

Regulation of the Content of Tenant Screening Reports

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As we have discussed, landlords can rely on a variety of sources – including their own internet research and outreach to prior landlords – but many if not most purchase what are known as tenant screening reports from private companies that gather and organize background check data and, often, offer assessments of the risk of renting to a particular applicant. The tenant screening reporting industry is governed at the federal level by the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681-1681x, and regulated by the Federal Trade Commission (FTC), the Consumer Financial Protection Bureau (CFPB), and others. Some states and localities have sought to supplement FCRA, adding local restrictions on the content of tenant screening reports.

This memo addresses these efforts to regulate the *content* of tenant screening reports.¹ It first offers a high-level description of tenant screening reports and how landlords use them. It then summarizes the regulation of tenant screening reports under FCRA and the scope of FCRA pre-emption. Next, the memo identifies the concerns that have led tenant advocates to call for greater regulation of the tenant screening industry, followed by examples of responsive state law provisions.

I. Tenant Screening Reports: Content and Use

Many if not most landlords purchase background reports from specialized tenant screening companies as part of their rental application process. When a prospective renter applies for an apartment, the landlord requires the applicant to consent to a background check and, often, passes along the cost of the check to the applicant. The landlord then purchases a tenant screening report on the applicant. The report is generally based on some combination of criminal record, housing case record, credit, and employment history, and sometimes additional background information. This information may be gathered and analyzed by the tenant screening company itself or purchased by it from another background checking source.²

The level of detail in the reports varies: some share the underlying data, others share only high level synopses (e.g., “Eviction case activity within the last 3 years? Yes.”). Many offer a risk assessment in the form of a numerical score or a thumbs-up/thumbs-down recommendation based wholly or in part on a computer algorithm; some supply only this recommendation, without any

¹ The *use* of information landlords receive in tenant screening reports was addressed in the February 2022 memo and meeting.

² See, e.g., *McIntyre v. RentGrow, Inc.*, 2022 WL 1538293 (C.A.1 (Mass.), 2022) (RentGrow issues tenant screening reports based on data collected and analyzed by a TransUnion subsidiary)

underlying data. Reports may be off the shelf or may give landlords the ability to toggle screening criteria on or off³ or set their own risk levels in particular areas.⁴

Even where a report makes a recommendation, it is of course the landlord who makes the final decision about whether to rent to the applicant. Where a landlord chooses not to rent to an applicant based on information in a tenant screening report, the landlord is required under FCRA to give the tenant an “adverse action” notice directing the tenant to the supplier of the adverse information so that the tenant can both know the information is out there and take steps to correct it if appropriate (see Part II below).⁵ Landlords often do not provide the required adverse action notice, and it can be nearly impossible for a tenant to unearth the real reasons she was denied an apartment if the landlord does not disclose them.

II. Federal Regulation of the Tenant Screening Industry

A. The Fair Credit Reporting Act

Companies that produce tenant screening reports are generally considered “consumer reporting agencies” within the meaning of the FCRA. FCRA imposes on those companies the obligation to follow “reasonable procedures to ensure maximum possible accuracy of the information” contained in the reports they publish.⁶ The Act limits the amount of time that certain information can be included in reports (e.g., civil judgments can be reported for seven years or until expiration of the statute of limitations, whichever is later).⁷ FCRA also provides remedies for consumers, who are entitled to learn when adverse action is taken against them based on a consumer report⁸ and gain access to the report and the information on which it is based⁹; to challenge inaccuracies and require “reinvestigation” of negative information by the consumer

³ See, e.g., “AG Healey Targets Companies Selling Pre-qualification Software That Discriminates Against Prospective Tenants” (reporting on \$100,000 settlement between Massachusetts Attorney General and tenant screening companies Buildium and Tenant Turner, which enabled landlords to select an option to screen out housing voucher recipients in violation of state law), <https://www.mass.gov/news/ag-healey-targets-companies-selling-pre-qualification-software-that-discriminates-against-prospective-tenants>.

⁴ The quantitative journalism entity The Markup collected sample tenant screening contracts and reports used by public housing authorities in a variety of states. While these samples are not necessarily representative of what most landlords purchase, they provide a window into the process for those newer to the subject. See generally Lauren Kirchner, “The Lockout,” series available at <https://themarkup.org/series/locked-out> and screening contracts and reports collected at <https://www.documentcloud.org/app?q=%2Bproject%3Atenant-screening-story-fo-49059>. See also, e.g., Rentec Direct information (<https://www.rentecdirect.com/tenant-screening>) and demo video (https://youtu.be/HSxyE8_LSiM); Oct. 19, 2021, Letter from Senator Sherrod Brown, Chair of the U.S. Senate Committee on Banking, Housing, and Urban Affairs, to CFPB Director Rohit Chopra (describing how tenant screening reports work), <https://www.banking.senate.gov/newsroom/majority/brown-calls-on-newly-confirmed-cfpb-director-chopra-to-review-the-tenant-screening-industry>.

⁵ 15 U.S.C. § 1681m(a)

⁶ 15 U.S.C. 1681e(b)

⁷ 15 U.S.C. 1681c

⁸ 15 U.S.C. 1681m

⁹ 15 U.S.C. 1681g

reporting agency¹⁰; and to sue and recover damages and attorneys' fees if they can prove that they were harmed by a company's failure to comply with the Act¹¹.

FCRA expressly preempts some but not all state regulation of tenant screening companies. As a general rule, only laws that conflict with FCRA are preempted, "and then only to the extent of the inconsistency."¹² The law contains certain exceptions, specified areas in which FCRA occupies the field and states are barred from imposing additional restrictions.¹³ With regard to tenant screening, for example, § 1681t(b)(1)(E) bars post-1996 state regulation of subject matter regulated under "§ 1681c of this title, relating to information contained in consumer reports." Section 1681c, in turn, requires that certain information—like older civil judgments and arrest records—be excluded from credit reports and that certain other information—like the fact that the number of credit record requests has influenced a person's credit score—be included. The scope of this field preemption has been the subject of litigation, including a 2022 decision in which the First Circuit found preemption limited to what Congress was "regulating narrowly and with specificity [in 1681c]: information older than seven years relating to bankruptcies, civil suits, civil judgments, records of arrest, paid tax liens, accounts in collection, or that is otherwise adverse."¹⁴ The scope of preemption by FCRA is, more generally, often a subject of debate.

The Federal Trade Commission, which enforces the FCRA, has published guidance for tenant screening companies and landlords on how to comply with the Act.¹⁵ It has also brought enforcement actions against tenant screening companies for failure to establish "reasonable procedures to ensure maximum possible accuracy" of reported information.¹⁶

The CFPB also plays a role in enforcing the FCRA in the tenant screening industry. The CFPB has taken the position that it has rulemaking and investigative authority over the provisions of FCRA that apply to tenant screening and supervisory authority over the tenant screening practices of certain companies.¹⁷ It does not have supervisory authority over companies that

¹⁰ 15 U.S.C. 1681i

¹¹ 15 U.S.C. 1681n and o

¹² 15 U.S.C. 1681t(a)

¹³ 15 U.S.C. 1681t(b)

¹⁴ *Consumer Data Industry Association v. Frey*, 26 F.4th 1 (1st Cir. 2022) (reversing District Court's ruling that FCRA preempted amendments to Maine's state Fair Credit Reporting Act regarding medical debt and debt resulting from abuse)

¹⁵ See, e.g., "Using Consumer Reports: What Landlords Need to Know," <https://www.ftc.gov/business-guidance/resources/using-consumer-reports-what-landlords-need-know>; "What Tenant Background Screening Companies Need to Know about the Fair Credit Reporting Act," <https://www.ftc.gov/business-guidance/resources/what-tenant-background-screening-companies-need-know-about-fair-credit-reporting-act>

¹⁶ 15 U.S.C. 1681e(b). See, e.g., FTC, "Tenant Background Report Provider Settles FTC Allegations that it Failed to Follow Accuracy Requirements for Screening Reports," <https://www.ftc.gov/news-events/news/press-releases/2020/12/tenant-background-report-provider-settles-ftc-allegations-it-failed-follow-accuracy-requirements>

¹⁷ See March 17, 2021, Letter from David Uejio, CFPB Acting Director, to Senators Elizabeth Warren and Cory Booker, on file with Reporter, citing 15 U.S.C. 1681s(a)-(c) and (e); 12 U.S.C. 5561-5565. The Senators' letter to the CFPB to which the Acting Director was responding is available here, courtesy of The Markup: <https://www.documentcloud.org/documents/20510708-20210301-letter-to-cfpb-on-oversight-of-tenant-screening-technology-companies>.

perform only tenant screening but can still investigate those companies and refer issues to the FTC.¹⁸

B. The Fair Housing Act and the Department of Housing and Urban Development (HUD)

Tenant screening report companies may also be governed by the antidiscrimination provisions of the Fair Housing Act, 42 U.S.C. 3601, *et seq.* In a pending case brought by the Connecticut Fair Housing Center, the District Court denied the defendant tenant screening company's motion to dismiss, holding that such companies can be liable under the FHA for following policies in the preparation of tenant screening reports that either intentionally discriminate against people in protected categories (including Black and Latino applicants and applicants with disabilities) or have an unjustified disparate impact on them.¹⁹ The court later denied the screening company's motion for summary judgment, and the case is awaiting trial on the merits of the claims.²⁰ State fair housing laws may impose parallel or complementary requirements, like a ban on helping landlords screen out tenants with housing vouchers where state law makes source of income discrimination illegal.²¹

III. Lingering Concerns and Responsive State and Local Regulatory Activity

While the question of whether and how tenant screening companies might violate federal law is outside the scope of this study committee, the availability, the efficacy, and the preemptive effect of federal remedies have all informed the debate about the need for and appropriateness of additional state or local regulation of the content of tenant screening reports. Despite the existing federal framework, tenant and consumer advocates have expressed ongoing concerns about industry practices, including:

- Use of data with limited predictive value and a heightened risk of facilitating race and gender discrimination (based on empirical evidence that, e.g., Black women are disproportionately likely to have eviction cases filed against them, and Black and Latino men are disproportionately likely to have arrest and conviction records)²²;

¹⁸ *Id.*

¹⁹ *Connecticut Fair Housing Center v. Corelogic Rental Property Solutions, LLC*, 369 F.Supp.3d 362 (D.Conn., 2019)

²⁰ *Connecticut Fair Housing Center v. CoreLogic Rental Property Solutions, LLC*, 478 F.Supp.3d 259 (D.Conn., 2020)

²¹ *See, e.g.*, "AG Healey Targets Companies Selling Pre-qualification Software That Discriminates Against Prospective Tenants," *supra* note 3

²² *See, e.g.*, U.S. Dept. of Housing and Urban Development (HUD) Policy, Development, & Research Office, "Tenant Screening With Criminal Background Checks: Predictions And Perceptions Are Not Causality," *PD&R Edge* (May 17, 2022), <https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-051722.html>; HUD 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 (April 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF; Complaint in *Connecticut Fair Housing Center*, *supra* note 18-19

- Reliance on algorithms that both produce/replicate and hide unlawful race and other bias²³;
- Overbroad inclusion of records of people with names similar or identical to the applicant’s without second-level matching (e.g., with an address and SSN), leading not only to denial of housing opportunities generally but disproportionate denial of opportunities to Latinos and people from other ethnic groups in which many people share names²⁴;
- Failure to accurately report court records, including failure to expeditiously remove outdated or expunged records²⁵;
- Insufficient presentation of data to enable landlords to critically assess risk (e.g. presenting only a yes/no recommendation without the underlying data or a description of the data on which the recommendation is based)
- Use of non-rental credit history as basis for negative recommendations or scores, even where a tenant’s housing voucher will cover all or substantially all of the rent²⁶;
- Direct sales of screening software or services by companies that claim to be exempt from FCRA²⁷;
- Opaque screening criteria causing tenants to pay to apply to apartments they will never be permitted to rent.

In some cases, states have stepped in to try to address some of these concerns through direct regulation of the content of tenant screening reports. For example:

- A 2022 Utah law providing for expungement of certain eviction case records requires “tenant screening agenc[ies]” to remove expunged records from their reports and databases within 30 days and bars them from using the expunged records in producing reports or calculating scores or recommendations.²⁸
- In Washington, landlords must let prospective tenants know about the type of screening they will do (information considered, screening criteria, name of tenant screening company if any) *before* the tenant decides to apply.²⁹ State law also provides for “comprehensive reusable tenant screening reports” that tenants can purchase

²³ See, e.g., <https://www.nhlp.org/our-initiatives/aroyo-v-corelogic/>

²⁴ See, e.g., Lauren Kirchner, “Access Denied: Faulty Automated Background Checks Freeze Out Renters,” *The Markup*, <https://themarkup.org/locked-out/2020/05/28/access-denied-faulty-automated-background-checks-freeze-out-renters>; 12 C.F.R. 1022, CFPB Advisory Opinion on Fair-Credit Reporting: Name-Only Matching Procedures (Nov. 10, 2021) (name-only matching is not a reasonable procedure to ensure maximum possible accuracy under FCRA)

²⁵ See, e.g., *McIntyre v. RentGrow*, *supra* note 2 (where jury could find RentGrow produced a report based on inaccurate and harmful eviction case records provided by a third party vendor and failed to follow reasonable procedures to ensure the accuracy of those records, RentGrow is still entitled to summary judgment because its failures were not reckless or willful)

²⁶ See, e.g., Complaint in *Louis v. SafeRent Solutions, LLC*, U.S. District Court for the District of Massachusetts, Docket No. 1:22-cv-10800 (filed 5/25/22)

²⁷ See, e.g., FOEWARN: Our Solutions <https://www.forewarn.com/our-solutions/>.

²⁸ Utah Code § 78B-6-854

²⁹ RCW 59.18.257

directly from screening companies and have sent to different landlords.³⁰ Both measures aim to cut down on futile applications and the associated costs as well as to facilitate earlier and more effective error correction.

- A Minnesota law gives tenants the right to include up to 100 words of explanation of any eviction record or other disputed item not resolved by a FCRA-style reinvestigation challenge.³¹ Where a “residential tenant screening service” creates a report based on court records, it is required to include both the individual’s name and date of birth, where provided in the court record; the actual outcome of the case; and the “specific basis” of the court’s decision where available.³²

Other states have their own credit reporting or fair housing laws that, where not preempted by federal law, may impose additional requirements on tenant screening services and their reports.

³⁰ *Id.*

³¹ MN Stat. 504B.241, subd. 1-3

³² *Id.*