

August 16, 2018

**VIA ELECTRONIC SUBMISSION**

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

Re: Docket No. FR-6111-A-01, Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

I. **Introduction**

The Consumer Data Industry Association (CDIA) appreciates the opportunity to provide comments in response to the Department of Housing and Urban Development's (HUD or the "Agency") Federal Register Notice issued on June 20, 2018 seeking public comment on possible changes to HUD's 2013 final rule<sup>1</sup> ("2013 final rule") implementing the Fair Housing Act's disparate impact standard in light of the Supreme Court's 2015 ruling in *Texas Department of Housing and Community Affairs v. Inclusive Community Project, Inc.*, ("Texas Department of Housing" case) which held that disparate impact claims are cognizable under the Fair Housing Act (FHA).

HUD seeks comments on the Agency's 2013 final rule and supplement, the Disparate Impact Rule and associated burden-shifting approach, the relevant definitions, the causation standard, and whether change to these or other provisions of the rule would be appropriate. CDIA submits these comments with recommendations relating to HUD-issued guidance regarding the use of criminal records by providers of housing and real estate-related transactions titled the "Office of General Counsel Guidance on Application of Fair Housing Act

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<sup>1</sup> *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 FR 11460; codified in 24 C.F.R. § 100.500.

Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions” (the “2016 Guidance”).<sup>2</sup>

While CDIA’s comments are not directly related to the Disparate Impact Rule, they are nonetheless indirectly and critically related in the housing context given that the use of criminal records and disparate impact claims in housing and real estate-related transactions are intertwined. HUD should consider the 2013 final rule and 2016 Guidance together in order for stakeholders (i.e., housing providers, public housing agencies, tenants) to have notice of what actions are potentially discriminatory under law with respect to the use of arrest information. Given that the Texas Department of Housing case officially recognizes disparate impact theory as a method for bringing a lawsuit under the FHA, coupled with the fact that use of such information may lead to liability under the FHA based on a practice’s discriminatory effect based on sex and race, there is a need for HUD to provide clear and consistent guidance in a way that currently does not exist.

As set forth below, CDIA seeks review and modification of the 2016 Guidance with respect to the type of criminal history information that a housing provider can consider in justifying an adverse housing action. We believe the 2016 Guidance merits modification to ensure consistency with other HUD guidance that offer advice on the use of criminal history information as well as guidance on the use of criminal history information issued by the Equal Employment Opportunity Commission (EEOC) in the employment setting, and to conform to Federal law more broadly.

## II. **Background**

The Consumer Data Industry Association (CDIA) is the voice of the consumer reporting industry, representing consumer reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, background check companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals, and to help businesses, governments and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity, helping ensure fair and safe transactions for consumers, facilitating competition

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<sup>2</sup> *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, U.S. Department of Housing and Urban Development, April 4, 2016, available online at: [https://portal.hud.gov/hudportal/documents/huddoc?id=HUD\\_OGCGuidAppFHStandCR.pdf](https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHStandCR.pdf).

and expanding consumers' access to financial and other products suited to their unique needs.

CDIA supports the fair and appropriate use of criminal history information when making eligibility determinations in both the housing and employment context. Landlords, property managers, employers and other users must only use such information in a fair and non-discriminatory manner. At the same time, landlords and property managers should be allowed to fairly assess potential renters in order to make decisions intended to protect resident safety and/or property. The 2016 Guidance is problematic, and requires modification for a number of reasons, including that (i) it categorically prohibits the use of arrest history information; and (ii) appears to imply that landlords and property managers should not consider conviction history beyond six or seven years. Both of these positions conflict with Federal law and Agency guidance. Specifically, this position is inconsistent with (i) other HUD guidance; (ii) other federal guidance issued by the EEOC regarding the use of criminal history information; and (iii) the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (FCRA) which establishes when and how consumer reporting agencies can report criminal history information, including in the housing context.

### III. **Review and Recommendations**

#### A. *Guidance on Arrests*

##### 1. **HUD Guidance**

According to HUD's 2016 Guidance, "A housing provider with a policy or practice of excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest."<sup>3</sup> This suggests that a housing provider is prohibited from having a policy that allows for the review of an individual's arrest record before making a housing decision.

In contrast, HUD's 2015 guidance for Public Housing Agencies (PHAs) allows public housing providers to consider the *conduct underlying* an arrest to the extent it was relevant for admission and tenancy decisions. Specifically, the document issued on November 2,

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<sup>3</sup> 2016 Guidance at 5.

2015,<sup>4</sup> states that while PHAs may not base a housing determination on a record of arrest, “PHAs and owners may make an adverse housing decision based on the conduct underlying an arrest if the conduct indicates that the individual is not suitable for tenancy” and there is “sufficient evidence other than the fact of arrest that the individual engaged in the conduct.”<sup>5</sup>

The 2016 Guidance—which categorically bans a housing provider from considering anything about an arrest record unless the arrest led to a conviction—directly conflicts with the 2015 public housing guidance which allows a housing provider to consider the conduct underlying an arrest. Simply, if the 2016 Guidance goes unmodified, HUD’s guidance will remain inconsistent in how it advises public and private housing providers with respect to the use of arrest records in making housing determinations.

## 2. EEOC Guidance

HUD’s 2016 Guidance also conflicts with EEOC guidance on the use of arrest history in the employment context—which allows for the consideration of the underlying arrest conduct to make a determination of unfitness for employment.<sup>6</sup> The EEOC affirms that an arrest, in some circumstances, can trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action. Title VII of the Civil Rights Act of 1964<sup>7</sup> calls for a fact-based analysis to determine if an exclusionary policy or practice—such as reviewing an applicant or employee’s arrest record—is job related and consistent with business necessity.<sup>8</sup> Therefore, similar to the 2015 Guidance to PHAs and Owners of Federally-Assisted Housing, the conduct underlying the arrest may be considered to determine if it makes the individual unfit, whether it be for admission or tenancy, or employment.

## 3. Policy Reasons

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<sup>4</sup> Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, U.S. Department of Housing and Urban Development Office of Public and Indian Housing, Notice PIH 2015-19, Nov. 2, 2015, available online at: <https://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf> (“2015 Guidance”).

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq., EEOC Enforcement Guidance, U.S. Equal Employment Opportunity Commission, Apr. 25, 2012, No. 915.002, ¶ VI.B.2., available online at: [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm#VB2](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#VB2) (“EEOC Guidance”) (“Although an arrest record standing alone may not be used to deny an employment opportunity, an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes.”).

<sup>7</sup> 42 U.S.C. § 2000e et seq.

<sup>8</sup> *Id.*

CDIA is not suggesting that an arrest record establishes that criminal conduct has occurred. We understand that a single arrest record, by itself, may not have reliable probative value. However, an arrest record or a history of arrest records with additional information could substantiate a pattern of potentially unlawful conduct. Disallowing the use of arrest records takes away a housing provider's ability to fully vet each of its residents, and ultimately keep both their residents and property safe. Certainly, a series of pending criminal cases (in some contexts referred to as "arrests") may suggest a pattern of potentially unlawful activity or behavior that could pose a safety and financial risk to a rental community. Housing providers and operators should have access to that public information to fully evaluate housing applicants.

#### B. *Guidance on Criminal Convictions*

HUD's 2016 Guidance states that, "...a policy or practice that does not consider the amount of time that has passed since the criminal conduct occurred is unlikely to satisfy [the] standard [of being necessary to serve a substantial, legitimate, nondiscriminatory interest], **especially in light of criminological research** (emphasis added) showing that, over time, the likelihood that a person with a prior criminal record will engage in additional criminal conduct decreases until it approximates the likelihood that a person with no criminal history will commit an offense."<sup>9</sup> The 2016 Guidance suggests that this time period is six or seven years. To support this directive, HUD cites to *Green v. Missouri Pacific R.R.*<sup>10</sup> an employment case as well as references "criminological research" found in one scholarly article.<sup>11</sup> We believe HUD's reliance on these sources is misplaced and does not consider current law.

#### 1. **Rebutting Case Law**

*Green v. Missouri Pacific R.R.* is an employment discrimination case which held that permanent exclusions from employment for any and all criminal offenses violate Title VII of the Civil Rights Act. *Green* requires employers to consider certain factors when evaluating a candidate for employment with a conviction record, including the nature and gravity of the offense, the time that has elapsed since the offense and/or completion of the sentence, and the nature of the job held or sought before excluding an individual from the opportunity on the basis of a criminal record. Consideration of these factors is necessary to determine if the

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<sup>9</sup> 2016 Guidance at 7.

<sup>10</sup> 523 F. 2d 1290 (8th Cir. 1975).

<sup>11</sup> Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *Criminology & Pub. Pol'y* 483 (2006).

criminal exclusion is job related for the position in question and consistent with business necessity.

*Green*, of course, is not binding on HUD, as it is an employment case—not a housing case. Also, while *Green* establishes certain factors for employers to consider when evaluating a candidate with a criminal record, the case does not constrain employers from looking at criminal history beyond six or seven years old. Furthermore, the EEOC Guidance on the use of criminal history records—which incorporates the *Green* factors—does so in the context of guiding employers to develop screening programs that do not have a disparate discriminatory impact.<sup>12</sup> But again, the EEOC does not constrain employers from considering criminal convictions that are older than six or seven years.

## 2. Criminological Studies

The criminological study referenced by HUD in the 2016 Guidance to support limiting review of criminal convictions to six or seven years comes from a scholarly article. The study—which was conducted to understand the relevance of criminal history in predicting employment behavior—explores the question of whether “after a given period of time, the risk of recidivism from a person who has been arrested in the distant past is ever indistinguishable from that of a population of persons with no prior arrests.”<sup>13</sup> The authors summarize their findings to say that “immediately after an arrest, the knowledge of this prior record does significantly differentiate this population from a population of nonoffenders. However, these differences weaken dramatically and quickly over time so that the risk of new offenses among those who last offended six or seven years ago begins to approximate (but not match) the risk of new offenses among persons with no criminal record.”<sup>14</sup> However this proposition is based on a study, which is the result of an analysis of a very limited dataset consisting solely of young males from Philadelphia, for whom data was collected only through the age of 26. That study was designed to assess the likelihood of re-offending during the narrow window of time between the ages of 25 and 26 and was considering recidivism in the employment context. The authors of the study explicitly recognized the limitations of their research and openly stated that “[t]hese findings are but a first look at this important question. Our analyses are limited to one cohort of

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<sup>12</sup> EEOC Guidance at ¶ VI.B.4.

<sup>13</sup> Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *Criminology & Pub. Pol’y*, 483 (2006).

<sup>14</sup> *Id.*

individuals representing one location during one time period. We were also artificially limited to a pre-age-27 follow-up period. To further understand patterns of desistance, we encourage further inquiry into this issue.”<sup>15</sup> In 2012, the authors of that study openly remarked that “[l]ong-term recidivism studies are surprisingly rare in criminology.”<sup>16</sup> Therefore, CDIA cautions HUD on relying on limited research when basing any legal or public policy decision on such.

While this study is interesting, it is limited in scope and should not be relied upon by HUD for the purpose of offering broad guidance on the use of criminal conviction history beyond the six or seven-year timeframe.

### 3. Fair Credit Reporting Act

Lastly, HUD’s 2016 Guidance regarding criminal conviction history has a chilling effect on landlords’ and property managers’ ability to request background checks on tenants—which they otherwise would be allowed to obtain through ordinary screening channels—for the purpose of ensuring a safe environment for their residential community. Disallowing criminal background checks beyond the six-to-seven-year period is inconsistent with the FCRA. The FCRA is a consumer protection statute which promotes the accuracy, fairness, and privacy of consumer information contained in the files of consumer reporting agencies. Consumer reporting agencies are often hired by employers and housing providers to provide a background check on a candidate for employment or housing purposes. The FCRA allows conviction history to be reported to employers, landlords and property managers regardless of any time-period.<sup>17</sup> Similar to the FCRA, a majority of states permit criminal convictions be reported indefinitely. When Agency guidance gives the appearance of limiting conviction records to a certain period of time it can have a chilling effect on landlords and property managers seeking to screen housing tenants and who are entitled to consider reported conviction records regardless of any time-period.

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<sup>15</sup> *Id.* at 500.

<sup>16</sup> Megan C. Kurlychek et al., *Long-term Crime Desistance and Recidivism Patterns – Evidence from the Essex County Convicted Felon Study*, 50 *Criminology* 71 (2012).

<sup>17</sup> 15 U.S.C. § 1681c(a)(5) (“*Information excluded from consumer reports...no consumer reporting agency may make any consumer report containing any of the following items of information:(5) Any other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.*”).

IV. **Conclusion**

Thank you for the opportunity to provide these comments relating to the 2016 “Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions” and HUD’s consideration of whether this guidance should be re-evaluated as part of the overall body of guidance which factors into disparate impact liability in the housing context.

Sincerely,

A handwritten signature in blue ink, appearing to read 'E. Ellman', with a long horizontal flourish extending to the right.

Eric J. Ellman  
Senior Vice President, Public Policy & Legal Affairs