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The Honorable Sherrod Brown, Chairman  
The Honorable Pat Toomey, Ranking Member  
United States Senate Committee on Banking, Housing, and Urban Affairs  
Washington, DC 20510-6075

Dear Chairman Brown and Ranking Member Toomey:

The Consumer Data Industry Association ("CDIA")<sup>1</sup> appreciates the opportunity to submit this letter in response to this Committee's inquiry into the tenant screening industry and its participants, and the industry's impact on consumers. In this letter, CDIA will discuss what is unique to tenant screening reports as compared to credit reports, how tenant screening reports are utilized in housing communities across the country, the role of the consumer reporting agencies that prepare such reports (known as "tenant screeners"), and the regulatory environment in which these companies operate.

#### I. Tenant Screening Reports and Their Role in Housing

Tenant screening plays a crucial role in local communities to help assure stability for landlords and tenants by evaluating rental affordability, as well as public safety. Tenant screeners provide tenant screening reports, a particular type of consumer report, to assist property owners, landlords, and managers in evaluating prospective tenants of rental properties, including multi-unit properties, to assess the risks associated with those applicants. A tenant screening report provides information on the history of applicants. These reports include both credit information, which is sometimes obtained from another consumer reporting agency, and public records such as eviction and criminal record data. These reports supplement other information that landlords obtain to make decisions about whether to rent and on what terms, including information collected directly from applicants.

In the past, the housing market operated less formally. Part-time landlords often recruited tenants through their social networks, relying on subjective assessments of personal relationships rather than the more objective factors used today, such as financial and behavioral history.<sup>2</sup> This type of subjective decision-making raised the risk of discriminatory conduct in violation of fair housing and other applicable laws and became disfavored.<sup>3</sup> As a result of subjective and sometimes discriminatory conduct, the landlord industry developed more professional, more objective means of evaluating applicants through the use of tenant screening reports and scores.<sup>4</sup>

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<sup>1</sup> CDIA is a trade association representing consumer reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening 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, thereby helping to ensure fair and safe transactions for consumers, and facilitating competition and expanding consumers' access to financial and other products suited to their unique needs.

<sup>2</sup> See Thacher, David, *The Rise of Criminal Background Screening in Rental Housing*, LAW & SOCIAL INQUIRY, Vol. 33, No. 1 (Winter, 2008), at 11.

<sup>3</sup> *Id.*

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

Tenant screening reports and scores are broadly available to landlords of all sizes across the country; thus, rental decisions today are far less subjective and minimize discrimination risk against protected classes. Fact-based, standardized information promotes compliance with fair housing laws and fair decision-making. Also, these practices are the right things to do. Screening reports allow landlords to eliminate subjective assessments and comply with any applicable law that requires screening and protect the safety and wellbeing of their employee, tenants, and guests, all while ensuring objective and non-discriminatory decision-making.

Tenant screening reports may include a variety of tools to help landlords protect their tenants and the buildings, including (1) financial information, including a credit score, credit history, income verification, and rent payment history; (2) eviction information; and (3) criminal background information regarding the commission of crimes against persons (such as assault, rape, homicide, etc.) and the commission of property crimes (including burglary, vandalism, larceny, etc.). Some information contained in tenant screening reports, particularly credit information, may be obtained from another consumer reporting agency. Each piece of information provides the landlord with predictors regarding the risk associated with an applicant, such as an applicant's ability to pay their potential lease obligations when due, as well as insight into any past criminal history, to allow the landlord to evaluate the applicant using factual—rather than subjective and uncontrolled—factors. For example, historically individuals who have not skipped or been late in rent payments have a roughly six percent rate of default; prospects with a rental debt default at a rate of nearly one in four.<sup>5</sup>

In addition to reducing housing costs, residential screening also advances public safety,<sup>6</sup> advances economic stability by reducing housing turnover, and provides protection from identity theft through the use of identity verification. Indeed, some evidence exists that the use of a background screening may actually *reduce* the incidence of racial discrimination by shattering subconscious stereotypes.<sup>7</sup>

The federal government has recognized the clear benefits of tenant screening, requiring that criminal history be used in the tenant screening process for public housing. Congress has enumerated four discrete categories of applicants with criminal histories that public housing authorities must reject: (1) persons subject to a lifetime registration requirement under state sex offender laws; (2) persons convicted of methamphetamine production on public housing property; (3) persons evicted

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<sup>5</sup> See Experian, *Risk versus Reward: Identifying the Highest Quality Resident Using Rental Payment History* 4 (2013) <http://www.experian.com/assets/rentbureau/white-papers/experian-rentbureau-rental-history-analysis.pdf>. We note that this study was performed prior to the pandemic, during which time the federal government and state governments have implemented significant limitations on evictions for consumer affected by the pandemic. See, e.g., <https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDC-Eviction-Moratorium-03292021.pdf>.

<sup>6</sup> See, e.g., *HUD v. Rucker*, 535 U.S. 125, 134-35 (2002 (affirming the ability of public housing authorities to have no-fault evictions to protect health and safety interests); see also Preventing Crime in Federally Assisted Housing—Denying Admission and Terminating Tenancy for Criminal Activity or Alcohol Abuse, 24 C.F.R. § 5.850 *et seq.* (2013) (defining times when public housing authorities may or must terminate tenants involved in particular types of criminal activity).

<sup>7</sup> See Harry J. Holzer *et al.*, *Perceived Criminality, Criminal Background Checks and the Racial Hiring Practices of Employers*, 49 J. Law & Econ. 451, 452 (2006).

from public housing for drug-related criminal activity in the three years prior to the application, unless the evicted individual completed an approved rehabilitation program; and (4) persons currently engaged in illegal drug use.<sup>8</sup>

Beyond these mandatory bans, public housing authorities have the discretion to develop more stringent screening policies and to accept or deny prospective renters with records of other crimes. Federal guidelines instruct that public housing authorities may reject applicants who have engaged in any of the following activities within a reasonable time before submitting their application: drug-related criminal activity; violent criminal activity; and other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing-agency employees.<sup>9</sup>

Aside from public housing, landlords may be held liable for some criminal misdeeds of their tenants. Courts have imposed duties on landlords to prevent crime on their premises in certain circumstances.<sup>10</sup> Moreover, many state and local governments have increased the scope of liability for landlords who fail to control crime on their properties, including anti-nuisance laws and building codes.<sup>11</sup> Landlords must consider all of these obligations when screening prospective tenants.

## II. Regulatory Environment

There are two significant federal laws that impact tenant screening and the manner in which tenant screening reports may be used by housing providers: the Fair Credit Reporting Act (“FCRA”) and the Fair Housing Act (“FHA”). In the area of tenant screening, the FCRA places important responsibilities on tenant screening companies and the housing providers that use tenant screening reports under the FCRA’s twin goals of accuracy and fairness. The FHA prohibits housing providers from discriminating against applicants and tenants in housing determinations, which in turn impacts the type of information that landlords may use in their housing determinations.

### A. The Fair Credit Reporting Act

The FCRA governs the collection, assembly, and use of tenant screening reports protects consumers by preventing the misuse of their sensitive personal information and improves the accuracy of consumer report information.<sup>12</sup> In enacting the FCRA, Congress recognized the value of the

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<sup>8</sup> See 42 U.S.C. § 1437n(f); 42 U.S.C. § 13661; 42 U.S.C. § 13663; 24 C.F.R. § 960.204.

<sup>9</sup> 42 U.S.C. § 13661(c).

<sup>10</sup> See, e.g. *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477, 481 (D.C. Cir. 1970) (“The duty is the landlord’s because by his control of the areas of common use and common danger he is the only party who has the power to . . . provide the necessary protection”).

<sup>11</sup> See Thacher, at 15-16.

<sup>12</sup> Federal Trade Commission, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations* (July 2011) (“40 Years Report”), at 1. The 40 Years Report, issued in July 2011, is a compilation of FTC staff guidance and incorporates much of the FTC’s prior “Commentary” (published in 1990). The Report is relied upon by government and industry as an authoritative source on the FCRA.

consumer reporting industry, finding that CRAs “have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.”<sup>13</sup> The FCRA “seeks to balance the needs of consumers and businesses” with respect to the use of consumer information.<sup>14</sup>

Under the FCRA, tenant screeners are required to employ reasonable procedures to assure the maximum possible accuracy of the information in consumer reports.<sup>15</sup> Notably, the FCRA does not establish a “strict liability” standard for CRAs with respect to the accuracy requirement – it requires only that CRAs act reasonably. As the FTC has observed in one of its studies of accuracy, “[b]y its terms (‘reasonable procedures . . . maximum possible accuracy’), the statute itself recognizes that absolute accuracy is, as a practical matter, impossible.”<sup>16</sup> One of the primary reasons that absolute accuracy is impossible is because of the errors that will inevitably be introduced into the consumer reporting system. As FTC staff has noted, “[i]f a CRA reports an item of information that turns out to be inaccurate, it does not violate [section 607(b) of the FCRA] if it has established and followed reasonable procedures in reporting the item.”<sup>17</sup>

The duty to have reasonable procedures does not mean that a CRA must make every possible step to improve accuracy. Instead, a CRA must only take “steps that it can take to improve the accuracy of its reports at a reasonable cost.”<sup>18</sup> As the FTC noted in its report to Congress, the FCRA was designed to provide CRAs flexibility in their approach to accuracy: “Rather than precisely regulating the way that CRAs maintain their files, Congress opted to hold CRAs accountable for their procedures, and to give consumers the opportunity to check the accuracy of their files.”<sup>19</sup> The FCRA further “promotes accuracy by creating a self-help mechanism that empowers consumers to obtain copies of their reports and dispute erroneous or incomplete information.”<sup>20</sup>

Landlords and other consumer report users play a key role in the accuracy process by providing a notice of adverse action to applicants for any application they decline or accept “with conditions.” The notice of adverse action advises the consumer of the decision, provides the consumer with the name, address and phone number of the CRA, and provides the consumer with the federal Summary of

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<sup>13</sup> 15 U.S.C. § 1681(a)(3).

<sup>14</sup> S. Rep. No. 209, 103<sup>rd</sup> Cong., 2d Sess. (1993).

<sup>15</sup> 15 U.S.C. § 1681(e)(b).

<sup>16</sup> Federal Trade Commission, Report to Congress Under Section 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003 (“FACTA Report”), December 2004, at p. 17, n. 53, *available at* [https://www.ftc.gov/sites/default/files/documents/reports/under-section-318-and-319-fair-and-accurate-credit-transaction-act-2003/0412\\_09factarpt.pdf](https://www.ftc.gov/sites/default/files/documents/reports/under-section-318-and-319-fair-and-accurate-credit-transaction-act-2003/0412_09factarpt.pdf).

<sup>17</sup> 40 Years Report at 67.

<sup>18</sup> *Id.*

<sup>19</sup> FACTA Report, *supra* n. 16, at p. 8.

<sup>20</sup> *See Prepared Statement of Federal Trade Commission, on Credit Reports: Consumers’ Ability to Dispute and Change Inaccurate Information, Before the House Committee on Financial Services, June 19, 2007, at p. 4, available at* [https://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-trade-commission-credit-reports-consumers-ability-dispute-and-change/070619credittestimony.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-credit-reports-consumers-ability-dispute-and-change/070619credittestimony.pdf); *see also* FACTA Report, *supra* n. 16, at p. 8 (“In guaranteeing consumers access to their own credit reports and creating the dispute process, Congress recognized that consumers have a critical role in ensuring the accuracy of credit reports.”).

Rights, which explains to the consumers all of their rights under the FCRA, including the right to receive a copy of the report from the CRA.<sup>21</sup> Consumers may obtain a copy of their file disclosure from the CRA directly, even if they have not experienced an adverse action.<sup>22</sup>

Tenant screeners have invested significantly in improvements to their systems. They have enhanced processes for ensuring maximum possible accuracy, including employing additional data and different techniques to tackle the challenges posed by public records (as explained more fully below). Tenant screeners have made voluntary improvements to the dispute process to ensure that consumer disputes are addressed quickly, appropriately, and lawfully. Tenant screeners facilitate consumer participation by providing copies of reports to consumers and, in many instances, electronically delivering copies of reports at the same time they are delivered to the housing provider. Tenant screeners processes disputes through multiple channels, including telephone, the Internet, and mail. Tenant screeners often address disputes in time frames shorter than the FCRA (2-3 days versus the 30 days permitted by law). All of these steps operate to improve the overall accuracy of data in the tenant screening system.

#### B. The Fair Housing Act

To combat discrimination, the federal Fair Housing Act (“FHA”), codified at 42 U.S.C. § 3601 *et seq.*, prohibits a housing provider from refusing “to sell or rent after the making of a bona fide offer . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”<sup>23</sup> In April 2016, the U.S. Department of Housing and Urban Development (“HUD”) announced new guidance for taking adverse actions based on an individual’s criminal history. HUD notes that the use of a blanket policy to deny any applicants with a criminal record might lead to disparate impact on a protected class due to the disproportionate incarceration rates among certain groups. As HUD states, “across the United States, African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population.”

The HUD guidance advises that “[a] housing provider violates the Fair Housing Act when the provider’s policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate.” Therefore, a blanket policy to deny *any* applicants with a criminal record may have a disparate impact on African Americans and Hispanics. The Guidance advises that a housing provider’s screening policy should consider the nature, severity, and recency of convictions, and that policy should support “substantial, legitimate, nondiscriminatory interests” of property.

As explained more fully below, tenant screeners assist housing providers in implementing their screening policies by eliminating non-relevant records from consideration and standardizing records across jurisdictions so that similar offenses can be evaluated the same way. See *infra*, pp.12-13. These tools facilitate a housing provider’s compliance with FHA and HUD guidance.

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<sup>21</sup> 15 U.S.C. § 1681m(a); *see also* [https://files.consumerfinance.gov/f/documents/bcfp\\_consumer-rights-summary\\_2018-09.docx](https://files.consumerfinance.gov/f/documents/bcfp_consumer-rights-summary_2018-09.docx).

<sup>22</sup> *See gen.*, 15 U.S.C. § 1681g.

<sup>23</sup> 42 U.S.C. § 3604(a).

### III. Issues Raised by the Committee

Given the importance of the FCRA and the FHA, the Committee's inquiry focuses on issues related to the accuracy of the information in tenant screening reports and the use of tenant screening reports to meet affordable housing needs, particularly among Black, Brown, and other ethnic minority renters in the wake of COVID-19. To aid the Committee in its inquiry, CDIA addresses the primary issues raised by the Committee, specifically (a) criminal records and measures to assure maximum possible accuracy, (b) the use of eviction records, and (c) the use of rental screening scores and similar decision tools.

#### A. Criminal Records in Tenant Screening

Considering the irreversible harms involved with violent, abusive, and other criminal conduct in a residential community, public policy strongly favors full disclosure of relevant criminal records belonging to a prospective tenant. As HUD has noted, "[e]nsuring resident safety and protecting property are often considered to be among the fundamental responsibilities of a housing provider, and courts may consider such interests to be both substantial and legitimate."<sup>24</sup>

Sadly, tragic consequences may result when a property fails to perform criminal background checks on prospective tenants. For example, in Nebraska in 2016, a tenant's minor child was kidnapped and raped by another resident who had been allowed to move into a rental community without first undergoing a background check.<sup>25</sup> A property management company serves as a first line of defense against violent crimes occurring on an owner's property, and the tenant screening process permits the property owner to fulfill that critical responsibility of tenant safety. All property owners and landlords, not just those involved in providing public housing, have a "fundamental responsibility" to assess all potentially relevant information that may bear on a prospective tenant's impact on the safety of a community and its residents, including any criminal record that is potentially associated with a prospective tenant.

Balancing these interests against the rights of the individuals about whom reports are prepared, Congress clearly delineated the type of criminal history information that CRAs may include, and for how long. In particular, FCRA Section 1681c expressly provides that records of arrest may only be reported for a period of seven years, while records of convictions may be reported indefinitely.<sup>26</sup> Moreover, to assure that consumers are treated uniformly across the country, the FCRA preempts state laws that attempt to regulate the content of consumer reports.<sup>27</sup>

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<sup>24</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," [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF) at pp. 4-5 (April 4, 2016).

<sup>25</sup> *Cure v. Pedcor Mgmt. Corp.*, 265 F. Supp. 3d 984, 988-89 (D. Neb. 2016) (trial court refused to grant defendant's motion to dismiss, finding instead that the plaintiff had alleged sufficient facts to argue that had the landlord conducted a background check, it would have been discovered that the perpetrator had multiple convictions for assault and public indecency).

<sup>26</sup> 15 U.S.C. §§ 1681c(a)(2) and (5), respectively.

<sup>27</sup> 15 U.S.C. § 1681t(b)(1)(E).

The necessity of an inclusive history approach to screening is evident from a comparison of the credit reporting context where there is no similar public policy considerations. In the credit context, the potential harms of eliminating a credit record are not life-threatening; however, in the tenant screening context, the failure to identify an applicable criminal record could potentially result in serious bodily harm, sexual assault, or death.

#### 1. The Risks of Omitting Relevant Records

With over 3,100 counties and county-equivalents in the United States, compiling complete and accurate criminal records data for use and inclusion in tenant screening reports is a monumental task. This task has become even more complicated over the past 10 years as each jurisdiction has developed its own rules as to what identifying information will be revealed to the public.<sup>28</sup> Thus, the FCRA's goal to achieve maximum possible accuracy logically extends to including criminal records that belong to the individual being screened, just as much as it extends to excluding records that do not belong to the person being screened.<sup>29</sup>

Tenant screening companies must balance the considerations of tenant and community safety with informational accuracy in the generation of screening reports. A tenant screening company must find the right balance between "false positives" and "false negatives." A "false positive" in this context is the association of a criminal record with a tenancy applicant when that record does not belong to the applicant. A "false negative" is the failure to identify or match a criminal record that does belong to an applicant. Neither a "false positive" nor a "false negative" achieves the FCRA's goal of accuracy. In other words, an incorrect omission of a record is as inaccurate as the incorrect inclusion of a record.

Striking this balance is no easy feat. In the screening context, the data sets used for matching are (i) the information provided by the applicant and (ii) the information about offenders provided by courts and other public record access points. The process of matching criminal records necessarily depends on the integrity, consistency, and relevance of the information in these data sets. For several reasons, this matching is extremely difficult and complex (and ever evolving) when compared, for example, to matching records of loans or credit card accounts:

- (1) Records made available by courts or departments of correction today contain limited personal identifiers and the information reported varies significantly between jurisdictions. Some records do not include middle names; others lack full dates of birth. Records rarely contain Social Security numbers ("SSNs"), and those that do are older records<sup>30</sup>. Addresses

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<sup>28</sup> This issue is one of the reasons that the Uniform Law Commission established a Committee on Criminal Records Accuracy, drafting model legislation to improve the quality of criminal records at the state level. <https://www.uniformlaws.org/committees/community-home?communitykey=8cf49e06-b9e1-43b0-8bc1-56d459d47ebo&tab=groupdetails>.

<sup>29</sup> In addition to providing a safe environment, landlords do not want to turn away an otherwise qualified applicant and leave a unit vacant. They are highly incentivized by natural market forces to quickly qualify a new applicant and fill vacant units to maximize revenue and to recoup the costs of evictions.

<sup>30</sup> The number of identifiers appearing in public records has decreased greatly over time, with many criminal records containing only a name, possibly an address, and some records that include the person's age, but often not a complete date of birth. Other identifiers, such as Social Security numbers ("SSNs"), generally are not provided in public criminal records. In the CFPB's report on the credit reporting market, the CFPB noted that

- are rare. Some jurisdictions collect and report demographic data such as height, weight, hair color, eye color, and race (which can be inherently subjective<sup>31</sup> or change over time and are therefore unreliable), while others omit such information.
- (2) There are often problems with accessibility to court records because not all courts allow non-parties or non-attorneys to access information in their hard copy or electronic files.
  - (3) There are limits imposed by other laws on what information can be requested from applicants (such as limitations based on fair housing and discrimination laws).
  - (4) Consumers are highly mobile and may use names and other personal identifiers that change over time.
  - (5) Consumers often try to avoid detection by submitting false information, such as a date of birth that is off by a single year, or by using an alias. These individuals often present this false information numerous times (including when arrested), causing the misinformation to show up in court records, credit information, utility records and the like.<sup>32</sup>

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according to one estimate, SSNs appear on court records only 3% of the time. Consumer Financial Protection 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* ("Key Dimensions"), at p. 17, December 2012. In fact, most states prohibit or restrict the inclusion of SSNs in public records. See, e.g., 65 P.S. § 67.708(B)(6)(i)(A); Va. Code § 59.1-443.2. This can be attributed, in part, to the work of the FTC and other federal agencies in advocating for the removal of SSNs from public records as a means of reducing identity theft. See, e.g., *The President's Identity Theft Task Force Report*, September 2008, at pp. 9-10, available at <https://www.ftc.gov/sites/default/files/documents/reports/presidents-identity-theft-task-force-report/081021taskforcereport.pdf>.

<sup>31</sup> There inevitably will be substantial differences between (i) information collected from tenancy applicants, (ii) the representations of offenders at the time of arrest (e.g., providing the middle name as the first name), and (iii) the information which is subjectively provided by arresting officers (e.g., blue eyes might be misperceived as green, black hair mistaken for brown hair, height misstated by several inches, or weight misrepresented by many pounds). Similarly, information on race and gender is also increasingly fluid and is prone to the same demographic issues relating to self-reporting by offenders and assumptions made by arresting officers at the time of arrest. With increasing numbers of mixed raced populations, how a person identifies oneself or is perceived by others can vary greatly (e.g., a Hispanic or Latino individual, or someone who identifies as Hispanic or Latino, may be misidentified by police officers as Caucasian).

<sup>32</sup> See, e.g., U.S. Dep't Of Justice, Evaluations & Inspections Div., I-2009-001, *Review of the Department of Justice's Implementation of the Sex Offender Registration and Notification Act, v-vi* (Dec. 2008) (noting widespread inaccuracies in state registry information); Charles Sheehan, *Sex Offenders Slip Away*, Chi. Trib. (Mar. 31, 2006), [http://articles.chicagotribune.com/2006-03-31/news/0603310164\\_1\\_number-of-sex-offenders-parole-illinois-prisoner-review-board](http://articles.chicagotribune.com/2006-03-31/news/0603310164_1_number-of-sex-offenders-parole-illinois-prisoner-review-board) (noting that in Chicago over seventy-five percent of randomly sampled addresses of registrants were invalid); see also Press Release, Kansas Office of the Attorney Gen., Attorney General Kline Releases Results of Kansas Sex Offender Registry Audit (2005), <http://cdm16884.contentdm.oclc.org/cdm/singleitem/collection/p16884coll31/id/151/rec/12> (describing a random sample of Kansas registrants indicating a twenty-one percent incidence of invalid home address; twenty-nine percent of invalid current employment; and twenty-four percent of invalid vehicle identification information); see also "Hiding in Plain Sight? A Nationwide Study of the Use of Identity Manipulation by Registered Sex Offenders," Center for Identity Management and Information Protection, Utica College (February 2015), at pp. 70, 75 (finding that "[a]pproximately 42% of the sex offender registrants on the [National Sex Offender Registry] file had some type of multiple identity elements" and that 17 percent of offenders attempted to manipulate their identities).



Screening companies strive to create procedures designed to match the most consistent and available information on criminal records, given the limitations and concerns identified above. However, any set of matching procedures cannot be so unbalanced as to miss a large percentage of records that actually belong to applicants. This is especially true where a “false negative” results in a failure to apprise a property of an applicant’s relevant criminal history and potentially put the residents of the property and local community at risk. Indeed, the dangers of “false negatives” resulting in missing potentially applicable criminal records are not theoretical, but rather have repeatedly manifested in numerous incidents throughout the country, as noted herein.

## 2. The Risks of False Negatives

Horrible events have shaped the thinking of the industry on the best way to achieve the proper balance. One such event involved a young woman who was brutally kidnapped, raped, and stabbed in her apartment complex by a neighbor whose tenant screening report had erroneously omitted a “lengthy criminal history,” which included violent crimes and sex offenses.<sup>33</sup> At the time of the attack, Friends Rehabilitation Program (“FRP”) both owned and managed the apartment complex. As part of its agreement with the Philadelphia Housing Authority and pursuant to HUD regulations, FRP had an obligation to screen all prospective tenants, including a criminal background check. When FRP ran the background check on the attacker, however, the report failed to uncover his lengthy criminal history, which included “eleven arrests, multiple convictions, and incarceration in the state penitentiary on a sentence of five to fifteen years for rape and sexual assault.” As a result of FRP’s failure to uncover the attacker’s criminal history, he was allowed to rent an apartment, setting the stage for his attack on Ms. Thomas several months later.

Unfortunately, the *Thomas* case is only one of multiple examples of the potentially devastating consequences of a “false negative” and the failure to identify the criminal history of a prospective tenant.<sup>34</sup> Failing to perform criminal screening can not only have direct consequences, but also cascading, indirect ones. And well-intentioned public policy can have detrimental effects. The City of Seattle adopted a Fair Chance Housing Ordinance in 2017 that prohibits landlords from taking adverse action against a tenant or applicant based on any arrest record, conviction record, or criminal history, subject to limited exceptions.<sup>35</sup> To comply with the new Ordinance, the Addison apartment complex in Seattle eliminated criminal screening. Living conditions in the Addison declined precipitously, with 911 calls from the building more than doubling over the two-year period following the elimination of

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<sup>33</sup> See *Thomas v. Friends Rehab. Program, Inc.*, No. Civ.A.04-4288, 2005 WL 1625054, at \*1 (E.D. Pa. July 11, 2005).

<sup>34</sup> See, e.g., *Estate of Campagna v. Pleasant Point Properties, LLC*, 464 N.J. Super. 153 (App. Div. 2020) (an apartment complex in New Jersey, Pleasant Point Properties, had a new tenant, Strong, murder another tenant in the building after Strong was allowed to live there without any screening process or background check, but where Strong had previously spent 5 years in prison for armed robbery); *Mulloy v. United States*, 884 F.Supp.622 (D. Mass. 1995) (wife of an army officer was raped and murdered by another enlistee living on the army base after the army screened the enlistee, but failed to uncover the enlistee’s criminal history which included aggravated burglary and rape, burglary and attempted theft, and several weapons charges); see also *Allstate Ins. Co. v. Tenant Screening Services, Inc.*, 914 P.2d 16, 17 (1996) (a tenant was sexually abused by another tenant after the screening report failed to disclose the other tenant’s criminal history).

<sup>35</sup> Seattle, Wash., Mun. Code § 14.09.025(A)(2) (2021).

screening.<sup>36</sup> Building management had to hire additional janitors and armed security guards to deal with issues, with total security costs increasing 308 percent since the Ordinance took effect, and the building's insurance deductible increased from \$5,000 to \$100,000. Staff turnover was reported to be 400%. Evictions tripled over that two-year period, with costs associated with a single eviction easily approaching \$4,000, not accounting for lost rents. Average total occupancy declined over 5 percent, and negative social media reviews increased 186%. Overall, the building turned from a cash flow positive operation to a negative one, dropping over 400%, and the tenants who reside there are increasingly unhappy with their community.<sup>37</sup>

### 3. Expunged Records

Given the importance of criminal record screening in ensuring public safety, the Committee's inquiry also focuses on expunged records. Tenant screeners do not include in reports records that they know are sealed or expunged but identifying such records in a timely fashion is complex work. To remove or prevent insertion of sealed or expunged records, tenant screeners need continued access at scale to case, charge, and personal identifier data. This is a current challenge across states, one that CDIA is addressing in states' efforts to update and automate criminal record expungement policies and processes.

Court criminal record access and expungement practices vary significantly state by state. Tenant screeners have unique knowledge and experience integrating expungement data timely and accurately at scale on a multistate basis, incorporating states' diverse systems, policies, and processes. Indeed, today, it is not uncommon for screening providers to contact courts to tell them that the court website continues to publish to the public a record that a consumer has indicated to the background screening firm should be expunged.

However, funding, technology, and organization constraints impact expungement initiatives. Several states lack a cost-effective statewide criminal record source that reflects expungement updates. Other states provide expungement updates using aged technology or raw records that must be converted in order to use at scale. Still other states provide limited support for record users to use to resolve discrepancies in case, charge, and defendant information found in the state's public records.

#### B. Eviction Records

In addition to a consumer's credit history and criminal records, landlords also look to a consumer's history of eviction filings to assess financial and other risks associated with a potential leasing transaction. This eviction information is largely obtained from public court records of eviction filings. Depending on state or local laws, landlords may be required to provide tenants with notice and an opportunity to cure prior to initiating an eviction proceeding. If the tenant does not pay the rent or otherwise remedy the lease violations, the landlord may then proceed with the filing of an eviction

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<sup>36</sup> Proposed Brief for GRE Downtowner LLC as Amicus Curiae Supporting Plaintiffs, *Yim v. City of Seattle*, No. 2:18-cv-736-JCC (W.D. Wash. filed May 21, 2018).

<sup>37</sup> *Id.*

proceeding. As a matter of practice, a landlord may agree to dismiss the proceeding if the tenant subsequently cures the rent deficiency or other lease violations, or if the tenant has already vacated the premises.

In evaluating eviction filings as part of a leasing decision, many landlords consider the presence of an eviction filing in court, regardless of the outcome, as an indicator of an added level of risk of future rental default and an element to be considered with respect to whether and on what terms to approve a rental application. This consideration is particularly true where a prospective tenant has a history of eviction filings. Although some landlords will not consider housing court records where the eviction filing was dismissed or satisfied, other landlords will consider the fact of the filing of an eviction proceeding in their overall rental determination. As noted above, however, this information is not considered in a vacuum, but is part of the overall rental determination.

### C. Rental Screening Scores and Similar Decision Tools

To further minimize the risk of disparate impact in rental housing, to get renters into housing more efficiently, and to lower the cost of housing by reducing turnover time, tenant screeners have developed a range of objective scores and other decision tools. These tools aid landlords in making rental decisions and complying with applicable laws, including the FCRA and FHA. Tenant screening scores are similar to credit scores, in that they are used as an objective assessment of risk. The scores for tenant screening are based on race-neutral data, and so they also facilitate fair housing compliance by enabling consistent and non-subjective decision-making. The use of scores by landlords is just one part of the application process; landlords typically do not make decisions whether or not to rent solely based on scores. Instead, they are but one helpful piece of information, along with an applicant's disclosed rental history, references, and current income status.

Tenant screening scores, like credit scores, are meant to assess the ability of a tenant to meet the financial obligations of the renting arrangement through an empirically derived and statistically validated model. Scoring models balance different risks of default against the ability of an applicant to pay. Landlords decide acceptable tolerances for these different factors, and the model then produces scores based on those tolerances. For example, a landlord could decide how much weight to allocate to particular rent or to debt-to-income ratios, and balance those risks against other positive attributes, like good credit history or no history of late rental payments. These models may weigh other risk factors, like past eviction proceedings, history of filing for bankruptcy, tax liens, and collection activity, which objectively indicate the ability of the applicant to meet the lease's financial obligations. Further, these models may be structured differently based on state law requirements, the amount of rent needed to remain profitable, the class of property in question, the type of tenant served (such as students, seniors, or families seeking homes near a school), and the landlord's judgement about the demands for a property.

For financial decisions, scores are typically not used to make a simple approve or decline decision. Landlords often have three potential outcomes: approved, declined, and approved with conditions. "Approved with conditions" is typically used when the applicant's prior history suggests a higher degree of the risk of non-payment, but the landlord is able to offer the unit to the applicant if

the applicant can furnish a security deposit or an advance on the rent. By assessing the ability of prospective tenants to meet the tenancy's financial obligations, tenant screening scores act to keep the cost of rentals low.

Tenant screeners also provide filtering and decision tools to assist landlords in using screening reports. Because different landlords may consider different information, whether financial, eviction, or criminal information, in different ways, screeners often provide tools to filter report results based on the landlord's pre-established criteria. For example, these tools may eliminate or filter records that are irrelevant to a particular housing determination, such as non-violent misdemeanors. With such filtering, screeners make only that information available to the landlord that the landlord has deemed necessary or useful to landlords to make its decisions in accordance with applicable law, minimizing subjective decision-making.

IV. Conclusion

Factual, objective, widely available, and standardized information promotes compliance with fair housing laws and fair decision-making. Tenant screening companies provide factual and objective reports that allow landlords to comply with any applicable law that requires screening, protect the safety and wellbeing of their employees, tenants, and guests, and remain profitable, all while ensuring objective and non-discriminatory decision-making.

Respectfully submitted,



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