may not be relevant include when the applicant has a cosigner who satisfies the housing provider's financial screening criteria. Negative credit history due to an event that is unlikely to recur, such as a family or medical emergency, also has little relevance. If the household member responsible for paying the rent passes the housing provider's financial screening criteria, the credit qualifications of other household members have no relevance. Minimal or poor credit history that was due to domestic violence, dating violence, sexual assault, or stalking is not the fault of the survivor and does not bear upon the likelihood that the survivor will pay their rent on time in the future.[98]

These circumstances can be accounted for by manually disregarding the applicant's credit score when it is not relevant or programming an automated screening model to do so

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[94] *See* CFPB Tenant Background Checks Market at 39.

[95] *See* Louis v. SafeRent Sols., LLC, Civ. No. 22-CV-10800-AK, 2023 WL 4766192, at *10–*14 (D. Mass. July 26, 2023); Lumpkin v. Farmers Grp. Inc., No. 05–2868 Ma/V, 2007 WL 6996584, at *4 (W.D. Tenn. Apr. 26, 2007). Note this guidance applies to credit scores currently in existence that have not been proven predictive of tenancy behavior. It would not apply to alternative credit scores designed and proven predictive for such purpose.

[96] FHEO FAQ on Credit Check Policies at 1.

[97] For similar reasons, minimum income requirements are also not relevant to predicting whether a tenant who receives income-based housing assistance will pay their rent on time.

[98] In addition to the Fair Housing Act requirements discussed herein, when screening tenants under certain housing programs the Violence Against Women Act ("VAWA") prohibits taking into account poor credit history that is due to an underlying experience of VAWA violence/abuse. 24 C.F.R. § 5.2005(b).

(e.g., not screening for credit if the applicant uses a Housing Choice Voucher).[99] Less discriminatory alternatives may also include giving applicants the chance to explain why their credit history is not relevant by presenting mitigating circumstances (discussed in Sections V.B.5 above). Waiving or adjusting credit screening may also be required as a reasonable accommodation if an applicant's poor credit history is related to their disability.[100] For example, poor credit could be caused by a gap between a loss of employment income and receipt of disability benefits.

Having no credit history or limited credit history (i.e., an absence of credit history, negative or positive) is even less relevant than having poor credit history. Admitting applicants so long as they do not have a negative credit history can be a more precise policy than requiring a positive credit history. In addition, automated screening tools can be programmed to rely on other available financial information as a substitute for an absent credit score.

2.   Eviction History

Eviction records are one of the most commonly-marketed tenant screening components, and they are standard features of many screening reports.[101] Tenant screening companies have built private databases from court records of eviction cases individuals have been involved in.[102] The quality of the records in these databases varies, as does whether they speak only to the existence of a filing or include its ultimate resolution.[103] Court records of evictions are notably unreliable: 22% of the eviction records evaluated in a large study contained ambiguous information on how the case was resolved or falsely represented a tenant's eviction history.[104]

Eviction disproportionately affects Black and Hispanic renters, women, families with children, and individuals with disabilities. Even though fewer than one in five renters are Black, over half of all eviction cases are filed against Black renters.[105] Black and Hispanic renters have eviction cases filed against them at higher rates than White renters, with women of those

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[99] *See* Louis v. SafeRent Sols., LLC., Case No.1:22-cv-10800-AK, Doc. 116-1 at 14 (Mar. 28, 2024) (approved by parties, awaiting court approval).

[100] *See, e.g.,* Schaw v. Habitat for Human. of Citrus Cnty., Inc., 938 F.3d 1259, 1267–69 (11th Cir. 2019) (requiring owner to consider support from a relative, among other financial resources, as a reasonable accommodation); Edwards v. Gene Salter Props. & Salter Constr. Inc., 739 F. App'x 357, 358 (8th Cir. 2018) (waiving policy requiring pay stubs, an offer letter, or tax returns as a reasonable accommodation); Giebeler v. M & B Assocs., 343 F.3d 1143, 1155 (9th Cir. 2003) (allowing tenant to add mother as a cosigner as a reasonable accommodation).

[101] TENANT BACKGROUND CHECKS MARKET at 14–16, 29.

[102] *See, e.g. Tenant Eviction Checks,* TRANSUNION, https://www.mysmartmove.com/tenant-screening-services/eviction-check (last visited Apr. 23, 2024).

[103] *See,* Lesly Fair, *Eviction Fiction? $15 Million FTC-CFPB Settlement with TransUnion and Tenant Screening Subsidiary Underscores Importance of FCRA's "Maximum Possible Accuracy" Requirement*, FED. TRADE COMM'N (Oct. 12, 2023), https://www.ftc.gov/business-guidance/blog/2023/10/eviction-fiction-15-million-ftc-cfpb-settlement-trans-union-tenant-screening-subsidiary-underscores.

[104] Adam Porton, Ashley Gromis & Matthew Desmond, *Inaccuracies in Eviction Records: Implications for Renters and Researchers*, 31 HOUS. POL'Y DEBATE 377, 382 (2021) (studying over 3.6 million administrative eviction court records from 12 states).

[105] Nick Gretz, Carl Gershenson, Peter Hepburn & Matthew Desmond, *Who is Evicted in America*, EVICTION LAB (Oct. 3, 2023), https://evictionlab.org/who-is-evicted-in-america/; *see, e.g., also* Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, 7 SOC. SCI. 649, 658 (2020).

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groups bearing even higher disparities.[106] Evictions are filed against adults living with children at more than twice the rate than for adults living without children.[107] Some groups of renters with disabilities disproportionately report a high likelihood of being evicted in the next two months.[108]

Because of these disparities, overbroad screenings for eviction history may have an unjustified discriminatory effect. Therefore, tenant screening companies and housing providers should not rely on eviction records that are old, incomplete, irrelevant, or where a better measure of an applicant's behavior is available.   If this information about an eviction record is known before a screening, the record should not be used. Otherwise, applicants should get the chance afterwards to have the record disregarded and corrections made (as discussed in Sections V.A.2 and V.B.5 above). Note that under the Fair Credit Reporting Act, tenant screening companies must include existing disposition information for eviction records.[109]

Housing providers and tenant screening companies should not deny or recommend the denial of housing to applicants based on eviction proceedings where the tenant prevailed, a settlement was reached, or the matter was dropped. Likewise, most jurisdictions allow for "no fault" evictions, for example, where the housing provider removes their property from the rental market. Models that use eviction records, irrespective of complexity, should be programmed to distinguish between different types of evictions and varied outcomes.

An eviction that occurred long ago or under circumstances that are no longer relevant does not bear upon the applicant's future performance as a tenant. For example, an eviction for non-payment of rent from a market-rate unit is not relevant to whether an applicant who has since begun receiving rental assistance (e.g. from a government agency) will pay rent on time.

In certain circumstances, it would be particularly problematic to hold a past eviction against a tenant, for example an eviction filed against a tenant in retaliation for asserting their rights (e.g., to remedy conditions violations). An eviction that is due to an underlying

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[106] Sophie Beiers, Sandra Park & Linda Morris, *Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color*, ACLU (Jan. 10, 2020), https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color. *See also* TIMOTHY A. THOMAS, OTT TOOMET, IAN KENNEDY & ALEX RAMILLER, THE STATE OF EVICTIONS: RESULTS FROM THE UNIVERSITY OF WASHINGTON EVICTIONS PROJECT, § 4.5 (2020), https://evictionresearch.net/washington/index.html ; BRIAN J. MCCABE & EVA ROSEN, EVICTION IN WASHINGTON, DC: RACIAL AND GEOGRAPHIC DISPARITIES IN HOUSING INSTABILITY 17–18 (2020), https://georgetown.app.box.com/s/8cq4p8ap4nq 5xm75b5mct0nz5002z3ap; Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 119 AM. J. SOC. 88, 91, 99 (2012); Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, 7 SOC. SCI. 649, 659 (2020).
[107] Nick Gretz, Carl Gershenson, Peter Hepburn & Matthew Desmond, *Who is Evicted in America*, EVICTION LAB (Oct. 3, 2023), https://evictionlab.org/who-is-evicted-in-america/.
[108] Carli Friedman, *Housing Insecurity of Medicaid Beneficiaries with Cognitive Disabilities During the COVID-19 Pandemic*, 16 DISABILITY & HEALTH J. 1, 2 (2023); Jaboa Lake, Valerie Novack & Mia Ives-Rublee, *Recognizing and Addressing Housing Insecurity for Disabled Renters*, CTR. FOR AM. PROGRESS (May 27, 2021), https://www.americanprogress.org/article/recognizing-addressing-housing-insecurity-disabled-renters/#:~:text=High%20housing%20insecurity%20among%20renters%20with%20disabilities&text=Overall%2C%207%20million%20renters%2 0with,more%20likely%20to%20face%20eviction.
[109] Advisory Opinion, Fair Credit Reporting; Background Screening, 89 Fed. Reg. 4171, 4174 (Jan. 23, 2024); *see also* Complaint ¶ 24, Fed. Trade Comm'n v. TransUnion Rental Screening Sols., Inc., Civ. No. 1:23-cv-2659 (D. Colo. filed Oct. 12, 2023).

experience of domestic violence, dating violence, sexual assault, or stalking (e.g., for related noise violations) should not be held against the survivor.[110] In addition, reasonable accommodations to the screening policy may be necessary if the eviction was related to the applicant's disability, for example, an eviction for late payment of rent because of the timing of an SSI or SSDI payment or a medical emergency.

3. Criminal Records

Persons who have been involved with the criminal justice 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.[111] "Research shows that these disparities cannot be simply attributed to certain groups committing more crimes and are better explained by biases in the criminal justice system."[112]

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.[113]

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.[114] As a best practice, tenant screening companies should ensure that screening reports, recommendations, grades, and algorithmic models differentiate between criminal records on these bases — such as by excluding records that are old or for offenses not directly relevant to tenancy — and housing providers should account for these considerations when formulating screening policies and reviewing applications.

When considering the criminal record of an individual with a disability, a reasonable

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[110] In addition to Fair Housing Act requirements, when screening tenants under certain housing programs VAWA prohibits taking into account evictions that were due to an underlying experience of VAWA violence/abuse. 24 C.F.R. § 5.2005(b).

[111] *See* HUD 2016 Criminal Records Guidance at 2; HUD 2022 Criminal Records Guidance at 2; *see also* SECRETARY MARCIA L. FUDGE, ELIMINATING BARRIERS THAT MAY UNNECESSARILY PREVENT INDIVIDUALS WITH CRIMINAL HISTORIES FROM PARTICIPATING IN HUD PROGRAMS 1 (Apr. 12, 2022), https://www.hud.gov/sites/dfiles/Main/documents/Memo_on_Criminal_Records.pdf; *see also* Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. 25,333, 25,346 (proposed Apr. 10, 2024). The 2024 Notice of Proposed Rulemaking proposes a number of policy responses to these issues with respect to housing providers that participate in HUD programs. HUD will carefully consider all comments on the NPRM before finalizing a rule.

[112] HUD 2022 Criminal Records Guidance at 2.

[113] HUD 2016 Criminal Records Guidance at 2–7; HUD 2022 Criminal Records Guidance at 2–3.

[114] For example, HUD deemed overbroad a criminal records screening policy that required the denial of all applicants and the eviction of all tenants who had any felony record, regardless of the nature or recency of the offense; under this policy, a tenant in good standing was evicted for a fifteen-year-old forgery conviction for which he served two years in prison. Charge of Discrimination ¶¶ 12–16, 20, 22–23, Sec'y of Dep't of Hous. & Urb. Dev. *ex rel.* Loveless v. Wesley Apt. Homes, LLC, No. 17-AF-0046-FH-004 (H.U.D. O.H.A. filed Jan. 18, 2017).

accommodation may be required.[115] This can include making exceptions to admissions policies and disregarding certain criminal records. Such an accommodation may be required, for example, if the individual's disability makes it unlikely that they would reoffend (e.g., a record of assault by someone who has since developed a severe mobility impairment). An accommodation may also be required if the criminal activity was related to the individual's disability and is unlikely to recur (e.g., criminal activity related to a mental health disability that has since been treated).[116] In addition, criminal activity should not be taken into account if it was due to an underlying experience of domestic violence, dating violence, sexual assault, or stalking (e.g., property damage during a violent incident, or a victim being forced to write bad checks).

VI.   Conclusion

Housing providers and tenant screening companies both have a role to play in ensuring that tenant screenings are transparent, accurate, and fair. This is the case even with the use of advanced technologies, such as machine learning and other forms of AI. Doing so not only promotes compliance with the Fair Housing Act, but also ensures that all applicants are given an equal opportunity to be evaluated on their own merit when seeking to fulfill a need as fundamental as housing.

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[115] *See* Fed. Trade Comm'n, Consumer Fin. Prot. Bureau, Dep't of Hous. & Urb. Dev. & Dep't of Justice, Tenant Background Check and Your Rights 5 (2024), https://www.hud.gov/sites/dfiles/FHEO/documents/HUD_Tenant_Background_Checks_and_Your_Rights.pdf.

[116] *See, e.g.,* Simmons v. T.M. Assocs. Mgmt., Inc.*,* 287 F. Supp. 3d 600, 604 (W.D. Va. 2018); *see also, e.g.,* Hunt v. Aimco Props., L.P., 814 F.3d 1213, 1226–27 (11th Cir. 2016); Roe v. Sugar River Mills Assocs.*,* 820 F. Supp. 636, 639–40 (D.N.H 1993); Roe v. Hous. Auth. of City of Boulder, 909 F. Supp. 814, 822 (D. Colo. 1995); Bos. Hous. Auth. v. Bridgewaters*,* 898 N.E. 2d 848, 850 (Mass. 2009); Dep't of Hous. & Urb. Dev. & Dep't of Justice, Reasonable Accommodations Under the Fair Housing Act 4–6 (2004), https://www.hud.gov/sites/documents/huddojstatement.pdf.

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VII.   Appendix: Sample Tenant Screening Reports

A redacted tenant screening report included in a legal complaint by an applicant suing a tenant background screening company and provided through public reporting.

Applicant Information

Redac Stephanie J
Redacted
Temple, TX Redac

SSN Redacted
DOB Redacted

Income $2,000   Rent $500
Months at Residence   12
Months at Employment 12

Rental Recommendation - Based on subscriber's employment, residency and applicant score acceptance criteria.

Reject Applicant

Rent to Income - Accept applicant
Score - Reject Applicant
See rejection letter for details

Analysis Results

Rent to Income Multiple Exceeds Requirement	Time at Residence Exceeds Requirement	Time at Employment N/A	Applicant Score 52

Applicant Score based on analysis of tenant performance information, public records and credit report.

Verification of Applicant Information

Applicant has credit report:	Confirmed
Applicant social security number matches credit report:	Confirmed
Applicant date of birth matches credit report:	Confirmed
Applicant current address matches credit report:	Not Confirmed
Applicant previous address matches credit report:	N/A
Report of Credit Fraud found:	No

Acceptable (100-80)

Conditional (79-60)

Reject (59-00)

Additional Addresses   see NTN Tenant Performance Profile

Redacted   Temple TX Redac
Redacted   Austin TX Redac
Redacted   Round Rock TX Redac

Additional Names (aliases) see NTN Tenant Performance Profile

A sample redacted tenant screening report from a tenant screening company provided through public reporting.

Rental Report for ██████████████

Overall Recommendation

DECLINE   This application does not meet one or more of your requirements that is set to "Pass/Fail". This recommendation has been automatically set to Decline. The Overall Recommendation was derived solely from your community's leasing criteria. On-Site makes no independent assessment of an applicant's qualifications.

Score for ████████████████ **: 538**

		Importance	Result
AI Score		Pass/Conditional	👎
Monthly income to rent ratio exceeds 1.0		Pass/Fail	👎
May have been through a bankruptcy		Pass/Fail	👍
No unpaid property collections in the last 7 years		Pass/Fail	👍
No Landlord Tenant Court records in the last 7 years		Pass/Fail	👎
Criminal History: Felony Convictions		Pass/Fail	👍
Total Considered Felony Convictions	-	Not Considered	N/A
Alcohol	None ever	Pass/Fail	👍
Bad Check	None ever	Pass/Fail	👍
Criminal Other	None ever	Pass/Fail	👍
Drug Manufacture Distribution	None ever	Pass/Fail	👍
Drug Marijuana Use	None ever	Pass/Fail	👍
Drug Meth Manufacture	None ever	Pass/Fail	👍
Drug Use	None ever	Pass/Fail	👍
Fraud	None ever	Pass/Fail	👍

FACT SHEET: HARASSMENT IN HOUSING

What is fair housing?

Fair housing is the right to choose housing free from unlawful discrimination. Fair housing laws protect people from discrimination in housing based on race, color, religion, sex (including sexual orientation and gender identity), national origin, familial status, disability, marital status, and age. Some city laws add other protected classes, including source of income. Discrimination is illegal in housing transactions such as rentals, sales, lending, and insurance.

The Fair Housing Act and other laws prohibit coercion, intimidation, threats, or interference with any person seeking to enforce their rights protected by the Act. Harassment in housing is illegal, including sexual harassment as well as harassment based on race, color, religion, national origin, familial status, or disability. All property owners and managers are responsible for helping ensure their housing is free from discriminatory harassment of any type.

20 Hall Street SE
Grand Rapids, MI 49507
616-451-2980 phone
616-451-2657 fax
fhcwm.org

There are **two types of harassment** covered under fair housing – quid pro quo or 'this for that' and the creation of a hostile environment through harassment.

Quid pro quo harassment refers to an unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, as a condition obtaining, maintaining, using, or enjoying housing or housing-related services. A person who complies with an unwelcome request or demand may still be protected.

Hostile environment harassment refers to unwelcome conduct that is sufficiently severe or pervasive as to interfere with the availability, sale, rental, or use or enjoyment of a dwelling as well as housing-related needs, facilities, or services.

Owners and management companies are liable for harassment in their housing if…

- The harassment is committed by ANY employee (even if the supervisors don't know about it)
- The owner or management company fails to take action(s) within its power to stop the harassment of a tenant or applicant by an employee or another tenant (if they knew or should have known about it)

Examples of Harassment

- Repeatedly yelling anti-Muslim slurs at a Muslim tenant.
- Taunting and threatening a person with a mental disability.
- Subjecting a person to pervasive racial epithets
- Defacing a person's home with racially derogatory or threatening words or images.
- A property management company learns that a tenant has been repeatedly harassing another tenant because of a disability and no one at the management company acts to stop the harassment.

Examples of Sexual Harassment

- Withholding repairs or evicting someone for refusing to have sex.
- Demanding nude photos in return for approving a rental application.
- Persistently making unwelcome and lewd comments about a resident's body.
- Sending pervasive unwelcome, sexually suggestive texts and entering the tenants' apartment without invitation or permission.
- Severe unwelcome touching, kissing, groping without consent.

Best Practices

- **Establish** and **enforce** anti-harassment policies to help stop inappropriate or offensive conduct early, before it becomes a Fair Housing Act violation.
- **Provide** multiple ways for tenants to safely and easily make complaints or otherwise report problems.
- **Attend** fair housing training that includes information about preventing harassment and require any staff to do so as well.
- **Take** measures to ensure that people who report harassment are protected from retaliation.
- **Talk** to tenants to find out whether harassment is occurring and to teach them about their fair housing rights and how to report harassment.
- **Hire or designate** a complaint coordinator whose primary responsibility is to investigate reports or complaints thoroughly and take the necessary corrective actions quickly.

Resources

- HUD Final Rule: Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act https://www.govinfo.gov/content/pkg/FR-2016-09-14/pdf/2016-21868.pdf
- HUD Equal Access to Housing Rules https://www.hudexchange.info/resource/1991/equal-access-to-housing-final-rule/
- Preventing and Addressing Harassment in Housing: Fact Sheet for Property Owners and Managers https://www.hud.gov/sites/dfiles/FHEO/images/owners-managers-508.pdf
- Preventing and Addressing Harassment in Housing: Fact Sheet for Public Housing Agency Employees https://www.hud.gov/sites/dfiles/FHEO/images/employees-508.pdf
- Preventing and Addressing Sexual and Other Discriminatory Harassment in Housing: Fact Sheet for Public Housing Agencies https://files.hudexchange.info/resources/documents/PHA-Preventing-and-Addressing-Sexual-and-Other-Discriminatory-Harassment.pdf

Where can I find more information?

If you have questions or would like resource materials, contact us at 616-451-2980. You can also visit our website, https://www.fhcwm.org for more information and resources.

* Please note that this fact sheet is not intended to be used as legal advice *

FACT SHEET: FAIR HOUSING & CRIMINAL BACKGROUND SCREENING

What is fair housing?

Fair housing is the right to choose housing free from unlawful discrimination. The federal Fair Housing Act (FHAct) and Michigan laws protect people from discrimination in housing based on protected classes. **Protected classes** include race, color, religion, sex, sexual orientation, gender identity, national origin, familial status, disability, marital status, and age. **Housing discrimination** means unfair treatment because of a protected class. Discrimination is illegal in housing transactions such as rentals, sales, lending, and insurance.

Fair Housing Center
of West Michigan

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Grand Rapids, MI 49507
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fhcwm.org

How does fair housing apply to criminal background screening?

Unfair criminal background screening can be housing discrimination. Screening based on criminal records should only consider convictions that indicate real and current risk to people or property. Screening criteria should be applied equally. People have the right to explain circumstances of their conviction and what they've done since.

In June 2022, U.S. Department of Housing and Urban Development (HUD) published updated guidance on how the FHAct applies to criminal background screening. It explains that racial and ethnic disparities caused by bias in the U.S. criminal justice system extend to housing. This is why criminal background screenings in housing often impact Black and Hispanic people the most. That makes it a fair housing issue.

HUD guidance specifically addresses when a housing provider's actions could violate the FHAct. It recommends that private housing providers **consider not using criminal history to screen tenants** for housing. It indicates that criminal history is not a good predictor of housing success. The guidance offers best practices for housing providers (see next page).

What are the rights of people with disabilities?

People with disabilities can make requests for reasonable accommodations to criminal background screening criteria. **Reasonable accommodations** are changes to rules, policies, practices or services of a housing provider that are necessary because of a disability. For example, asking for an exception where (1) a disability contributed to the criminal conduct AND (2) there is evidence that it won't happen again. Evidence could be improvements from ongoing therapy or treatment.

All reasonable accommodations should be evaluated on a case-by-case guidance. Consult the HUD guidance on reasonable accommodations.

Resources

HUD Guidance: www.hud.gov/program_offices/fair_housing_equal_opp/fheo_guidance

More resources available from the Fair Housing Center at www.fhcwm.org/publications

| Please note that this fact sheet is not intended to be used as legal advice. |

HUD RECOMMENDED BEST PRACTICES: CRIMINAL BACKGROUND SCREENING

Procedures

- Per HUD guidance, consider not using criminal history to screen tenants for housing.
- Check for state or local laws or that may limit ability to run criminal background checks.
- Check for any applicable program requirements, regulations, or restrictions.
- Avoid third-party screening companies that use biased algorithms.
- Have a written criminal background screening policy that is available to all applicants.
- Delay considering criminal history until after verifying financial and other qualifications.
- Treat comparable criminal histories similarly.
- Before denying an applicant or evicting a resident, provide them the criminal record and give them opportunity to correct wrong information or explain extenuating circumstances.
- Only evict for criminal activity as a last resort and after an individualized assessment.
- Never evict a person or family because they have been victims of a crime.
- Do not ban a tenant's invited guest from visiting based on the guest's criminal involvement.
- **Document** any screening completed, circumstances considered, and decisions made.

Policies

- Consider the nature, severity (i.e. felony or misdemeanor), and recency of criminal conduct.
- Ensure policy can be justified with reliable evidence showing that it actually assists in protecting resident safety and/or property.
- Accurately distinguish between criminal conduct that indicates a **demonstrable risk to resident safety and/or property** (i.e. homicides, sexual assault, arson, etc.) and criminal conduct that does not (i.e. gambling, prostitution, tax crimes, cyber-crimes, etc.).
- Avoid automatic denials, blanket bans (i.e. "no felonies") and consideration of arrests.
- Consider the amount of time that has passed since the criminal conduct occurred.
- Provide for an **individualized assessment** of relevant mitigating information. Consider the circumstances surrounding the criminal conduct, the age of the individual at the time of the conduct, evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct, and evidence of rehabilitation efforts.
- Consider requests for reasonable accommodation on the basis of disability.

For more information call Fair Housing Center of West Michigan (616-451-2980) or visit www.fhcwm.org.