



Consumer Data Industry Association
1090 Vermont Ave., NW, Suite 200
Washington, D.C. 20005-4905

P 202 371 0910

Writer's direct dial: +1 (202) 408-7407

CDIAONLINE.ORG

May 30, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Suite C-5610 (Annex B)
Washington, D.C. 20580

Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552

**Re: Comment to Tenant Screening Request for Information
Docket: FTC-2023-0024-002**

To Whom It May Concern:

The Consumer Data Industry Association (“CDIA”)¹ offers its comments to the Request for Information issued jointly by the Federal Trade Commission and the Consumer Financial Protection Bureau on Tenant Screening. Tenant screening reports provide a valuable tool to property managers and owners (collectively, “Housing Providers” or “Properties”) to assist them in fulfilling their responsibilities to provide safe, clean, and well-maintained properties to their residents. The use of credit information and eviction information provides insight into the likelihood that consumers will be able and willing to satisfy their lease obligations, including making timely and full lease payments, as well as treating the owner’s property with care. Housing Providers use other public record data such as criminal history information and sex offender registration to assist them with their duties to provide a safe home to live and to mitigate known risks that applicants may pose to existing residents and employees of the property.

¹ CDIA is the voice of the consumer reporting industry, including the nationwide consumer reporting agencies, regional and specialized consumer reporting agencies, background check and residential screening companies, and others. CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals and to help businesses, governments, and volunteer organizations assess risk and avoid fraud. CDIA members help to ensure fair and safe transactions for consumers, facilitate competition, locate crime victims and fugitives, reunite consumers with lost financial assets, help keep workplaces and apartment residents safe, and expand consumers’ access to products suited to their needs.

Consumer reporting agencies (“CRAs”) and the consumer reports they provide are regulated by the Fair Credit Reporting Act (“FCRA”), which provides various protections to consumers about whom reports are prepared. Tenant screening reports are designed to minimize the risks associated with subjective decisioning, user misunderstanding, and potential bias. Such reports are a far preferable alternative to the “gut proxy” applicant evaluation methods that were more common in the rental housing market decades ago - and which continue today with many smaller rental operators.² The world of resident screening by “gut proxy” is not desirable for consumers, affordable housing providers, CRAs, or regulators. Instead, by using reliable public record, rental, and credit data and predetermined housing criteria applied equally to all applicants, Housing Providers “screen in” applicants with well-informed decisions and reduce the risk of unequal treatment of applicants.

Tenant Screening Generally

CRAs provide consumer reports and sometimes other non-FCRA covered products and services, including identity verification, fraud prevention products, and OFAC reports to Housing Providers who are “users” of the reports for tenant screening under the FCRA. (Questions 1 and 35).³ Consumer reports often contain credit and public record information on consumers and are used by Housing Providers to make an eligibility determination about consumers (i.e., to approve, approve with conditions, or decline a tenancy application) as contemplated under FCRA § 1681a(d), based on the Housing Providers’ stated criteria. Non-FCRA services generally are used by Housing Providers for the

² From a recent survey of 157 housing providers in lower-cost housing markets in Baltimore, Cleveland, Dallas, and Washington, DC: “Smaller-scale landlords more often make ‘gut’-level decisions based on highly subjective - and sometimes illegal - tenant signifiers, including appearance, demeanor, family status, and expressed and ascribed racial identity. These landlords use a range of informal screening mechanisms, such as home visits, visual inspections of children’s cleanliness, and idiosyncratic questionnaires to weed out ‘problem’ tenants they judge to have messy homes, unruly children, and poor self-management skills.” Rosen, E., Garboden, P. M., & Cossyleon, J. E., *Racial Discrimination in Housing: How Landlords Use Algorithms and Home Visits to Screen Tenants*, AMERICAN SOCIOLOGICAL REVIEW, 86(5), 787-822 (2021).

³ A reseller is a type of CRA that may not maintain a database of information about consumers, but instead, either resells a consumer report provided by the originating CRA without making any changes, or merges two or more reports into a single report that is sent to the user. See 15 U.S.C. §1681a(u). A pure reseller’s accuracy obligations are therefore different than those of the originating CRA, and the FCRA imposes different responsibilities on them as a result. 15 U.S.C. § 1681i(f).

purpose of identity verification, fraud prevention, and legal compliance with federal and state law, such as know your customer requirements or the U.S. PATRIOT Act.

Depending on client preference and product offering, CRAs can provide:

- Credit, rental, employment, public, and income verification records;
- Anti-fraud identity and document verification tools – Designed to limit face-to-face and online application fraud;
- Categorization tools - Identifying or grouping records (e.g., multiple credit charge offs, public records with abbreviated code descriptions) for easier interpretation;
- Scores - Lease risk scores, credit scores, or client-weighted scores;
- Interview results - results of interview with prior Housing Providers;
- Application of client criteria to tools or scores - Depending on the product type and client preference, this output may include a recommendation for client review resulting from the application of client criteria to the tool or score;
- Applicant disclosure and adverse action notice delivery service - Some screening providers may opt to provide this for client convenience. (Question 35).

1. Tenant Screening Criteria

The RFI seeks information about how approval criteria are established and applied by Properties to the tenant screening applications. In short, Housing Providers set their own eligibility criteria for each property according to their own risk tolerances and process preferences. (Question 1). Housing Providers vary in their sophistication and decision methods and recognize that lease default risk and safety risk exposure can vary by property, season, and neighborhood. Many Housing Providers are generally sophisticated commercial enterprises that understand the nature of their legal obligations and have their own policies and procedures established to ensure compliance with applicable law and rely on objective tenant screening reports to evaluate applications. Some Housing Providers, especially those smaller in scale, prefer to look up applicant history themselves and/or use subjective interview methods without using a consumer report; others prefer to use their experience with decision rules of thumb (e.g., rent/income ratios, minimum income, prior credit factors) individually applied to consumer report and applicant data; while still others prefer to rely on a statistically validated score.

Importantly, CRAs do not establish eligibility criteria for housing providers. CRAs aim to provide reports that are easily understandable and accurate to the Housing Provider. Some CRAs offer a platform or workflow tool to help Housing Providers expedite their review and improve user understanding of the information within a tenant screening

report. In such cases, the CRA will work with each Housing Provider to identify in the platform or tool the information that the Housing Providers would like noted as potentially disqualifying or warranting further review by the leasing team. Such information might include minimum credit score thresholds, recent eviction data, or the existence of other recent public records such as felony convictions, bankruptcies, etc. CRAs provide specialized onboarding and training to Housing Provider customers in order to educate them on how to use these tools to review the reports provided by the CRA.

As a further aid to the Housing Provider's review of the tenant screening report, some platforms and tools may calculate lease-to-income ratios, overall debt load, or income reported as a factor of the applicant's monthly payment obligation (e.g., 2x resident's monthly lease payment obligation). (Question 1). These settings are manageable by Properties directly through their own administrative access (i.e., management level access) to the portal or platform. The RFI asks to what extent Housing Providers tailor their criteria to their localities, including local laws. (Question 10.b). In the CRAs' experience, members have observed that Housing Providers often vary their criteria by location of the community.

Generally, CRAs assist their customers with the establishment of platform settings to show the property the level of customization available. Ultimately, the Housing Provider customer has complete control over the use of the platform tool and the specific settings that will be applied to the reports. The Housing Provider has access to all of the application information that it collects from an applicant, much of which is not provided to the CRA when a report is requested. Properties also have the ability to communicate directly with the applicant as needed. This access to information puts the Housing Provider in a unique position to make its eligibility determination in compliance with applicable law.

Contractually, when these platforms and tools are made available to Housing Provider customer, the contract will typically specify that the CRA is providing the information for the Property's use, and that the CRA is not making any tenant screening decision, even when the CRA applies the Housing Provider's criteria to the information contained in the reports. (Question 1). The Housing Provider acknowledges that it will use the information consistent with all applicable law, including fair housing law and the FCRA where applicable, and will not use non-FCRA products and services for eligibility determinations.

When the CRA prepares a report, the CRA may flag or highlight those records and other items of information that meet - or do not meet - the settings as predetermined by

the Housing Provider. (Question 1). For example, a report may have a green-colored note when the consumer's credit score meets the thresholds established by the Housing Provider, or it may have a red notation or flag that advises the Housing Provider that the record requires further review. Housing Providers always have full access to the entire consumer report, although they do not always allow access to the consumer report information by all personnel.

Some platforms allow a property to return a customizable message through the platform, which will be reviewed by the front-line property staff that reflects the Property's potential decision with respect to the application based on the initial consumer report. For example, if an application does not meet the property's pre-determined criteria, the Housing Provider may elect to return a message that instructs the front-line staff how to proceed. In some cases, that message is something to the effect of "User Criteria Not Met" or "Records Found" - wording designed to clarify that the returned report is not a decision of the screening provider.

Tenant screening and the reports CRAs provide for tenant screening are already subject to a highly varied patchwork of federal, state, and local laws that create substantial potential liability exposure for both CRAs and Housing Providers. The FCRA established a national standard of consumer reports, and restricts the age of adverse credit, rental history, and public record data that may be included in a consumer report,⁴ requires CRAs to vet prospective users (e.g., Housing Providers) for consumer privacy and sets standards for report accuracy,⁵ gives consumers access rights to data about themselves,⁶ provides broad consumer dispute rights,⁷ requires clear notice from the user (here, Housing Providers) to the consumer in the event of adverse action based in whole or part on the report,⁸ and pre-empts a variety state laws.⁹ A wide range of additional state and local consumer reporting, fair housing, and landlord-tenant laws, to the degree not pre-empted,

⁴ 15 U.S.C. § 1681c.

⁵ 15 U.S.C. § 1681e.

⁶ 15 U.S.C. §§ 1681g, h.

⁷ 15 U.S.C. § 1681i.

⁸ 15 U.S.C. § 1681m.

⁹ 15 U.S.C. § 1681t.

govern the reporting and use of consumer report information for decisioning rental applicants.

The RFI asks whether any mechanisms can make tenant selection more objective. (Question 5). Respectfully, where properties rely on tenant screening reports to make decisions, the selection process is already more objective than those made without such objective information.¹⁰

Where objective consumer history data is withheld from Housing Providers' consideration in tenant screening, studies show that minority rental applicants experience adverse results, such as fewer positive Housing Provider responses, as Housing Providers may place greater reliance on stereotypes and experience in the absence of applicant data.¹¹ Similar findings have been made for employers and minority employment applicants under ban the box laws.¹² Reducing the availability of objective data for tenant decisioning, then, is the wrong way to go - for applicants and Housing Providers alike.

In the CRAs' experience, Housing Providers work hard to establish and apply an objective tenant screening process, not only because it is the right thing to do, but also because they are trying to decide consistently across properties to mitigate against a

¹⁰ In the credit context, the Secretary of the Treasury explained in 2003 that the FCRA's national consumer reporting standards makes consumers' "reputation as a borrower portable, so that you don't have to establish your good name from scratch in every city you visit, or every store where you shop." Treasury Secretary John W. Snow Testimony on Strengthening Consumer Interests of the Fair Credit Reporting Act Before the Committee on Banking, Housing, and Urban Affairs, *available at*: <https://home.treasury.gov/news/press-releases/js620> (July 30, 2003). Explaining that "[t]his democratization of credit has especially benefited minority and lower income families," the Secretary noted the benefits many Americans received as a result, including an increase in the number of minorities holding mortgages between 1995 and 2001, and further, that a greater percentage of African-American households had credit cards in 2001 than in 1995. *Id.*

¹¹ Gorzig & Rho, *The Impact of Limiting Applicant Information on Rental Housing Discrimination*, FED. RES. BANK. MINN., OPPY. & INCLUSIVE GROWTH INST. WORKING PAPER 61 (Sept. 21, 2022), *available at*: <https://www.minneapolisfed.org/research/institute-working-papers/the-impact-of-limiting-applicant-information-on-rental-housing-discrimination>.

¹² "Our results support the concern that BTB policies encourage racial discrimination: the black-white gap in callbacks grew dramatically at companies that removed the box after the policy went into effect. Before BTB, white applicants to employers with the box received 7% more callbacks than similar black applicants, but BTB increased this gap to 43%." Agan, Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, THE QUARTERLY JOURNAL OF ECONOMICS, Vol. 133, Iss. 1, 191–235 (Feb. 2018).

violation of fair housing law. For example, Housing Providers and score providers have all followed the guidance flowing out of the nation's credit and banking system with respect to the development of rules and products designed to minimize subjective bias in tenant screening. The U.S. Department of Housing and Urban Development ("HUD") and housing provider counsel alike recommend that properties establish their own written approval criteria by which housing applications will be evaluated, and encourage providers to apply their criteria consistently across all applicants.¹³ One concern Housing Providers have expressed is that individualized assessments, such as those urged by HUD in the context of criminal history information,¹⁴ deviate from this standard and objective process they have adopted in order to prevent unintentional discrimination based on prohibited bases.

2. Use of Tenant Screening Reports & Adverse Action

Similar to creditors who use consumer reports to make credit decisions, it is the recipient of the report - here, the Housing Provider - that makes the actual eligibility determination, not the CRA. (Question 1, Question 40). Operationally, the Housing Provider has unique access to all the application information provided by the consumer - and to the applicant him or herself - that is unavailable to the screening provider. With this information advantage, the Housing Provider is in a unique position to review reported information against its proprietary applicant information and to ask further questions of the

¹³ See, e.g., *HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Providers* (Nov. 2013) (the "Handbook"), p. 4-23 § 4-7 ("All screening criteria adopted by the owner must be described in the tenant selection plan and consistently applied to all applicants."); Janet Portman, *Choosing Tenants: Avoid Fair Housing Complaints and Lawsuits*, NOLO, available at: <https://www.nolo.com/legal-encyclopedia/choosing-tenants-avoid-fair-housing-29816.html> ("Consistency is crucial when dealing with prospective tenants. If you don't treat all tenants more or less equally—for example, if you arbitrarily set tougher standards when renting to members of a racial minority—you are violating federal laws and opening yourself up to lawsuits.").

¹⁴ HUD has included individualized assessment approaches in its recent tenant screening guidance to industry and fair housing enforcement entities in recent years. Demetria L. McCain, *Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, U.S. Dept. of Housing and Urban Development (June 10, 2022), available at: <https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf>; Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, U.S. Dept. of Housing and Urban Development (April 4, 2016), available at: https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

applicant where necessary in order to carry out its eligibility determination responsibility. Even when a tool or platform provides an initial “recommendation” based on the property’s pre-determined criteria, Housing Providers regularly override their initial assessment. In fact, CRAs often do not know the outcome of the property’s decision unless contacted by the applicant or the property directly.

Some tenant screening platforms require the property to affirmatively select whether the application has been approved, declined, or conditionally approved, but many do not. CRAs are generally not involved in the evaluation of the merits of the application, or of any individualized assessment that might follow preparation of the report. For those CRAs that opt to provide such evaluation services, they do so as a service provider to the Housing Providers and under the express direction of the property, and the Housing Providers contractually assumes the responsibility for the decision.

In the CRAs’ experience, many Housing Providers do not want their front-line staff personnel to have access to sensitive and confidential consumer information, including the background report itself. In such cases, Housing Providers regularly ask for the option to not allow the front-line staff to see all reported records in some platforms. In addition to privacy concerns, Housing Providers insist on limited report access for site staff in order to ensure decision criteria are applied consistently. As explained above, however, the underlying data (i.e., the full report) is always made available to the Housing Provider. It is expected, and is often contractually required, that the Housing Provider’s administrator or internal team review those reports to assure that they pertain to the applicant, consistent with their own internal screening policies and procedures regarding screening of applicants, as well as HUD guidelines. CRAs typically require the Housing Provider to review all records returned, including any mitigating information presented by or on behalf of the applicant, prior to taking adverse action against a consumer.

The FCRA imposes adverse action notice responsibilities on the user of the report when a consumer report is used to take adverse action with respect to an application.¹⁵ (Question 9.a). In the CRAs’ experience, there is often a verbal communication to the applicant with respect to approvals and declines, and, where adverse action has occurred, a follow-up notice is often delivered in writing by the Housing Provider. Some CRAs offer an adverse action fulfillment service by which they prepare the notice on behalf of the Housing

¹⁵ 15 U.S.C. § 1681m(a).

Provider and may deliver that to the consumer as directed. In this way, the CRA is acting as a service provider to the Housing Provider under specific contractual terms.

From the CRAs' perspective, consumers would benefit from an adverse action notice that includes the reasons for the decline or other adverse action, similar to that which is required under the Equal Credit Opportunity Act for declined credit applications. Some CRAs' software can automatically generate written adverse action notices that specify the reason(s) for the adverse action based on the information that does not meet the property's stated criteria. If a property chooses to use this optional feature, property staff can use the generated notice or customize it based on the property's final decision and the underlying reason(s) for it. However, in the CRAs' experience, front-line staff at the property can appear to have been trained to not provide much information verbal to the consumer about the decline, and applicants often contact the CRA or a property management-designated off-property contact for more information. (Question 9.b). Upon receiving such calls, a CRA will generally inform the consumer that the Housing Provider is responsible for making eligibility determinations in applying its criteria but will take the time to explain the contents of the consumer's file or the historical report to the consumer. Of course, the CRA will provide a copy of the report or file disclosure to the consumer upon request, as well as assist with any dispute should the consumer wish to pursue one.

Consumers and users would further benefit from nationally standardized adverse action notice language, the use of which should be a safe harbor from litigation for screening providers and users. Today, myriad state and local adverse action notice rules can increase operating burdens and lead to consumer misunderstanding.

3. Disclosures & Other Consumer Information

The RFI seeks input on what information should be provided by Housing Providers to applicants with regard to Housing Providers' eligibility standards. (Question 4). From the CRAs' perspective, advising consumers in advance about the property's acceptance standards would likely diminish some amount of consumer confusion and frustration in an application process. In CRAs' experience in speaking with consumers, the consumers often know when their credit score is relatively "low" and whether they have an eviction, bankruptcy, or other record in their past that could be viewed as disqualifying. It would be helpful for consumers to know in advance about the property's screening criteria, so the consumers can use that information to determine if they should apply in the first instance.

Notably, CRAs do not prohibit Housing Providers from providing copies of their reports to the applicant, although they do prohibit the sharing of such information with third parties for the protection of the consumer. (Question 9.c). With respect to what extent Housing Providers or consumer reporting agencies share the recommendations or scores with prospective tenants (Question 41), practices vary. Some local laws and ordinances require the sharing of report results with applicants. Explanations provided may include a reference to Housing Provider's criteria and derogatory factors in the consumer's report that may have contributed to adverse action. In terms of how commonly adverse action notices explain the criteria that the recommendation or scoring product considered or the reason(s) the prospective resident scored differently under an algorithm, (Question 41.a), practices also vary. Some state laws require housing providers to include with the adverse action notice user criteria or derogatory factors in the applicant's history that contributed to adverse action.¹⁶

The RFI seeks input on the collection of information on the source of income from prospective tenants. (Question 7). First, currently high and even increasing levels of fraudulent pay stubs from rental applicants is a key reason a Housing Provider may desire to verify documentation of an applicant's source of income. Since the COVID-19 epidemic, consumer preference for convenient online property tours and applications have grown, and "make your own" paystub web sites and false identity documents for sale have grown too.¹⁷ Given this convergence of consumer preferences and fraud-enabling technologies, it is unsurprising that Properties report high and growing document fraud rates in rental applications.¹⁸ Given the prevalence of fraudulent applicant income documents, verification of the accuracy and legitimacy of documentation of source of income is critical.

Second, questions exist around third-party assistance, including vouchers, in support of the resident's obligation to pay its lease obligations. Housing Providers have extensive program experience with government and private third-party assistance (e.g., local nonprofit support) to tenants and the associated risks of lease default where such support is present. For example, not all contingent guarantor organizations are well-funded and reliable, especially now that Emergency Rental Assistance funds have dried up. Vouchers

¹⁶ See e.g., R. C. Wash. § 59.18.257; Ore. R. S. § 90.304.

¹⁷ M. Johnson, *Fraud Trends in Residential Real Estate*, Newsweek.com (Dec. 16, 2022), available at: <https://www.newsweek.com/fraud-trends-residential-rental-real-estate-1767481>

¹⁸ D. Berlind, *Spotting Risky Paystubs in Tenant Verification* (Feb. 18, 2021), available at: <https://www.snappt.com/blog/how-to-spot-fake-paystubs-in-residential-applications>.

typically are not underwritten to support a renter's actual housing costs and are subject to jurisdictional payment delays. Voucher holders can present a risk of lease default when they are no longer voucher-eligible. Further, tenants remain responsible for costs associated with living and maintaining their rental homes, including for the payment of utilities, insurance, food, etc., which means that even with a housing subsidy that covers the basis rent amount, the consumer may still present a risk of payment default when they lack sufficient supplemental income to satisfy their living needs. Jurisdictions like Washington, D.C. are now issuing guidance that would require a Housing Provider to determine if the applicant is going to be a recipient of public housing assistance.¹⁹ At the same time, Housing Providers do not want to be perceived as discriminating on the basis of the source of income and are often afraid to inquire about the availability of assistance. Such inquiries into the source of income or assistance are almost always undertaken by the Property and not the CRA. Housing Providers would therefore appear to benefit from further clarity regarding when and how to inquire into the consumer's source of income within the application process.

The RFI solicits comments on Housing Providers' procedures by which applicants can explain mitigating circumstances relating to potentially adverse records. (Question 8). CDIA presumes that Properties have their own processes by which they consider such information. From the CRAs' perspective, CRAs are not evaluating the eligibility of the consumer for housing, and therefore the reason for the hardship or other circumstance is not relevant to the preparation of the report itself. The RFI asks if CRAs provide such information to Housing Providers to the extent they are aware of it (Question 8.a) but generally, CRAs are never made aware of such personal applicant information or circumstances. Most CRAs have little to no interaction with the applicant prior to preparing the report. Of course, if a natural disaster flag, COVID alert, consumer statement, or other alert provided for under federal or state law is included in the consumer's credit report maintained by a nationwide credit bureau, that information is passed along to the property with the credit report. But in almost every case, it is the Housing Provider which has sole access to information self-reported by the consumer because it is the Housing Provider who interacts with the applicant directly.

4. Application Fees

¹⁹ https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/OHRGuidance16-01_SourceofIncome_FINAL.pdf.

The RFI asks several questions about application and screening fees. (Questions 11-12).

From the CRA's perspective, application processes and fees are often readily disclosed in person and on property websites. (Question 11.a).

In response to Question 11.b, generally, screening fees charged by Housing Providers cover the cost of conducting background screening of applicants, including transactional costs related to purchase of screening reports, site and regional review of applications and reports, interviews with applicants, guarantors, or prior property managers, consideration of appeals, communication of adverse action notices, documentation of results in property management software, and participation in any consumer disclosure request or reinvestigation.

In addition to Housing Providers' transactional costs, management, legal, and training costs may be incurred periodically in resident screening - e.g., establishing screening criteria, training leasing teams on the application of criteria in client environment, review of appeals and disputes, and review and adjustment of criteria against actual outcomes for decision consistency and fairness.

These screening costs relate to screening products and practices that are more complex and data-driven than they were a decade ago. As noted above,²⁰ today more attention is paid to applicant fraud - both document and identity fraud - as fraud triggers have increased and renters have moved to more convenient online tours and leasing. Costs around data aggregation and matching have increased as personal identifiers have been partially redacted, legal standards have tightened, public record expungement practices have expanded, and renter expectations for faster turnaround have marched ahead of courts' ability to keep up. Meanwhile, expanded use of individualized assessment concepts and locally specific decision methods has made Housing Providers' screening decision processes more complex than before.

Per Question 11.c, Housing Providers are best positioned to describe the entirety of the application-related costs they incur, of which screening-related costs are one component.

²⁰ See note 18, *supra*.

State landlord-tenant laws may govern application and screening fees. Where permissible fees are limited to less than actual costs, consumers may be disadvantaged, as properties' reviews of applicant information may become more cursory and less nuanced. Where fees are such that the costs of criminal, credit, rental history and fraud screening cannot be included for an applicant, then new, material risks to lease default and tenant safety may enter (Question 11.d).

Housing providers are best-positioned to speak to the treatment of prospective tenants' application-related fees if the prospect is not considered for the housing (e.g., because the provider chose another applicant before considering the prospect's application). (Question 12).

5. Miscellaneous

With respect to portable screening reports (Question 13), some CRAs make them available to consumers, at least in states where they are specifically addressed by law. (Questions 13.b and 13.c). But portable screening reports are not common for several reasons. First, screening criteria vary greatly property to property - one property will require income verification and a fraud check, and use a custom experiential rule of thumb (e.g., selected rental history and credit factors), its neighboring property a statistically validated score, and another adjacent property a personal character reference check and rental history. These non-standard criteria differ greatly even among rental properties with different owners that share the same property manager. Second, the concept anticipates that a hard copy, human-readable version of a consumer report will be transmitted, and today most properties leverage computerized property management systems that integrate directly into the CRA from which it obtains reports. The system organizes the information received from the CRA in a way that makes it usable by the property consistent with its own practices. As a result, taking a hard copy of a report to multiple properties that do not have means by which to accept and review it is largely unworkable in practice today. Third, portable screening reports have a shelf life: they are accurate as of the report date and may change immediately thereafter. CRAs update millions of records daily, and what was accurately described today may be materially different tomorrow. Finally, the existence of portable screening reports presents opportunities for fraud to the extent it results in the

production of hard copies, which are inherently more difficult to secure access to and control.²¹

Notably, some CRAs have a consumer-directed report process, instead of a user-initiated report inquiry process. In those cases, the consumer logs into a platform and requests a copy of their report, and then directs the CRA to send the report to a particular property. Under such models, the consumer receives the report at least at the same time as the end user, but often before.

With respect to the handling of disputes, (Question 15), Housing Providers will have to explain their processes for holding/handling applications during the time in which a consumer disputes. Some CRAs offer an expedited review of a report where the property identifies a potential question regarding the report based upon their review of the information. These are not consumer disputes originating from the consumer but can occur when a property believes something in a report does not pertain to the relevant consumer or is otherwise questionable. CRAs will often be able to provide a review of that information on an expedited basis. Of course, if a consumer contacts a CRA to dispute an item of information, the CRA will reinvestigate the dispute and provide the results of the dispute to the consumer consistent with the FCRA.

The RFI asks to what extent states or local jurisdictions require tenant screening companies to be registered or licensed. (Question 16). A number of states require registration by CRAs, generally, which processes are often unwieldy and burdensome. For example, the Maryland bond requirement is exceedingly difficult to meet, so smaller tenant screening companies often struggle to comply.²² In addition to Maryland, Maine, New York, and Rhode Island also have CRA registration requirements.

²¹ Rental applicant fraud is a prevalent concern among apartment operators, after the spike in such fraud during COVID epidemic. *Tenant who used fraudulent documents owes \$101k, using COVID laws to avoid eviction, landlord says*, ABC 7 News (Apr. 9, 2022), available at:

<https://abc7ny.com/ca-covid-rent-relief-eviction-protection-alameda-county-moratorium-landlord-cant-pay-mortgage/11730571/>; D. Olick, *Rental fraud warnings jump 30% due to coronavirus pandemic*, CNBC (Nov. 10, 2020), available at: <https://www.cnbc.com/2020/11/10/rental-fraud-warnings-jump-30percent-due-to-coronavirus-pandemic.html>.

²² See Md. Code Ann., Com. Law § 14-1217; Md. Code Regs. 09.03.07.04 (setting bond at between \$100,000 and \$1,000,000, depending on number of consumer reports assembled, evaluated or sold).

Criminal Records in Tenant Screening

Criminal records contain highly relevant information about an applicant’s criminal history, including prior convictions or the existence of pending charges. These records may provide insight into whether that applicant has the propensity for violent, abusive, or otherwise criminal behavior that creates risk to property and its residents. (Questions 17, 18). The high stakes involved in protecting residential communities and preventing life-altering or fatal incidents make review of an applicant’s criminal history essential in today’s societal climate. This is especially true as the tragic consequences of failing to perform criminal background checks on tenants and members of the community have led to numerous devastating incidents across the nation.

Housing providers are responsible for providing safe and drug-free housing. As HUD has stated, “[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.”²³ All Housing Providers 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.²⁴

Notably, public housing authorities and properties are often specifically required to screen applicants and to prohibit certain applicants with disqualifying drug and other criminal offenses from residing on the property. Congress has declared that “the Federal Government has a duty to provide public and other federally assisted housing that is decent, safe, and free from illegal drugs[.]”²⁵ As such, four discrete categories of criminal histories are grounds for denial of public housing: (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 from public housing for drug-related criminal activity in the three years prior to the application, unless

²³ *Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, Office of General Counsel, U.S. Dept. of Housing and Urban Development, pp. 4-5 (April 4, 2016), available at: https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

²⁴ *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477, 481 (D.C. Cir. 1970) (A “landlord [has] a duty to take those steps which are within his power to minimize the predictable risk to his tenants”).

²⁵ 42 U.S.C. §11901(1).

the evicted individual completed an approved rehabilitation program; and (4) persons currently engaged in illegal drug use.²⁶

Beyond these mandatory bans, public housing authorities also have 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.²⁷ (Question 17.b). Providers of market-rate rental housing should continue to be allowed to screen for the same kinds of offenses to maintain the safety of their property and the persons living within them.

The best means of preventing housing discrimination is establishing objective criteria and applying those criteria consistently across all applicants. (Question 21). HUD has demonstrated the prudence of taking a balanced approach to regulating the use of criminal background screening in housing. In 2016, HUD released Fair Housing Act guidance relating to the use of criminal record information in tenant screening.²⁸ HUD explained the potential for disparate treatment and disparate impact on minorities resulting from housing eligibility decisions that relied on criminal record history information, where the policy or practice lacked a legally sufficient justification. In its Guidance, which applies to providers of all housing types, HUD did not adopt a blanket ban on the use of criminal record information in housing decisions.²⁹ Instead, the Guidance requires Housing Providers to engage in an individualized assessment of the applicant, including information related to the criminal history, and requires them to adopt non-discriminatory policies regarding the use of criminal record information in screening that considers the nature, recency, and severity of

²⁶ 42 U.S.C. § 1437n(f); 42 U.S.C. § 13661; 42 U.S.C. § 13663; 24 C.F.R. § 960.204.

²⁷ 42 U.S.C. § 13661(c) (emphasis added).

²⁸ U.S. Dept. of Housing and Urban Development, *Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (Apr. 4, 2016), available at https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF (“Guidance”).

²⁹ The Guidance expressly noted that Section 807(b)(4) of the Fair Housing Act “does not prohibit conduct against a person because such person has been convicted ... of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802).”

the crime.³⁰ In this way, HUD balanced the risk for potentially discriminatory effects against the need that housing providers have to protect their residents and employees. This allows Housing Providers to utilize this key information to manage risk but at the same time, provides protection for those who may be victims of its misuse.

HUD and property management counsel alike recommend that properties establish their own written approval criteria by which housing applications will be evaluated and encourage providers to apply their criteria consistently across all applicants.³¹ (Questions 17.d, 17.e). Such uniformity is often touted as a best practice on how to avoid fair housing liability:

Consistency is crucial when dealing with prospective tenants. If you don't treat all tenants more or less equally—for example, if you arbitrarily set tougher standards when renting to members of a racial minority—you are violating federal laws and opening yourself up to lawsuits. And if you give one person a break (such as lowering the security deposit for a single mother but not for other tenants), you'll likewise risk a charge of discrimination from other tenants.³²

And further:

Landlords are legally free to choose among prospective tenants as long as their decisions comply with these laws and are based on legitimate business criteria. For example, a landlord is entitled to reject someone with a poor credit history, insufficient income to pay the rent, or past behavior—such as damaging property—that makes the person a bad risk. . . Landlords must apply selection standards, such as requiring a minimum income and a good credit report, equally to all tenants.³³

³⁰ *See, gen, id.* at 6-7.

³¹ HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Provider, p. 4-23 § 4-7 (“All screening criteria adopted by the owner must be described in the tenant selection plan and consistently applied to all applicants.”)

³² Janet Portman, *Choosing Tenants: Avoid Fair Housing Complaints and Lawsuits*, NOLO, available at: <https://www.nolo.com/legal-encyclopedia/choosing-tenants-avoid-fair-housing-29816.html>.

³³ Beth Dillman, *How to Screen and Select Tenants FAQ*, NOLO, available at: <https://www.nolo.com/legal-encyclopedia/how-screen-select-tenants-faq.html#answer-1739503>. “If you create standardized scoring criteria based on this information and apply the same criteria

Thus, it is not surprising that a Housing Provider will establish standardized, easy-to-apply screening criteria and not deviate from them, with the goal of *avoiding, not facilitating*, discrimination in housing.

Criminal record data can be used to estimate the potential risk of future criminal activity, and in CDIA members' experience, housing providers do not treat all offenses equally. (Question 17.d, 18). In particular, Housing Providers are rightfully more concerned about the presence of violent offenses in a criminal history as opposed to nonviolent - and less severe - crimes. (Question 17.b). Moreover, the length of time since the offense occurred is a relevant factor that is normally considered by Housing Providers. The purpose for consideration of this information is the risk of harm created by someone likely to re-offend.

The U.S. government has conducted several studies of re-arrest frequency to demonstrate high levels of repeat criminal activity by defendants - even eight or nine years after their prison release. Re-arrest, not re-conviction, has been these expert researchers' often-used measure. Specifically, in the U.S. Department of Justice 2018 study, the re-arrest rate for state prisoners was 83% over a nine-year study period. A 2019 U.S. Sentencing Commission report found a 39.8% re-arrest rate for nonviolent and a 64% re-arrest rate for violent federal prisoners over an eight-year period.³⁴ A 2021 study released by the federal Bureau of Justice Statistics substantiates the concern regarding violent offenders, finding that "[a]bout 1 in 3 (32%) prisoners released in 2012 after serving time for a violent offense were arrested for a violent offense within 5 years.³⁵ "Violent offenses" were defined to include homicide, rape or sexual assault, robbery, assault, and other miscellaneous or unspecified violent offenses.³⁶

These expert U.S. Department of Justice and U.S. Sentencing Commission studies

equally to all applicants, you should be in compliance with Fair Housing laws." *How to Create a Tenant Screening System*, Innago (Jan. 4, 2021), available at: <https://innago.com/tenant-scoring-system/#:~:text=Tenant%20scoring%20systems%20allow%20you,need%20to%20choose%20only%20on.>

³⁴ M. Clarke, *Long-term Recidivism Studies Show High Arrest Rates*, Prison Legal News (May 3, 2019), available at: <https://www.prisonlegalnews.org/news/2019/may/3/long-term-recidivism-studies-show-high-arrest-rates/>

³⁵ *Recidivism of Prisoners Released in 34 States in 2012: A 5-Year Follow-Up Period (2012-2017)*, <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/rpr34s125yfup1217.pdf> p. 12.

³⁶ *Id.* at 24.

support the case for thorough criminal history screening with long lookback periods and close attention to the disposition of the re-arrests of released prisoners. The studies demonstrate a high frequency of repeat, often violent, criminal activity - a key concern for rental housing providers who have a duty to provide safe communities for residents, and face litigation exposure to premises security claims and resident concerns for safety. Absent long lookback periods, Housing Providers cannot make data-driven decisions about an applicant's risk of reoffending and may revert back to subjective "gut proxies."

Moreover, evidence exists that the use of background screening reports to verify for the presence or absence of an applicant's court history may actually *reduce* the incidence of racial discrimination, as such objective consumer report data is more reliable than users' baseline opinions, the latter of which may impose subconscious stereotypes in lieu of verifiable data.³⁷ (Question 17.d). Tenant screening reports allow applicants for housing to be screened against objective criteria set beforehand by properties, which reduces individual tendencies to discriminate in the absence of such information, such as by relying on stereotypes and biases rather than an applicant's actual conduct.

With respect to the accuracy of public record data (Question 19), data sets used for matching are: (i) the information provided by the applicant, (ii) related identifying information about the applicant, and (iii) the information about offenders provided by courts and other public record access points. The process of matching public records necessarily depends on the integrity, consistency, and relevance of the information in the data sets. Records made available by courts or departments of correction 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 and those that do are older records. Addresses are rare in public criminal records. Some jurisdictions collect and report demographic data such as height, weight, and race (which can be subjective and unreliable), while others omit such information. CRAs and data researchers play a unique and valuable role aggregating and

³⁷ 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) (finding that employers who use criminal background checks are more, not less, likely to hire African Americans and noting that "in the absence of background checks, employers use race, gaps in employment history, and other perceived correlates of criminal activity to assess the likelihood of an applicant's previous felony convictions and factor such assessments into the hiring decision"). See also notes 4,5 *supra*.

normalizing this public data into an understandable format for prompt, consistent applicant qualification.

Moreover, there are often problems with accessibility to court records because not all courts allow non-parties or non-attorneys to gain access to information in their hard copy or electronic files. There are limits imposed by other laws on what information can be requested from applicants. Given their concerns surrounding fair housing and discrimination laws, Housing Providers generally do not collect and therefore cannot provide to CRAs race information of the applicant for purposes of generating a screening report. Properties in some states, such as California, are reluctant to request or provide gender information for the same reasons. Consumers are highly mobile and may use names and other personal identifiers that change over time. Finally, criminals 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.

Not using criminal record information in tenant screening presents concrete, material risks to residents. For example, in 2016, a Nebraska 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.³⁸ Another child was raped and murdered in 2017 by a resident in an apartment community who had a history of violent offenses but was allegedly permitted into the community without undergoing a background check.³⁹ Last year, following the death of a renter at the hands of a property management employee, Miya's Law⁴⁰ took effect in Florida to protect renter safety. The law requires Housing Providers to conduct thorough background checks of their employees through a

³⁸ *Cure v. Pedcor Mgmt. Corp.*, 265 F. Supp. 3d 984, 988–89 (D. Neb. 2016) (denying motion to dismiss because plaintiff alleged sufficient facts to argue that if the housing provider had conducted a background check, it would have discovered that the perpetrator had multiple convictions for assault and public indecency).

³⁹ Cate Cauguiran, *Family of woman murdered in Schaumburg apartment files lawsuit*, ABC 7 News (Aug. 2, 2017), available at: <https://abc7chicago.com/tiffany-thrasher-rape-murder-schaumburg/2267952/>

⁴⁰ Codified at Fla. Stat. § 83.515.

consumer reporting agency.⁴¹

Tenant screening reports help Housing Providers do what they can to protect their residents. And the use of criminal record information in tenant screening protects underserved populations from violence and discrimination.

Eviction Records in Tenant Screening

The RFI seeks input on how Housing Providers are currently requesting eviction record information and using eviction records in making housing decisions about prospective tenants (Question 22). Court records of landlord-tenant matters, including eviction or non-payment of rent, are widely used examples of rental history. Because court costs and delays can significantly impact housing providers' ability to deliver safe, clean, and affordable housing, obtaining a complete and accurate picture of a rental applicant's rental history in court and credit records is vital.

The RFI asks how Housing Providers obtain eviction record information (Question 22.a) practices for collection of public court eviction records vary. Individual Housing Providers may interview applicants or prior property managers, do their own research directly with the courts, or obtain a consumer report containing eviction and landlord-tenant court records. Additional consumer protections apply under the FCRA where a consumer report is used.

The RFI asks what types of eviction records are being used in evaluating tenants (Question 22.b). Court records used in tenant screening may include landlord-tenant court records that do not involve eviction, or recovery of possession of the property, but only involve recovery of funds owed under the lease. Generally, current eviction case statuses are used, including filings and judgments.

As tenant risk prediction tools, eviction and landlord-tenant court records returned in consumer reports have many benefits over other alternative measures, such as calls to prior owners or property managers or do-it-yourself local court research. First, public court records relate specifically to renter payment and default history (i.e., the outcome the

⁴¹ "Florida Renters Made Safer Under Miya's Law – Landlords Required to Background Check Workers," Jun. 30, 2022, A. Martinez, <https://www.forbes.com/sites/alonzomartinez/2022/06/30/florida-renters-made-safer-under-miyas-law--landlords-required-to-background-check-workers/?sh=1e499e5b626c>.

Housing Provider is trying to predict and protect against), and not some proxy for rental history, such as credit trade line history, generally.

Second, landlord-tenant court records have accuracy safeguards not found in anecdotal reports of renter history (e.g., character interviews by a property manager with a prior housing provider). Court documentation and perjury requirements a manager or owner must meet in order to file an eviction matter are nowhere present in a prior Housing Provider's anecdotal report to a prospective Housing Provider of an applicant's prior lease dispute. Housing Providers well understand this difference in source accuracy when they are evaluating competing reports of an applicant's rental history.

Third, landlord-tenant and eviction court records are widely available on a national basis in consumer reports. In an age of rampant applicant fraud and non-disclosure, Housing Providers can have confidence that a consumer report containing multi-state court records reflects accurate court records from jurisdictions an applicant did not voluntarily identify, giving a wholistic picture of an applicant's true rental history risk.

The RFI asks if "additional context" is considered in evaluating court rental history (Question 22.c). The above three reasons provide context that should be recognized with respect to why landlord-tenant and eviction courts records in consumer reports are preferred to anecdotal eviction records and incomplete eviction searches.

"Additional context" may be considered on a case-by-case basis under Fair Housing Act reasonable accommodation provisions by the Housing Provider. Care is taken by Housing Providers to evaluate similarly situated applicants alike, including the administration of exceptions to standard criteria. Housing Providers also take validation steps to safeguard against fraudulent applicant-presented information. Further standards do not exist for the consideration of contextual information in landlord-tenant court records.

The RFI seeks to learn to what extent Housing Providers consider the outcome of an eviction proceeding in evaluating a prospective tenant (Question 22.c). CDIA understands that Housing Providers' decision criteria vary. Housing Providers recognize that, because of the substantial costs involved in preparing, filing, and pursuing to judgment landlord-tenant court actions, these court matters are usually undertaken as a last resort.

For a number of reasons, many Housing Providers view the mere fact that a landlord-tenant case has been filed as a significant outcome. First, because landlord-tenant

and eviction court actions typically create significant costs for housing providers from the moment they are prepared and filed, Housing Providers do not rush to evict. Most state laws require some period of time for a resident to cure a payment default prior to a notice to pay or quit being issued, and many allow a resident to cure some amount of the past due amounts to stave off an eviction - even after the case has been filed. Where the filing of eviction or landlord-tenant action follows some form of a lease default, the court record with a filed status alone usually indicates a lease payment default. A resident who abandons the property without payment after an eviction filing, and a resident ordered to vacate a property after a court hearing, each impose significant additional costs on a housing provider - and each suggest materially higher risks of lease default that the next housing provider prefers to avoid. The filing outcome in a public eviction record is highly relevant to the prospective housing provider evaluating the likelihood a consumer will satisfy the lease obligations.

Where courts can make more nuanced summary case outcome indicators readily available at scale with each case (i.e., judgment for plaintiff, judgement for defendant, amount in controversy, fault/no-fault), Housing Providers and their screening providers can differentiate among different case status types. State property laws and court technology and access rules vary as to the availability of such details. Absent ready availability of summary details in the courts, cases cannot be reported timely with those details due to clerk assistance constraints, limited terminal availability, and court-imposed researcher quotas.

The RFI asks what steps Housing Providers and other industry participants take to avoid discriminatory impacts from their use of eviction records in assessing prospective tenants and/or to comply with fair housing laws (Questions 22.d, e). As noted in the answer to Question 22.b above, eviction and landlord-tenant court records are evidence of the very type of risk housing providers seek to protect against. To predict lease default risk, use of such rental history default records with court accuracy safeguards is preferable to use of rental risk proxy records, such as credit trade lines, alone. Also, using court records subject to perjury and evidentiary requirements creates safeguards against using inaccurate and potentially discriminatory anecdotal reports of evictions reported by prior Housing Providers who may have had a personal issue with the individual. Finally, the national coverage and public access to courts limits the risk that a non-public, locally specific factor (such as local reputation) would be used by Housing Providers instead.

CRAAs do not play any role in such considerations and are generally unaware of the outcome of the screening decision. As such, CRAAs have little insight into the impact the use of such information, or deviations from the property's standards, may have on specific applicants or classes of applicants of a particular property. Generally speaking, CDIA is aware that professional Housing Providers work with counsel to conform decision and appeal criteria, including the use of eviction records, to applicable fair housing law.

The RFI asks what steps, if any, Housing Providers and other industry participants take to verify eviction record information with prospective tenants (Question 22.f). Again, this is undertaken by the Housing Providers, and typically not the CRAAs which have the unique ability to confirm report information with the subject applicant. Certainly where a CRA receives a dispute from a consumer regarding eviction data, the CRA will reinvestigate based on the information provided by the consumer.

The RFI asks broadly about the potential benefits and harms of considering eviction records in making housing decisions. (Question 23).

Reporting court landlord-tenant history has several benefits. First, as discussed, this court rental history data is direct evidence of the very type of rental history risk Housing Providers are trying to guard against. Further, landlord-tenant court records can help qualify applicants who would not otherwise qualify on their credit history alone. Often, an applicant with a thin credit file and a clean landlord-tenant court record rental history can qualify to rent a property.

Potential constraints do exist. Courts must continue to readily provide adequate matching identifiers at scale for the continued use of eviction records to qualify applicants promptly. Absent such availability, it will take housing providers longer to qualify applicants. Also, eviction records should be weighed with other predictive variables for a wholistic applicant risk analysis.

Particularly, the RFI asks how those benefits and harms vary by outcome (e.g., dismissals versus judgments) and recency of the eviction action (Question 23.a). Where, as a policy matter, eviction public records are sealed based on case status or recency, the result is to boost applicants who have hidden-by-policy eviction rental history over similarly situated applicants with no eviction history and minor derogatory credit history. Such sealing of public records creates no new affordable housing, of course. Rather, the sealing of such public rental history due to recency or outcome can enable applicants with newly sealed rental history to displace comparable applicants with no such evidence of risk.

Affordable Housing Providers are left to accept the added default costs of this policy-hidden risk.

The RFI asks how tenant screening companies account for different jurisdictions' approaches to eviction proceedings and judgment amounts in their tenant screening products. (Question 24). All court users are limited by the information readily available from the court. Case status codes vary with court technology and real property and disclosure laws. For ease of comparison across jurisdictions, some screening companies invest heavily in technology and systems to standardize case outcomes and judgment amounts in their reporting for users who request it to aid leasing staff in making consistent decisions. Other screening providers provide only raw eviction records, letting the user interpret court abbreviations when applying its criteria.

The RFI asks how tenant screening companies differentiate between the actual amount in controversy and any additional fees levied or permitted by the court (e.g., statutory attorney's fees, treble damages, or collection fees). (Question 25). Generally, information at this level of detail is not readily available at scale in most local eviction records, under current court technology capabilities, court access rules, and real property laws. Some screening providers may not report smaller amounts in dispute. Some providers may filter out eviction records without disposition that are older than a certain age (e.g., 24 months) on the grounds that they are presumably not active.

The RFI asks how tenant screening companies account for variations in the completeness of records from different jurisdictions, and to what extent tenant screening reports differentiate between judgments for eviction and other types of eviction filings. (Question 26). Some tenant screening companies may standardize case status information to facilitate improved decision-making by users who are not experts in case status descriptions and abbreviations. Other tenant screening companies may only report the underlying case status as it appears in the record and rely on the user to apply its criteria appropriately across the jurisdictions in which the user conducts business.

Generally, most tenant screening companies will report case status descriptions, where readily available in the court records, enabling users to differentiate between eviction and landlord-tenant case filings and judgments. Because case filings and judgments can impose similar costs on Housing Providers, property criteria will often not treat eviction judgments more harshly than initial filings when evaluating applicant history, though actual practices vary.

The RFI seeks to learn how accurate (including complete) are eviction records, both from public records sources like courts and as provided by tenant screening companies. (Question 27). Eviction and landlord-tenant court records are highly accurate, only a very small percentage of resident screening reports contain these records, and a vanishingly small subset of reports contain eviction records with a material inaccuracy - that is, an inaccuracy such that, if corrected, the previously declined applicant would now qualify under the user's criteria.

Consumer allegations of inaccuracy in resident screening reports are extremely low. As an example, only 0.35% of one CDIA member company's resident screening reports ever receive a consumer inquiry over the content accuracy. And a vanishingly small subset of that low percentage ever results in a material inaccuracy such that an adverse action would change if a report correction were needed. Additionally, the percentage of tenant screening reports that include an eviction or criminal public record are also very low. Allegations of "inaccurate" records, both in disputes, CFPB complaints, and litigation, often include technical allegations that reflect a lack of understanding by the user or a technical inaccuracy that is not cognizable injury. Frequently, a dispute reinvestigation reveals a misunderstanding of the record by the consumer, or agreement by the consumer following reinvestigation that the record as reported was accurate. Also, it is common for thousands of CFPB accuracy complaints to be resolved with no finding of inaccuracy by the entity and no further action by the consumer.

Continued remote access to personal and case identifiers at scale in public court records is a critical policy and technology issue related to accuracy - a CDIA priority where we continue to invite active agency support. Where identifiers can be accessed and resolved remotely at scale, matching can be accomplished, records can be updated, applicants can be qualified, and reinvestigations completed faster with accuracy. But these turnaround times for accurate public record reporting suffer where:

- Personal identifiers (such as Full Name, Date of Birth, Address, Driver License) and Case Status identifiers (such as identified parties, case status, update date, amount in controversy, and expungement status) are not readily searchable at scale in structured formats on a standard statewide basis.
- Access quotas, lack of remote access, and clerk assistance dependency limit access to public records.

Where there are inaccuracies in reported eviction records, court technology and policy may be a contributing factor as identified above. Often, alleged “inaccuracy” in eviction and landlord-tenant court record consumer reports is found to be unsubstantiated or immaterial.

In shockingly large number of cases, an accuracy dispute is initiated by a credit repair organization working for compensation with incomplete information from the consumer about his/her rental history.⁴² Credit repair organizations are flooding the complaint process with frivolous complaints to attempt to take advantage of a shorter resolution time period. The CFPB does not reject ones that are from third parties such as credit repair companies based upon the number that get to a CRA that have never contacted the CRA and appear to be from credit repair companies. Often the CRA will receive a complaint from a consumer using credit repair and that consumer’s file has no recent activity or inquiry that would lead to a complaint.

The RFI asks if there are particular types of oversight and quality control efforts that can catch any inaccuracies before they appear on tenant screening reports. (Question 27.b). Tenant screening providers and their public record data researchers deploy significant steps to limit inaccuracies before they reach reports and before they become the basis for adverse actions.

The RFI asks how the accuracy of eviction records impacts their usefulness in assessing individuals for housing or the benefits of considering them in making housing decisions. (Question 28). Accuracy is a key reason eviction court records in consumer reports are preferred for the purpose of evaluating tenant applicant lease risk. As articulated above, anecdotal property manager reports or do-it-yourself partial court

⁴² The CFPB is well aware how credit repair organizations can mislead consumers and abuse the dispute process. CFPB Takes Actions Against Credit Repair Companies for Charging Illegal Fees and Misleading Consumers, Prime Credit (Jun. 27, 2017), *available at*: <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-actions-against-credit-repair-companies-charging-illegal-fees-and-misleading-consumers/>; *CFPB Takes Action Against Company and its Owners and Executives for Deceptive Debt-Relief and Credit-Repair Services*, Burlington Financial (Jun. 29, 2021), *available at*: <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-company-and-its-owners-and-executives-for-deceptive-debt-relief-and-credit-repair-services/>; *CFPB Sues Software Company That Helps Credit-Repair Businesses Charge Illegal Fees*, Credit Repair Cloud (Sep. 20, 2021), *available at*: <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-software-company-that-helps-credit-repair-businesses-charge-illegal-fees/>.

searches lack the accuracy safeguards, completeness, and consumer protections of court record consumer reports. (Question 22.b).

Allegations of “inaccuracy” in eviction records are often, in and of themselves, inaccurate or sufficiently immaterial to not impact user decisioning or create cognizable harm. That is, such accuracy claims are often thoroughly investigated and determined to be unfounded or based on consumer misunderstanding. Or where a change is made in a reported record following reinvestigation of such a claim, the post-change report frequently would not support a different decision by the user under its criteria - so the claimed “inaccuracy” does not negatively impact the usefulness of the data.

Question 29 of the RFI seeks research (statistical or otherwise) to show that eviction records - or records in which an eviction proceeding was resolved in a particular way - are useful or relevant to assessing whether a particular individual is more likely to have a negative housing outcome when compared to the general population. For affordable housing providers, loss costs from a subsequent avoidable eviction of an applicant are among the more significant “negative housing outcome[s]” that a provider can experience. Depending on jurisdiction, costs of lost rents and damages, court costs, attorneys’ fees, and management expense can total up to \$10,000 per filing.⁴³

A 2016 analysis also found that evicted residents have nearly three times as many prior eviction and rental-related collection records as non-evicted residents.⁴⁴

From a user’s perspective, 56% of Housing Providers cite eviction records as a top concern when reviewing an applicant’s history.⁴⁵

The RFI requests suggestions for additional steps regulators can and should take with respect to the use of eviction records in tenant screening. (Question 30). We invite regulators to join with CDIA in reaching out to courts, court organizations, and court

⁴³ *The True Cost of an Eviction*, My Smart Move (Feb. 10, 2017), available at: <https://www.mysmartmove.com/SmartMove/blog/true-cost-eviction-infographic.page>.

⁴⁴ *TransUnion Analysis: Collection Records are Highly Predictive of Resident Behavior*, TransUnion (Feb. 22, 2016), available at: <https://newsroom.transunion.com/transunion-analysis-collection-records-are-highly-predictive-of-resident-behavior/>.

⁴⁵ *How to Check for Evictions and Why You Should*, My Smart Move (Jun. 19, 2017), available at: <https://www.mysmartmove.com/SmartMove/blog/landlords-check-applicant-eviction-history.page>.

technology providers to ensure wider remote access to public court records at scale with sufficient personal and case identifiers to enable timely turnaround of accurate court records in consumer reports.

Regulators can encourage courts to publish regular, standard-format updates of expunged and sealed records with adequate identifiers, enabling researchers to proactively update previously reported public records. Aging court technologies that require expensive clerk assistance or user quotas should be encouraged to upgrade to scalable remote-access technologies to speed approval of consumer applicants. Regulators might encourage courts to define common data formats for landlord-tenant and eviction court record reporting, to enable easier comparison among jurisdictions.

Regulators should continue to root out fraud and deceptive acts and practices among credit repair organizations that clog dispute resolution channels.

Regulators should give greater weight to consumer delays in being approved for housing that come with longer applicant verification and screening procedures. Increasingly, consumers seek to move in promptly and prefer fast decision processes in resident screening as in their other online transactions.

Using Algorithms in Tenant Screening

The RFI seeks input on how automated decision-making and similar technology is used in tenant screening. (Question 31). Data-driven methods have been adopted by users to reduce subjectivity and gain consistency and improved understanding of records and what they mean for lease risk evaluation. As tenant screening decision processes have become more complex, these tools have become more valuable for user understanding and consistent decisioning.

Tenant screening scores and decision tools have reduced Housing Providers' dependency on subjective beliefs and biases that vary among leasing agents and properties to the benefit of consumers. Such tools have improved users' understanding of the meaning and relevance of various records that are used in tenant risk evaluation. Similarly, the tools have enabled the use of larger lease-relevant data sets to determine projected lease performance than a leasing agent alone could timely consider.

But subjective tenant screening methods persist, especially among small Housing Providers or in places where local law prohibits or materially limits screening. For example, the National Low Income Housing Coalition noted in summarizing a recent survey of smaller

housing providers' applicant screening practices: "Forty-one percent of landlords who owned one to five units indicated they relied on "gut feelings" or intuitive judgments to differentiate renters. . . . Nearly a quarter of landlords interviewed in Baltimore and Cleveland conducted home visits of prospective tenants' living spaces as part of routine screening practice."⁴⁶ Regulators should encourage the use of objective and reliable data-driven methods like consumer reports over these subjective practices that lack consumer reports' consumer protections.

This RFI provides no definition of an algorithm. As such, the inquiry is very broad and awaiting a regulatory definition. Merriam-Webster broadly defines "algorithm" as "a procedure for solving a mathematical problem (as of finding the greatest common divisor) in a finite number of steps that frequently involves repetition of an operation."⁴⁷ A narrower definition will be needed in any future regulation.

Algorithms are designed to solve problems. The answers to "what are the problems to solve for?" - and the tradeoffs among competing problem solutions - require close attention to how current practices have evolved to meet consumer and user preferences. For example, in defining the use of algorithms, policymakers should recognize applicants' desire for prompt online responses, Housing Providers' need for scalable, explainable decisions, source courts' technology and rule constraints, and existing regulatory approaches in consumer credit laws.

Several validated tenant screening algorithms in use today exemplify well-known design principles of fairness (inclusiveness and equal treatment), transparency (of inputs, measurement factors, and results), consistency (in application), and privacy. Future resident screening policymaking should recognize the complexity of the tradeoffs inherent in algorithm design, the diversity of opinion among Housing Providers among risk management and resident screening processes, and the essential position that resident screening and affordable housing providers play in delivering and preserving safe, quality affordable housing. The RFI also seeks input on how CRAs use algorithms, automated decision-making, artificial intelligence or similar technology (collectively "algorithms") to facilitate FCRA compliance, match records to particular consumers, and evaluate

⁴⁶ Rosen et al., *Racial Discrimination in Housing: How Landlords Use Algorithms and Home Visits to Screen Tenants*, National Low Income Housing Coalition (Aug. 2021), *available at*: <https://nlihc.org/resource/racial-stereotypes-pervade-tenant-screening-processes>

⁴⁷ *Algorithm*, MERRIAM-WEBSTER, *available at*: <https://www.merriam-webster.com/dictionary/algorithm>

prospective tenants. (Question 31.a). With respect to FCRA compliance (Question 31.a.1), algorithms may be used by court researchers to identify non-standard patterns in updates from data sources, including courts, departments of correction, sex offender registries, and other public records sources. Such use is one tool used to maintain quality control. Algorithms under the RFI's broad definition are also used by some CRAs to identify potential fraud in new client onboarding and in connection with applicant fraud.

Algorithms are used to address risks related to the preparation of file disclosures and in handling consumer disputes. Algorithms may identify patterns in consumer disputes which allow a CRA to identify ways to improve its processes or to identify issues with sources. With respect to matching records to particular consumers (Question 31.a.2), algorithms are used to identify correctly matching records from jurisdictions not presented by an applicant, and to link and de-duplicate records from the same event from multiple public and private record sources (e.g., court and corrections records relating to the same defendant and charge) where sufficient data exists to do so.

With respect to evaluating applicants (Question 31.a.3), algorithms are used to help Housing Providers predict a rental applicant's lease performance, including the likelihood of lease default by a particular applicant. Algorithms are also used to identify applicant fraud for the protection of consumers and Housing Providers alike.

In each example above, manual oversight of the algorithmic tool and business process is also involved. Developers of such tools have followed in the footsteps of those credit score developers, often developing scores that are empirically derived, demonstrably and statistically sound.

The RFI asks how common these uses of algorithms are by CRAs. (Question 31.b). Practices vary widely among CRAs and may be subject to user preferences. For example, in evaluating applicant risk, many Housing Providers prefer to use heuristic, experiential decision tools such as minimum income criteria, rent/income ratios, home-grown decision models, or interviews with the applicant and/or his/her prior housing provider.

The RFI further seeks information on the types of data algorithms used. (Question 31.c).

We first discuss the inputs for the uses we identify above. (Question 31.c.i). With respect to FCRA compliance, inputs are raw public and private records, source names, structures, transmission dates, file sizes, fill rates, and other source information. For fraud

detection in applications and consumer inquiries, inputs are applicant-provided information and examples of known fraud. With respect to linking records to specific consumers – specifically jurisdiction and case records - inputs are applicant-provided information, case and charge identifiers, names, dates of birth, and address information. In terms of evaluating applicants, inputs may vary with respect to tenant lease performance, and may include applicant-provided information, credit history, rental history, and expected rental payment. User-provided factor weighting may be included.

The outputs of the algorithms used in tenant screening vary by use case. (Question 31.c.ii). With respect to FCRA compliance, outputs include identified records, sources, and updates that may not fit known record formats or update dates from that source. With respect to linking records to specific individuals, outputs include potential matches, with tips for further research. Some may include a confidence level associated with the likelihood that the two linked records are a likely link. In terms of applicant evaluation, outputs vary with user preference. A score may be provided that measures the relative riskiness of a consumer on particular terms. And fraud detection outputs may include user-submitted identifying information that does not conform to known consumer profiles (such as identifying information for deceased persons) or that conforms to known fraudulent uses elsewhere. Once an algorithm is applied to a particular transaction and a score derived, housing providers may request their decision criteria be applied to such score, to ensure consistent decisioning and equal treatment of similarly situated applicants in accord with the Fair Housing Act. For clarity and transparency, supporting documentation, including raw records, is typically available to the user. Derogatory factors impacting the score may also be provided to the user.

Regarding the tasks algorithms perform for applicant evaluation (Question 31.c.iii), they may predict the relative likelihood of default by a consumer on particular lease terms, or the length of stay by a consumer on particular lease terms. For fraud evaluation, the algorithm may be performing an analysis that user or consumer-provided transaction information reflects known fraudulent patterns.

With respect to how algorithmically generated scores, recommendations, and predictions are being advertised to Housing Providers (Question 31.d), the primary advantages emphasized to Housing Providers are that these scores contain data relevant to rental housing lease performance not found in providers' more subjective, rule-of-thumb approaches, personal interviews, or data sets developed for other uses. The use of alternative data can help qualify consumers to rent who would otherwise not be decision-

able. They are modeled against lease outcomes, instead of non-lease outcomes (e.g., general credit outcomes), to find qualified applicants other models may turn away. Moreover, they reduce the risk of renter default, damages, and accompanying loss costs that negatively impact the availability of rental housing. Further, they reduce the risk of consumer and housing provider loss due to identity fraud. For example, a 2020 survey, “Fraud in the Multifamily Industry,” found a substantial increase in the incidence of fraud triggers with the onset of COVID-19 pandemic and increases in bad debt and time spent by executives in application review. Notably, 64% of surveyed executives reported experiencing 100 incidences or more of fraud in the reported period.⁴⁸ The following are representative examples of how scores used in lease risk evaluation are advertised:

- TransUnion ResidentScore: <https://www.transunion.com/product/resident-screening>
- SafeRent: <https://saferentsolutions.com/saferent-score/>
- RealPage: <https://www.realpage.com/apartment-marketing/resident-screening/>

The RFI asks to what extent Housing Providers select consumer reporting agencies (including tenant screening companies) based on the companies’ offering of recommendation or scoring products to evaluate prospective tenants. (Question 31.e). This varies. A large category of housing providers relies on experiential rules of thumb - including proprietary models, “home visit” personal interviews with applicants, and calls to prior Housing Providers - to make their decisions.⁴⁹

The methods by which algorithms are designed (Question 32) vary and are usually proprietary intellectual property.

Some CDIA members have adopted responsible AI principles and apply them to products which contain or use machine learning. These principles may involve regular risk assessments and reviews, using explainable models, decision consistency, and privacy preservation in design and application.

⁴⁸ *Fraud in the Multifamily Industry*, TransUnion (2020), available at: <https://content.transunion.com/v/residentid-renter-fraud-survey-report>. See also *Fraud in the Rental Housing Industry* by Andrea Collatz (May 23, 2022), available at: <https://www.mysmartmove.com/SmartMove/blog/rental-property-industry-fraud-infographic.page>.

⁴⁹ Rosen et al., *Racial Discrimination in Housing: How Landlords Use Algorithms and Home Visits to Screen Tenants*, AM. SOC. REV. (Aug. 2021).

The RFI requests information on what the sources of data are and how the data is obtained. (Question 33). The RFI also asks what steps, if any, are tenant screening companies taking to ensure the data is representative of the relevant population (e.g., that the demographics of subjects in the training data are similar to those of the population of tenants to be screened). (Question 33.a). Demographic information about rental applicants and residents is not generally maintained by property management firms. However, demographic information may have been used to develop some credit scores used in tenant selection (e.g., FICO, Vantage).

Score developers may provide users and resellers with independent evaluations of the predictiveness of their models in comparison to alternative methods. (Question 33.b). With respect to what steps tenant screening companies take to assess how third-party algorithms have been developed (Question 33.c), some lease risk scores are evaluated by third party experts to determine how well they predict lease performance. These built-for-purpose scores are often found to be more predictive of tenant performance than credit scores and rules of thumb in common use (e.g., rent/income, minimum income).

In addition, credit scores used in tenant screening, such as multiple versions of the FICO Score and Vantage Score, are regularly validated for fair lending compliance and for fair housing compliance, particularly in the mortgage market. (Question 33.d). A well-known empirical study by the Federal Reserve Board found “little or no evidence that the credit characteristics used in credit history scoring models operate as proxies for race or ethnicity.”⁵⁰ After a multi-year process, both FICO 10T and VantageScore 4.0 were validated in October 2022 by the Federal Housing Finance Agency.⁵¹ These and earlier FHFA-validated versions of these scores are used by some Housing Providers in the tenant

⁵⁰ Avery et al., *Does Credit Scoring Produce A Disparate Impact?* Fed. Reserve Board, at 26 (Oct. 12, 2010), 2010-58, available at: <https://www.federalreserve.gov/pubs/feds/2010/201058/201058pap.pdf>.

⁵¹ *FHFA Announces Validation of FICO 10T and VantageScore 4.0 for Use by Fannie Mae and Freddie Mac*, Federal Housing Finance Agency (Oct. 24, 2022), available at: <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Validation-of-FICO10T-and-Vantage-Score4-for-FNM-FRE.aspx>, Oct. 24, 2022. Mortgage lending falls under both the ECOA and the FHA.

screening process. The Fair Housing Act guidance currently does not include specific criteria for evaluating lease risk scores.⁵²

We next discuss how the performance of algorithms in tenant screening is tested, both pre- and post-deployment. (Question 34.)

Some evaluative measures are a decision model's ability to reduce a portfolio's lease default rate and total balance outstanding, when compared to alternative methods. (Question 34.a). Reducing lease default rate and total balance outstanding are two crucial metrics, since renters in default tend to drive overall loss costs that negatively impact property economic stability. The savings in total balance outstanding may also be expressed as a dollar amount of savings per unit per year, when calculated against unit turnover.⁵³ Other evaluative measures used in the market are a purpose-built tenant screening model's ability to predict the likelihood that a particular applicant will end up in collections or evictions. Independently validated scores show correlations between scores and likelihood of a lease outcome ending with an amount in collections or evictions. The cost of collections and evictions are key variables to rental housing providers: each cost substantially impacts overall property operating costs - particularly after the end of Emergency Rental Assistance to cushion renter default.⁵⁴ One such evaluation shows how consumers with prior evictions or prior collection records are substantially more likely to be subsequently evicted, and that a validated, purpose-built tenant screening score was able identify residents' likelihood of

⁵² HUD proposed guidance on the development of tenant risk scores; however, such guidance was not adopted. See 24 CFR 100, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, <https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>.

⁵³ Performance Validation available after self-identification at: <https://www.realpage.com/case-studies/ai-screening-performance-validation/?showPdf=true>.

⁵⁴ Eviction costs to landlords vary by jurisdiction. One national estimate finds housing providers incur an estimated \$3,500 per eviction for legal fees, court costs, financial damages, property damages, and lost rent. *The True Cost of an Eviction*, My Smart Move (Sept. 14, 2022), available at: <https://www.mysmartmove.com/SmartMove/blog/true-cost-eviction.page>. The Emergency Rental Assistance programs provided more than \$45 billion directly to renters and housing providers to cushion renter default, on top of hundreds of billions of dollars of other federal COVID aid to small businesses and unemployment insurance that indirectly supported renters and housing providers.

subsequent eviction.⁵⁵

In terms of independent third-party audits of algorithms, expert third parties are retained to independently evaluate lease risk scores and general credit scores in common use in tenant screening. (Question 34.b). Summaries of performance assessments are available to clients for several lease risk scores and credit scores in use in tenant screening. (Question 34.b.i.)⁵⁶ These audits are kept confidential because proprietary intellectual property must be protected, and litigation concerns affect distribution of such audits. (Question 34.b.ii). From a competitive perspective, lack of disclosure of analysis of popular alternative decision methods - e.g., housing provider decision rules of thumb - may impede disclosure of assessments of lease risk scores and credit scores used in renter risk evaluation. (Question 34.b.ii).

In terms of what factors, data points, or characteristics algorithms rely on in producing recommendations (Question 35.c), specifics are proprietary intellectual property. In general terms, scores may be derived from credit and rental history information and application-specific information, such as rent, income, and guarantor data points. Anti-fraud algorithms may use inputs from known fraud trends - such as identifying information for people known to be dead or unissued Social Security numbers - to evaluate the possibility of synthetic identity, account takeover, Social Security number, and other types of identity fraud. Recommendations are the result of client-defined criteria applied to returned results, which includes raw records and may include scores or decision tools.

With respect to the Housing Providers' ability to opt into or out of considering particular factors (Question 35.d), some scores and decision tools permit user filtering to remove specific factors. Other providers meet user preferences to review an applicant's entire reportable history. Still other providers offer tools that enable users to apply their experience to make consistent decisions with user-provided factors and weights.

The RFI seeks information on how CRAs decide what criteria should be included in their tenant screening recommendation or scoring products. (Question 36). CRAs listen

⁵⁵ See *TransUnion Analysis: Collections Records Are Highly Predictive of Resident Behavior*, TransUnion (Feb. 22, 2016), available at: <https://newsroom.transunion.com/transunion-analysis-collection-records-are-highly-predictive-of-resident-behavior/>.

⁵⁶ A white paper describing the results of the performance assessment of one tenant screening model is available at: <https://www.realpage.com/apartment-marketing/resident-screening>.

closely to customer preferences on which criteria they want to use. Some users prefer a score to rank order risk. In this group, score ranges will vary with product. Other Housing Providers prefer to control the weighting of various factors in their decision criteria. Outcomes may be a score derived from users' weighting, or a recommendation without a score based on user weighting of user-selected inputs (e.g., number of trade lines in default). Still others rely on personal interviews of applicants or prior housing providers. The methodology for including certain factors may also include regression testing of credit and rental history input factors against lease or general credit outcomes.

In terms of CRAs using amounts owed by tenants in their recommendations or scoring products (Question 36.a), practices vary. Generally, amounts must be supported by a lease or clear notice to the tenant. Amounts owed according to court filing or court order are subject to court requirements of documentation. Amounts in collections are typically subject to validation requirements under the Fair Debt Collections Practices Act.

With respect to the inclusion of public records (Question 36.b), criminal records are not typically included in lease risk scoring models. Criminal records may be categorized by age, type, and severity in a decision grid, to enable the accurate comparison of similar offenses from different jurisdictions for consistent decisioning.

Scores used in tenant screening may be independently assessed to evaluate their impact on one or more protected classes. (Question 37). Unlike the mortgage process, no federal law exists for identifying rental applicants by race or ethnicity. Rental applicants can be reluctant to self-identify their race or ethnicity in the absence of such a mandate, and most housing providers are loathe to request it for fear of a fair housing complaint.

As tenant screening grows increasingly complex and varied across jurisdictions, CRAs are taking several steps to explain the tools and their benefits to the tenant screening market. (Question 38). Product-specific sales education is provided to users, providing independent analysis of how a score or tool improves over review of raw records alone, or in contrast to legacy models. Training on the product is also provided to clients, so that the client knows how to use the score or tool in specific situations (e.g., student housing applicants, voucher holders, co-applicants), and where to access raw underlying records, if needed. With some products, returned results include the factors that most impacted a particular score or recommendation. With some products, a client or consumer help desk is available to explain the application of Housing Providers criteria to a specific applicant. Service agreement language is provided to clarify a client's responsibility to set its criteria in accord with applicable law; decide on applicants, including the consideration of any appeals

or accommodations; and evaluate client criteria against actual decision results on a periodic basis, adjusting criteria and appeals or accommodation processes as necessary.

The RFI seeks information on the extent to which CRAs inform Housing Providers and/or prospective tenants about (1) the factors that an algorithm relied on in producing or arriving at a particular determination and the weighting of each factor; and (2) the limitations of each algorithm and its outputs, including any factors that could affect the accuracy or reliability of the algorithm. (Question 38.a).

First, with some products, returned results include the factors that most impacted a particular score or recommendation. (Question 38.a.1). A client or consumer help desk may be available to explain the application of criteria to information in a report to a specific applicant. Importantly, weighting decision factors in a decision tool is the Housing Provider's responsibility.

Information is provided to Housing Providers about the limits of identifiers in public records and the corresponding obligation for the client to review returned results against all application information it has - including information not provided to the screening company – before taking adverse action. (Question 38.a.2). Users are also informed of their obligation to consider mitigating information in conducting an individualized assessment and to process disputes, including reconsideration of the applicant in the event a correction is made.

The RFI asks how Housing Providers are using recommendations or scores from CRAs in deciding whether to rent to prospective tenants. (Question 39). Unfortunately, market numbers are not generally available. However, research and training on product features and user responsibilities are available to Housing Providers. (Question 39.b). Guidance may include data components, model evaluation summary, comparison of model with alternative methods, using the product, adjusting client criteria, considering appeals, conducting individualized assessments, evaluating applicants with vouchers or guarantors, obtaining underlying results, handling disputes and reconsiderations, providing adverse action notices, and developments in local law and ordinances of interest to owners and housing providers.

The benefits of using lease risk scores to consumers includes the ability of properties to qualify some applicants that might have been declined based on raw credit scores alone. For example, well-established and independently verified lease risk scores in common use in

the market incorporate rental payment history data not found in generic credit files that help credit invisibles with thin generic credit files get approved.

Also, a lease risk score is modeled specifically against lease risk instead of generic credit outcomes. The benefits of identity fraud recommendation tools include enabling Housing Providers to limit their, and consumers', exposure to identity fraud. Such fraud exposure has increased during COVID and with the growing consumer preference for convenient online lease applications in lieu of traditional face-to-face lease applications. With respect to decision tools and recommendations without scores, the benefits include easing management evaluation that similarly situated applicants are evaluated similarly portfolio wide. They also reduce the burden of evaluating any given applicant, as raw credit and public records are made easier to understand (e.g., with categorization tools).

CRAAs allow applicants and other consumers the opportunity to dispute or seek review of the use of a recommendation, prediction, or score produced by the algorithm, and the Housing Provider's decision involving such product. (Question 42). Under their screening policies, Housing Providers often reassess applications following a dispute and modification of scoring criteria or underlying data.

The RFI seeks input on whether there are steps that regulators should take with respect to the use of algorithms in the tenant screening process. (Question 43).

Regulators should look to existing regulations, such as the Equal Credit Opportunity Act, in developing additional regulations for score evaluation.

Regulators should recognize the benefits that rental and public records data add to qualify thin-file applicants who are un-scorable with narrower legacy credit data sets and legacy scoring models or subjective methods. The Federal Housing Finance Agency has recognized and validated the improvements that newer FICO and VantageScore solutions bring to qualify more consumers for mortgage lending.

Federal Trade Commission
Consumer Financial Protection Bureau
May 30, 2023
Page 40

Please contact us if you have any questions concerning our comments.

Sincerely,

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

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