

## **CDA Memo: Affirmative Fair Housing Marketing Plans and Tenant Selection Policies** **August 5, 2024 – Updated November 26, 2024**

The Maryland Department of Housing and Community Development (“Department”) is committed to ensuring fair and open access to affordable housing and compliance with state and federal civil rights obligations. Fair Housing requirements apply to the full spectrum of housing activities, including, but not limited to, outreach and marketing, qualification and selection of residents, and occupancy. This memo will continue DHCD’s long-standing commitment to affirmatively furthering fair housing and ensure that the tenant selection policies for projects receiving Department funding do not unjustifiably exclude people from housing opportunities in discriminatory ways.

On April 29, 2024, the Department of Housing and Urban Development (HUD) released “Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing”<sup>1</sup> (“HUD Guidance”), discussing how housing providers and companies that offer tenant screening services can screen applicants for rental housing in a non-discriminatory way. The HUD Guidance concludes “...tenant screenings that are transparent, accurate, and fair... 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”.

To that end, the Department has modified our requirements for Affirmative Fair Housing Marketing Plans and Tenant Selection Plans to comply with the HUD Guidance. Owners and/or managers of properties that have received LIHTC awards, program funds, or other subsidies from the Department are now required to submit a copy of their tenant selection plan or policy by January 1, 2025, to evidence compliance with the policies listed below. DHCD will review the tenant selection plan and will reject any plan that is clearly not in conformance. Additionally, projects must review and update their tenant selection plans at least every five (5) years or more frequently if required by DHCD. Failure to comply with an approved tenant selection plan will be subject to compliance action by DHCD.

### **AFFIRMATIVE FAIR HOUSING MARKETING PLAN REQUIREMENTS**

The owner must affirmatively market and lease LIHTC units in a manner that complies with the goals and requirements of applicable federal, state, and local fair housing and civil rights laws or regulations, and the Tenant Selection Plan approved by CDA. Owners must submit an AFHMP regardless of whether the project receives federal funds. Marketing plans, including the AFHMP and Tenant Selection Plan must be maintained, reviewed, and updated to document that such marketing efforts are being made and that the results are being reported and evaluated. Plans should contain, at a minimum:

1. A statement as to how affirmative marketing strategies and tenant selection criteria will be implemented, inclusive of occupancy and lease-up goals;
2. Copies of all advertisements and promotional marketing plans; and
3. Groups determined to be least likely to apply to the project without targeted marketing and outreach, and the data used to make the determination in accordance with the HUD instructions for preparation of AFHMPs.

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<sup>1</sup> [Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing](#). U.S. Department of Housing and Urban Development. April 29, 2024.

Owners should consult the HUD Handbook 4350.3 REV-1, Chapter 2. Civil Rights and Nondiscrimination Requirements (or most current version) for guidance on Affirmative Fair Housing Marketing Plans.

**NOTE:** Before a household takes occupancy, the owner (or manager) must determine that the household will meet the rent and income restrictions to qualify for the LIHTC unit.

## TENANT SELECTION POLICIES

Owners must prepare, submit to DHCD for review,<sup>2</sup> and post in their leasing office and website a Tenant Selection Plan that describes all criteria that will be used in the decision-making process to screen and approve eligible applicants for tenancy. The Tenant Selection Plan must be specific so that a prospective applicant or third party may reasonably determine an applicant's likelihood of acceptance to the property. The owner must provide access to the information for people with limited English proficiency and people with disabilities. The Tenant Selection Plan must use criteria that comply with the General Public Use requirement, the Fair Housing Act, and the threshold requirements of Section 3.3.2 Affirmative Fair Housing Marketing of the Multifamily Rental Financing Program Guide. Records outside of the scope of the Tenant Selection Plan should not be considered. The Tenant Selection Plan must include, at a minimum, the following provisions:

- Reasonable accommodation request process for applicants with disabilities;
- Description of how applications will be made available and accepted for processing;
- How the waiting list will be maintained if a waiting list is part of the plan;
- Prohibition of income and minimum credit score requirements for prospective tenants with Housing Choice Vouchers or similar rental assistance, including, but not limited to, VASH, Shelter Plus Care, Bridge Subsidy and Continuum of Care, or prospective tenants applying for units with project-based vouchers;
- Criminal record screening policy in accordance with the requirements listed below in the Criminal Record Screening section; and
- Denial notification process that includes in writing, via mail or email, all reasons for the denial, including the specific standard(s) that the applicant did not meet. 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. Letters should also include instructions on how to submit an appeal within 14 days of receiving a denial letter if a record is inaccurate, incomplete, or irrelevant; mitigating circumstances exist; or a reasonable accommodation for a disability is needed.

Owners should follow the guiding principles for non-discriminatory tenant screening in all cases, which include: (1) screening only for relevant screening criteria; (2) using only accurate records; (3) following the applicable screening policy; (4) being transparent with applicants; (5) allowing applicants to challenge negative information; and (6) designing and testing complex models for fair housing compliance.

Owners utilizing tenant screening services must ensure that the tenant screening services (a) offer customizable services based on a property's screening criteria; (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. Tenant screening services should serve to help implement, rather than effectively set, a housing provider's screening policies. If

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<sup>2</sup> DHCD will review owners' plans for clear inconsistencies with fair housing compliance; however, the owner is ultimately responsible for ensuring compliance with fair housing and other applicable laws. DHCD shall not assume any liability for an owner's tenant selection policies, regardless of DHCD's review thereof.



screening reports include denial recommendations, the owner should make an independent determination whether, under their screening policies, the information in the report is, in fact, disqualifying.

Owners should avoid screening existing tenants of a property who have lived there without incident. Tenants' behavior at the property is more relevant than a records-based screening.

Denial notifications should be maintained for a period of no less than five (5) years, and will be made available for DHCD's review for compliance monitoring, within three (3) business days of the date of request.

If DHCD receives a complaint that applicants to any property have been unfairly turned down for housing, DHCD will ask for a summary of the facts and circumstances used in the decision to deny the applicant and to compare against the written Tenant Selection Policy on file at DHCD for the property. In any case where the tenant's claim appears to have merit, the matter will be referred to the appropriate authorities or, in appropriate circumstances, a compliance action may be pursued by DHCD.

The information in this section is not intended as legal advice and does not provide a legal opinion as to the matters stated. It is recommended that all property owners consult with an attorney who is well versed in fair housing law when making decisions regarding their Tenant Selection Policy.

Note: Owners of LIHTC properties are prohibited by federal law from refusing to lease to a prospective tenant based on the fact that the applicant holds a Section 8 Housing Choice Voucher.

Based on Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing provided by HUD on April 29, 2024, the following types of screening are likely to pose fair housing concerns: credit history, eviction history, and criminal records.<sup>3</sup> Overbroad screenings in these areas, including screenings that fail to account for individual circumstances, are especially likely to have an unjustified discriminatory effect based on race, national origin, sex, disability, or other protected characteristics.

### **Credit History Screening**

Pursuant to the HUD Guidance, scores are calculations designed to calculate the relative risk of consumers defaulting on a loan, not the risk that a tenant will fail to pay rent. Racial, gender, and other disparities exist in the context of credit scores; thus overbroad screenings for credit history may have an unjustified discriminatory effect. Owners and tenant screening companies should avoid denials and denial recommendations based on an applicant's credit score when the applicant's financial background has 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. Other relevant financial information could include circumstances like a cosigner who satisfies the financial screening criteria. Negative credit history due to an event that is unlikely to recur, such as a medical emergency or job loss also has little relevance. Further, minimal or poor credit history 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.

Applicants should be given the chance to explain why their credit history is not relevant by presenting mitigating circumstances.

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<sup>3</sup> Owners should review the HUD guidance (see fn. 1) for additional details relating the background and implementation of screening practices identified in this memorandum.



Having no credit history or limited credit history (i.e., an absence of credit history, negative or positive) is 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.

## **Eviction History Screening**

Eviction records are among the most commonly-marketed tenant screening components and they are standard features of many screening reports. However, eviction disproportionately affects Black and Hispanic renters, women, families with children, and individuals with disabilities. Thus, overbroad screenings for eviction history may have a discriminatory effect.

Owners and tenant screening companies 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 afterward to have the record disregarded and corrections made.

Owners 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. Several other circumstances exist in which it would be problematic to hold a past eviction against a tenant; for example, where a tenant was retaliated against or where the eviction is due to an underlying experience of domestic violence, dating violence, sexual assault, or stalking.

An eviction that occurred long ago or under circumstances that are no longer relevant does not likely 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 likely relevant to whether an applicant who has since begun receiving rental assistance (e.g. from a government agency) will pay rent on time.

## **Criminal Record Screening**

Overbroad criminal records screening policies are likely to have an unjustified discriminatory effect. The owner and management company must initially assess applicants without conducting a criminal background check on any member of the applicant household. The management company may examine applicants' rental history, credit history, ability to pay rent, and/or other screening factors. This will not apply to federally subsidized housing and programs that require mandatory denials for people who are convicted of producing methamphetamines in federally subsidized housing or legally required to register on the lifetime sex offender registry under a state sex offender registration program.

Should an applicant satisfy the general requirements of tenancy, the management company can choose to conduct a criminal background check on each adult member of an applicant's household. An adult means a person aged 18 or older. The management company should note and document when the initial screening was completed, before the application proceeds to the background check stage, if a background check is completed. The owner and management company can only evaluate applicants' criminal backgrounds through the criteria detailed in the following section, "Admissions Criteria."

If the criminal background report includes information that can be considered based on the Admissions Criteria, the management company will conduct an individualized assessment of the criminal record and its impact on the household's suitability for admission. The management company will notify the applicant in writing that they will conduct an individualized assessment. The notice will include the name, address, and telephone number of the agency that composed the criminal record report and inform the applicant of his or her right to dispute the accuracy of the



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criminal record report as well as his or her right to a free copy of the criminal record report. An individualized assessment worksheet is available on our website to assist with this process. All individualized assessments should be maintained for a period of no less than five (5) years, and will be made available for DHCD's review for compliance monitoring, within three (3) business days of the date of request.

The individualized assessment should include consideration of the following factors:

- The seriousness of the offense and how it would affect other residents;
- The effects that denial of admission may have on other members of the family who were not involved in the action or failure;
- The age of the household member at the time of the offense;
- The extent of participation or culpability of individual family members, including whether the culpable family member is a minor or a person with disabilities, or a victim of domestic violence, dating violence, sexual assault, or stalking;
- The length of time since the offense, with particular weight being given to significant periods of good behavior, as well as the family's recent history and the likelihood of favorable conduct in the future;
- The number and nature of any other criminal convictions;
- Whether the offense has a direct and specific negative impact on the safety of other individuals or property;
- Whether the offense occurred on or was connected to a rental property that was rented or leased by the applicant;
- Evidence of the applicant's family's participation in or willingness to participate in social service or other appropriate counseling service programs;
- Evidence of rehabilitation, such as employment, participation in a job training program, education, participation in a drug or alcohol treatment program, or recommendations from a parole or probation officer, employer, teacher, social worker, or community leader; and
- Tenancy supports or other risk mitigation services the applicant will be receiving during tenancy.

The owner and management company must also provide reasonable time for the applicant to provide mitigating evidence to support the individualized assessment. Mitigating evidence may include:

- A written statement from a parole officer or a member of law enforcement explaining whether the applicant is rehabilitated;
- Documentary evidence that shows proof of employment or job readiness training;
- Documentation of participation in or completion of a substance use disorder treatment; and
- Character references from past housing providers, employers, or other members of the community.

If a management company decides to deny the applicant due to the result of a criminal background check, after conducting the individualized assessment, the landlord must:

- Send a denial letter by mail or email to the applicant that includes all reasons for the denial, including the specific standard(s) that the applicant did not meet. 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. Letters should also include instructions on how to submit an appeal within 14 days of receiving a denial letter, if the tenant disputes the record as inaccurate, incomplete, or irrelevant; where the tenant alleges that mitigating circumstances exist; or a where a tenant seeks a reasonable accommodation for a disability; and .
- Return any holding deposit collected from the applicant.



## Admissions Criteria

Should the owner and management company elect to conduct a criminal background check on an applicant after a conditional offer has been made, the owner and management company may not charge a separate fee and must comply with the Renter's Rights and Stabilization Act of 2024. Additionally, if a criminal background check is conducted, the owner and management company may not consider the following in its determination of whether to accept or deny an applicant household:

- Juvenile records, or any expunged, vacated, pardoned, or sealed records;
- Convictions for crimes that are no longer illegal in the state of Maryland; and
- Charges that are pending for eligible crimes at the time of screening may be considered, subject to the individualized assessment. If a member of an applicant household has been convicted of a felony offense or violent misdemeanor offense during the applicable "further review period" (dated from the day of conviction), the housing provider may choose to consider that record in determining whether to accept or deny an applicant household based on an individual assessment.

Should the owner and management company consider arrests, criminal charges that were resolved without conviction, or nonviolent misdemeanor convictions in their determination of whether to accept or deny an applicant household, they are required to address the specific arrests, charges, or convictions in their individualized assessment.



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