Final Meeting Summary Memo

Esme Caramello, Reporter
ULC Study Committee on the Use of Tenant Information in Rental Decisions
January 2023

Over the course of four meetings, this Study Committee has investigated the pros and cons of creating model or uniform legislation on the use of tenant information in rental decisions. In doing so, we have considered the many different forms such an act might take, as well as the likely legal or practical limitations on any relevant legislative activity by the states. The purpose of this memo is to summarize at a high level the ground covered in order to facilitate final comment and decision-making.

I. Previous Work of the Study Committee

The committee held an introductory meeting on June 30, 2021. Commissioners and observers introduced themselves and expressed initial thoughts on the subject matter. The reporter offered a summary of the topic along with a list of five preliminary questions to guide the committee's investigation:

1. What types of tenant information would a uniform law address?
2. Whose conduct would be regulated by a uniform law?
3. Would the law limit access to information, or govern its use, or both?
4. What types of provisions might be included in a uniform law?
5. Might any of the proposed measures be prohibited by law in some or all jurisdictions?

After a brief discussion, additional stakeholders were identified; following the meeting, they and others identified by the reporter, chair, and ULC Executive Director were invited to join the committee as observers, and several did.

The next three meetings were substantive, with each considering a different approach to legislation in this area. The first, in October 2021, covered **housing case record sealing and expungement**. The second, in February 2022, covered **restrictions on the use of publicly available information in screening decisions**. The third, in June 2022, covered **regulation of the content of tenant screening reports**. Before each meeting, the reporter distributed a memorandum offering legal and practical background and summarizing the key issues for discussion; these memos are attached and available in the study committee's online workspace. At each meeting, a summary presentation by the reporter was followed by a lively discussion and debate about the pros and cons of the approach under consideration.

II. Should the Committee Recommend the Drafting of a Model or Uniform Act?

The committee is now tasked with making a recommendation about the need for and feasibility of a model or uniform act on our subject matter. In so doing, the committee is guided by the following considerations outlined by the ULC:

1. Whether there a need for an act on the subject;

2. Whether there is a reasonable probability that an act, when approved, either will be accepted and enacted into law by a substantial number of states or, if not, will promote uniformity indirectly;
3. Whether the subject of the act will produce significant benefits to the public through improvements in the law; and
4. Whether the act will maintain the integrity of well-balanced and well-settled law in areas traditionally governed by the states.

In addition to the material covered in the meeting memos (attached) and the proposal memo submitted to the ULC by Commissioner Stern and observer Allen Joslyn, the following issues raised in the committee's meetings may bear on this deliberation:

A. An identified issue and a small but growing number of state laws (and bills and ordinances) to address it

Tenant screening has come under scrutiny in recent years, with advocates identifying a range of problems that law reform could solve. As outlined in Commissioner Stern's proposal letter and the reporter's introductory presentation, and as discussed by the participants at that first meeting, the concerns tend to be that:

- The information used to screen tenants can be inaccurate, without a workable process for identifying and correcting inaccuracies;
- The information can be incomplete, without a real opportunity to clarify or supplement it;
- Information like tenant victories and extremely outdated records can still lead to housing denials;
- There is virtually no empirical evidence showing that even recent, accurate information being used as exclusive support for housing denials is in fact predictive of success in future housing/rentals; and
- Screening recommendations or ratings can be based on discriminatory material from other systems and lead to decisions based on invisible, unintentional race and gender bias.

While not everyone agrees that there is a problem, or that legislation is the solution, calls for law and policy reform, along with study and documentation of the problems, are on the rise. *See, e.g.,* American Bar Association, "ABA Ten Guidelines for Residential Eviction Laws" (2022) (recommending laws allowing both automatic and discretionary sealing of eviction cases in various circumstances); The Fair Credit Reporting Act's Limited Preemption of State Laws, 87 Fed. Reg. 41042 (July 11, 2022) (interpretive guidance issued by the Consumer Financial Protection Bureau documenting concerns with tenant screening, including the lack of empirical evidence of its predictive value, and green-lighting state legislative reform); Tinuola Dada and Natasha Duarte, "How to Seal Eviction Records: Guidance for Legislative Drafting" (Upturn, 2022); Family Housing Fund and Family Justice Center, "Opening the Door: Tenant Screening and Selection – How it

works in the Twin Cities Metro area and opportunities for improvement" (March 2021); Adam Porton, Ashley Gromis, and Matthew Desmond, "Inaccuracies in Eviction Records: Implications for Renters and Researchers," Housing Policy Debate 31:3-5 (Sept. 2021); Kathryn A. Sabbeth, "Erasing the Scarlet 'E' of Eviction Records," The Appeal (Apr. 12, 2021); Paula A. Franzese, "A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity," 45 Fordham Urb. L.J. 661 (2018); Allyson E. Gold, "No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income Tenants, 24 Geo. Law and Policy J. 60 (2016).

Legislative activity, too, is growing. The federal Fair Credit Reporting Act (FCRA), 15 U.S.C. s. 1681 *et seq.*, governs the content of tenant screening reports across the country, but state and local laws governing the use of tenant information in rental decisions have historically been scarce. This has begun to change. Since 2020, new laws in the area studied by the committee have been adopted in, for example, Arizona, Colorado, the District of Columbia, Illinois, Nevada, New Jersey, Oregon, Utah, and the cities of Philadelphia and Minneapolis. Legislation has been filed but not (yet) passed in several other states in the last three years, including Connecticut, Massachusetts, New Jersey, North Carolina, Virginia, and Pennsylvania. These lists are likely underinclusive, but they convey the general picture.

The dearth of existing legislation, and the relative newness of this spate of legislative activity, may suggest that the issue is not ripe, or appropriate, for ULC action. On the other hand, action by the ULC at this early stage could make it easier for states to legislate thoughtfully in a developing area and encourage uniformity in a field where many of the players – both landlords and tenants – are active across state lines.

B. A diversity of approaches, with a variety of pros and cons, from which to choose

Both the enacted laws and the various proposed laws approach the issue of regulating the use of tenant information in rental decisions in a variety of ways. As reflected in the meeting subtopics, these approaches fall into three broad categories: record sealing, restrictions on the use of publicly available information, and regulation of the content of tenant screening reports. Each approach can be used individually or in combination, and within each there is another set of choices to be made: about whose conduct to regulate and under what circumstances, and about how to strike balances between privacy and transparency and between landlords' interest in useful business information and tenants' desire to be free from arbitrary or discriminatory barriers to housing choice and stability. The attached meeting memos outline the choices in more detail.

This diversity could suggest that any attempt to promote uniformity is inappropriate or infeasible, or it could highlight the potential benefits of a uniform act to states that otherwise must keep reinventing the wheel in a complicated framework. A model act from which states can adopt one or several approaches depending on the local political and legal context could prove useful.

Alternatively, the study committee could recommend that a drafting committee be formed to take up one or more specific approaches. The pros and cons of various approaches have been

analyzed in the meeting memos and discussed in committee meetings, but there has been no consensus on the best choice.

Several observers argued strongly that record sealing, particularly early or automatic eviction record sealing, is the approach most likely to be effective at promoting tenants' access to housing and preventing inaccurate or improper housing denials. In the Internet age, once information becomes publicly available, it is difficult to truly remove from the public domain; the toothpaste does not go easily back into the tube. Restrictions on landlords' use of tenants' publicly available information, while often politically palatable, are difficult to enforce in practice and may therefore be unlikely to have a significant practical effect. Regulating the content of tenant screening reports faces similar enforceability hurdles, some observers asserted, pointing to the challenges consumers have in utilizing the FCRA error correction framework (15 U.S.C. s. 1681i). And tenant screening reports are only one piece of the puzzle: many court dockets and filings are available online, with free or inexpensive public access. For those who seek the most effective solution for protecting tenants and reducing screening errors, therefore, early record sealing – perhaps combined with the other two approaches for good measure – is generally the strongly preferred approach.

At the same time, record sealing – particularly the kind of automatic-upon-filing case record sealing promoted as most effective – may be subject to challenge under the First Amendment to the U.S. Constitution and some state constitutional provisions on public access to court records. The law in this area is unsettled. On the one hand, Courthouse News Service has brought and won several recent cases challenging the constitutionality of court record sealing under some circumstances. See, e.g., *Courthouse News Service v. Planet*, 947 F3d 581 (9th Cir. 2020) and *Courthouse News Service v. Schaefer*, 2 F.4th 318 (4th Cir. 2021). On the other hand, record sealing is common in courts across the country in some circumstances and has survived constitutional challenges in the past. More specifically, several states have had eviction record sealing laws on the books for years. *See, e.g.,* Cal. Civil Procedure Code 1161.2 and earlier California statutes; 735 Ill. Comp. Stat. 5/15-1701; Minn. Stat. 504B.345 and 484.014. Local court processes and technology may also impact what kind of record sealing is feasible in a given jurisdiction. It may be that careful drafting can eliminate or at least sufficiently minimize these concerns.

Observers also debated the question of federal preemption by FCRA of state attempts to regulate the content of tenant screening bureau reports. In June 2022, the Consumer Financial Protection Bureau issued interpretive guidance clarifying its view that FCRA does not limit states' ability to regulate the content of tenant screening reports. *See* The Fair Credit Reporting Act's Limited Preemption of State Laws, 87 Fed. Reg. 41042 (July 11, 2022). In so doing, the CFPB noted the lack of empirical evidence that tenant screening report content is "reliably predictive of future tenant behavior." The CFPB's analysis is not novel, though the degree to which courts will defer to or agree with its interpretation is not settled.

Additional pros and cons of different approaches are outlined in the meeting memos, should the study committee choose to evaluate them at this point and recommend one or more approaches for a drafting committee.

C. A note on stakeholders and enactability – not the usual suspects

While debates over landlord-tenant legislation often play out in a familiar way – landlords vs. tenants – the question of tenant screening can follow a different pattern. Landlords and tenants may agree that a screening world in which decisions are based more on significant, accurate, recent facts rather than on old, inaccurate, misleading, or confusing records or scoring systems is better for both of them. In Massachusetts, for example, eviction sealing legislation has been supported by both the Greater Boston Real Estate Board – the most powerful real estate lobbying group in the state – and Winn Companies, a large and politically conservative corporation that runs both affordable and market-rate housing developments across the country. This is not to say that there will never be landlord opposition to restricting tenant screening, but rather than fierce fights are not inevitable. Meanwhile, special care must be taken to hear and address the concerns of court administrators, who could face unfunded or infeasible mandates if legislation is not drafted with their needs in mind. Other stakeholders, including consumer reporting companies and industry groups and media outlets, may have and express more fundamental opposition to particular reforms.

Attachments:

1. Preliminary Memo on Issues to Be Considered (May 11, 2021)
2. Memo on Housing Case Record Sealing and Expungement (October 2021)
3. Restrictions on the Use of Publicly Available Information in Screening Decisions (February 2022)
4. Memo on Regulation of the Content of Tenant Screening Reports (June 2022)

Preliminary Memo on Issues to Be Considered

Esme Caramello, Reporter
Study Committee on the Use of Tenant Information in Rental Decisions
May 11, 2021

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 first two criteria are relatively uncontroversial. The latter two 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 criminal history screening and rental history/court records screening could be unwieldy; most if not all law reform efforts have addressed them separately. At the same time, a law that addressed one but not the other could have a 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 a lesser 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 target 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 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, however, can face greater constitutional and ideological challenges; 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 the committee consider?

Following is a non-exclusive list of provisions from current or proposed laws that the committee might consider including in a uniform law:

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 (e.g., Washington), while public access to court records may be a simple matter of common law and regularly restricted in others (e.g., California).

Restrictions on the Use of Publicly Available Information in Screening Decisions

Esme Caramello, Reporter
Study Committee on the Use of Tenant Information in Rental Decisions
February 2022

This memo offers a guide to another of the potential approaches to regulating the use of tenant information in rental decisions: **restricting the consideration of certain information in the tenant screening process.** Like record-sealing approaches, use restrictions reflect a public policy decision that it is unfair or harmful to use certain kinds of records or information when deciding whether to rent an apartment to a particular tenant. Unlike record-sealing, use restrictions make no effort to limit *access* to information but instead focus on which available information a prospective landlord should be allowed to *consider* during the screening process. Regulation of the screening process is becoming more common in housing, as well as in the employment and credit contexts.

A. The Tenant Screening Process and Concerns about Unfettered Screening

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 eviction and other housing case records).[1] Not all landlords review the same information or evaluate it the same way, and it is usually impossible for a tenant to know what information has formed the basis for a rental decision and why the decision was made. The opacity of the decision-making process contributes to the cost of apartment-hunting, with tenants paying hundreds of dollars in fees to apply to apartments they will never get due to the landlord's screening criteria or unknown errors in the tenant's screened information. There are also widespread concerns about whether landlords are in fact screening tenants based on reliable, unbiased information, or whether instead much of the information landlords are using is incomplete, inaccurate, biased, or otherwise unfair and unreliable as a predictor of a tenant's ability to succeed in an apartment. The concerns include:

1. Racially Disparate Impact of Certain Screening Criteria

a. Criminal records screening

In April 2016, HUD's Office of General Counsel issued guidance on the application of the Fair Housing Act to the use of criminal records in tenant screening.[2] The guidance compiled the research showing that using criminal records to screen tenants will have a disparate impact on people of color, especially Black and Latinx tenants, and warned that where a disparate impact was shown, a screening policy barring all tenants with arrest or conviction records would likely fail to meet the landlord's burden of establishing a legitimate nondiscriminatory basis

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[1] *See, e.g.*, "Opening the Door: Tenant Screening and Selection," Family Housing Fund and Housing Justice Center (MN) (March 2021), pp. 8-13.

[2] Guidance on Application of Fair Hous. Act Standards to the Use of Criminal Records by Providers of Hous. & Real Estate-Related Transactions (Apr. 4, 2016)

for their screening criteria.[3] Further research and litigation since 2016 have only underscored the unlawful racially discriminatory impact of outright bans on tenants with arrest or conviction records.

b. Eviction records screening

Matthew Desmond's Eviction Lab at Princeton and many other researchers across the country have consistently found that eviction records, like criminal records, are disproportionately common among Black and Latinx renters, with Black women most impacted.[4] The same fair housing considerations therefore likely apply where, for example, a landlord adopts a blanket policy of rejecting any tenant with an eviction or housing court filing of any kind rather than doing an individualized assessment of the nature of the underlying case or its disposition.

2. Other discriminatory impacts

In some situations, screening criteria can mask or facilitate other forms of unlawful discrimination. Income-to-rent ratios might be used to exclude Section 8 tenants in jurisdictions with source-of-income protections even though, as a practical matter, a voucher holder's income has little to no impact on their ability to pay rent fully and on time. Survivors of domestic violence and tenants with mental disabilities may be more likely to have certain kinds of eviction cases brought against them and may face unlawful discrimination based on those records even where the law required that they be accommodated or held not responsible in the case itself.

3. Questionable predictive value of information

There is little to no empirical support for the predictive value of certain kinds of information regularly used by landlords as a basis for denying rental applications. A study conducted by Wilder Research in collaboration with a group of housing nonprofits, for example, found that

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[3] *Id.* *See also*, Kaveh Waddell, "How Tenant Screening Reports Make It Tough for People to Bounce Back from Hard Times," *Consumer Reports* (March 11, 2021), https://www.consumerreports.org/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times-a2331058426/

[4] See., e.g., ACLU, "Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color," Sophie Beiers, Sandra Park, and Linda Morris, January 10, 2020, https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color/; Jane Place Neighborhood Sustainability Initiative (JPNSI) and Davida Finger, "New Orleans' Eviction Geography: Results of an Increasingly Precarious Housing Market (March 2019); Justin Steil, *et al.*, "Evictions in Boston: The Disproportionate Effects of Forced Moves on Communities of Color" (2020), http://bostonevictions.org; Community Legal Services of Philadelphia, "Breaking the Record: Dismantling the Barriers Eviction Records Place on Housing Opportunities" (November 2020), https://clsphila.org/housing/report-eviction-record-policy/

11 out of 17 criminal offense categories had no correlation with housing outcomes, and any correlation that did exist in any categories declined precipitously over time.[5] Reports have also shown that some landlords refuse to rent to tenants who have any kind of eviction case filed against them for any reason, even if the case was brought for no fault of the tenant (e.g. a desire to rehab the property) or the tenant wins.[6] This can have a disparate impact based on race and gender, because Black women have been shown to be most likely to have an eviction case filed against them and later dismissed.[7] Credit scores, too, are based in part on information that is not likely to be relevant to a tenant's ability or willingness to pay rent and are therefore of questionable predictive value. Some argue that if information has no measurable impact on a tenant's likelihood of success in the rental, then it should not be allowed to serve as a barrier to a tenant's access to housing, particularly where a certain criterion correlates with an increased risk of discrimination, even if unintentional, based on a protected category.

B. Use restriction examples

- In 2019, Cook County (Chicago) enacted a "Just Housing Amendment" to its Human Rights Ordinance. The JHA bars landlords from using arrests, rather than convictions, as a basis to reject a tenant's rental application. It also contains a **lookback period** of 3 years for most criminal convictions and requires an **individualized assessment** in lieu of an absolute bar on rentals to people with more recent convictions, with very limited exceptions. In the individualized assessment process, a tenant has the **right to receive a copy of any criminal background check** used to deny housing**, a right to supply mitigating evidence** (e.g., rehabilitation, a disability-related right to reasonable accommodation), and **a right to dispute the outcome**.

- Seattle's 2017 Fair Chance Housing Ordinance similarly required individual assessment of criminal records. It also **barred landlords from discouraging applicants with criminal histories from applying** by banning advertising criminal history screening and requiring criminal record disclosures as part of the application process. It also prohibited "steering" of tenants with criminal histories away from units by falsely representing that they were unavailable (a tactic that testing operations often discover as a method of discrimination).

- The 2021 Philadelphia Renters Access Act requires landlords to **give prospective tenants a list of screening criteria before they apply** and to use the same list for all tenants. **A landlord cannot reject a tenant based solely on a poor credit score or on certain eviction case records: where the tenant effectively won the case or satisfied the**

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[5] Cael Warren, "Success in Housing: How Much Does Criminal Background Matter?" (January 2019) https://drive.google.com/file/d/1HwYOBFJ_k98C6TT99w2o7ryk2CnAGvgo/view

[6] See, e.g., Paula A. Franzese, "A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity," 45 Fordham Urb. L.J. 661 (2018) (documenting blacklisting of tenants even after baseless eviction lawsuits)

[7] ACLU, supra note 4 (Black women in Massachusetts were more than twice as likely as white women to have a dismissed eviction filing on their record)

judgment or where the case is older or a result of the pandemic. Tenants have the opportunity to review the documents the landlord considered as the basis for any denial and may dispute the denial, including by offering additional clarifying or corrective information. A tenants has a private right of action against a landlord who violates the ordinance, with damages of up to $2000.

- A bill introduced in Maine in 2021 (LD913) would bar landlords from considering certain civil court case information during tenant screening, including court records from cases in which the tenant was not accused of any wrongdoing or in which the tenant won or resolved the case by agreement, records from court cases more than 3 years old, and COVID-related eviction case records.

- A 2021 District of Columbia law, the Fairness in Renting Amendment Act, that has been in effect since November of 2020, would prohibit landlords from inquiring about previous eviction cases that did not 1) result in a judgment in favor of the landlord 2) was filed more than 3 years ago, or 3) stemmed from a domestic violence, sexual assault or stalking incident. An adverse rental decision (denial or leasing on less favorable terms) may not be based solely on a tenant's credit score. Landlords must provide written notice of the adverse action to the prospective tenant, and the tenant has an opportunity to dispute the information forming the basis of the housing provider's adverse action.

C. Arguments against use-restriction approaches

Use restrictions promote transparency and open access to information by avoiding sealing. At the same time, limitations on landlords' use of information can be nearly impossible to enforce: while landlords' stated policies may change, their actual reasons for making rental decisions can easily be disguised or even unintentionally but harmfully unlawful. Similar schemes restricting landlords' consideration of race or other protected characteristics have been notoriously difficult to enforce without testing (usually funded with HUD fair housing dollars). Laws that aim not only to identify prohibited categories of information but also to create infrastructure for deeper conversations between landlords and tenants may at least help to promote more nuanced decision-making, which ultimately benefits landlords and tenants alike.

Regulation of the Content of Tenant Screening Reports

Esme Caramello, Reporter
ULC Study Committee on the Use of Tenant Information in Rental Decisions
June 2022

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 off[3] 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 report[8] and gain access to the report and the information on which it is based[9]; to challenge inaccuracies and require "reinvestigation" of negative information by the consumer

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[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/HSxvE8_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 agency[10]; 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 Act[11].

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

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[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];

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[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 bias[23];
- 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 names[24];
- Failure to accurately report court records, including failure to expeditiously remove outdated or expunged records[25];
- 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 rent[26];
- Direct sales of screening software or services by companies that claim to be exempt from FCRA[27];
- 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

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[23] *See, e.g.*, https://www.nhlp.org/our-initiatives/arroyo-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 possibly 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.*