Study Committee on the Use of Tenant Information in Rental Decisions

Preliminary List of Issues for the Study Committee to Consider

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Question 1: What types of "tenant information" would a uniform law address?

There are four types of information that landlords typically use to screen tenants: current finances (including income/employment and assets), credit history, criminal history, and rental history (including references from prior landlords and housing litigation history). The latter two -- criminal history and rental history – have increasingly been targets of intervention and reform campaigns at the federal, state, and local levels over the last decade. A uniform law that tackled both might be unwieldy, but a law that addressed one but not the other would have a much more limited impact on access to housing.

Question 2: Whose conduct would be regulated by a uniform law?

Some prospective landlords conduct tenant screening on their own, through internet searches and phone calls to prior landlords. Some pull reports from traditional credit reporting agencies like Experian and Transunion or, more commonly, specialized tenant screening companies. Both landlords and tenant screening bureaus (and, to some extent, credit reporting agencies) access publicly available court records by going to courthouses to review files, by purchasing bulk data reports from financially strapped court systems, or in some states through direct searches in the courts' online case management databases. A uniform law might address the actions of the credit reporting agencies (subject to FCRA preemption, discussed below), the tenant screening companies, prior landlords, prospective landlords, or court systems, or all of the above.

Question 3: Would the law limit access to information, or govern its use, or both?

Relatedly, the committee will need to look at whether to target the *type of information that is made available* to prospective landlords and tenant screening bureaus or focus on the *use of freely available information*, or both. Some existing laws and proposed laws, for example, provide for sealing or expungement of eviction records; such measures recognize that enforcement of use restrictions has proven extremely difficult in similar contexts, and that making it illegal to use certain kinds of information in rental decisions is likely to simply force those decisions underground (except where the wrongdoer is unsophisticated and perhaps herself facing barriers to equity in the housing market). Sealing laws can face constitutional challenges in some states; if not crafted carefully, they may also

restrict access to court data in ways that impede scholarship, journalism, and the targeting of resources to vulnerable people facing housing crises.

Question 4: What types of provisions might be included in a uniform law?

The following is a non-exclusive list of provisions from current or proposed laws that the committee might consider including in a uniform law. A more detailed survey of existing approaches, with citations, will be circulated before the next meeting.

1. Limitations on use of criminal records
    a. Barring denials based on arrests (as opposed to convictions)
    b. Requiring individualized assessments of criminal records
    c. Limiting lookback periods
    d. Barring use of sealed/expunged records, including via "ban the box" rules

2. Limitations on use of housing case records
    a. Barring denials based on filings
    b. Barring denials based on dismissals or other outcome categories
    c. Barring denials of tenants who have sued their landlords or retained counsel to pursue or defend a case

3. Sealing/expungement of housing court records
    a. Automatic sealing of some or all cases upon filing, with cases to be unsealed where allegations admitted or proven or under other specified circumstances
    b. Automatic sealing of case records after a certain period of time
    c. Establishment of a process for tenants to seal or expunge certain records during or after the case, either as a matter of right or in the exercise of judicial discretion guided by statutory criteria
    d. Maintaining public access to housing case records but restricting access to online databases or bulk data lists
    e. Establishment of court record error correction procedures that correct errors across platforms, including public-facing online databases

4. Opportunities for tenants to be more involved in the screening process
    a. Requiring disclosure of screening criteria and tenant screening company to be used before any application fee is required;
    b. Requiring disclosure of reasons for adverse decisions and/or giving tenants access to screening reports
    c. Permitting tenants to purchase screening reports and include mitigating circumstances in them

d. Requiring landlords to conduct individualized assessments and offer tenants the opportunity to share context or mitigating circumstances

5. Regulation of tenant screening companies
    a. Clarifying that tenant screening companies are subject to FCRA (see below)
    b. Requiring screening companies to quickly update reports with changed information, including quickly removing sealed records from reports
    c. Requiring stricter matching criteria to avoid misidentification of tenants
    d. Giving tenants the right to request copies of their own screening reports and a prompt process for error correction
    e. Requiring that screening reports include more than naked scores or "thumbs up/thumbs down" rankings to enable landlords to engage in informed decision-making
    f. Requiring that tenant screening companies monitor and control for algorithmic bias

Question 5: Might any of the proposed measures be prohibited by law in some or all jurisdictions?

The Fair Credit Reporting Act, 15 U.S.C. § 1681, preempts some but not all state-level regulation of credit reporting agencies. To the extent that tenant screening companies are considered credit reporting agencies under FCRA, and most likely are, regulating them, too, must be done with the FCRA preemption provisions in mind. Because this is a uniform law, it is also important to consider that states' approaches to public records vary such that proactive sealing of entire categories of court records may be unconstitutional in some states, while public access to court records may be a simple matter of common law and regularly restricted in others.