June 10, 2024

U.S. Department of Housing & Urban Development
Office of General Counsel, Regulations Division
451 7th Street SW, Room 10276
Washington, DC 20410-0500

Re: National Housing Law Project's Extended Comment on HUD Notice of Proposed Rulemaking "Reducing Barriers to HUD-Assisted Housing"

Thank you for the opportunity to provide feedback on the Department of Housing and Urban Development's Notice of Proposed Rulemaking "Reducing Barriers to HUD-Assisted Housing." The following comments are submitted on behalf of the National Housing Law Project (NHLP), members of the Housing Justice Network (HJN), and the undersigned organizations that contributed to the creation of this comment. We strongly support the proposed rule, which takes a much-needed step toward a more balanced and reasonable approach to the use of criminal history in admissions, subsidy terminations, and evictions in HUD-assisted housing. Once finalized, this rule will further fair housing by reducing criminal records barriers that disproportionately harms Black communities and other communities of color, people with disabilities, and survivors of gender-based violence.

NHLP's mission is to advance housing justice for people living in poverty and their communities. NHLP achieves this by strengthening and enforcing the rights of tenants and increasing housing opportunities for underserved communities. Our organization also provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide.

NHLP hosts the national Housing Justice Network (HJN), a vast field network of over 2,000 community-level housing advocates and resident leaders. HJN member organizations are committed to protecting affordable housing and residents' rights. In 1999, HJN – known then as the Loose Association of Legal Services Housing Advocates and Clients – submitted comments to HUD about the very regulations that are the subject of the current NPRM. HJN has been invested in proper implementation of these rules and have observed first-hand the issues that have arisen since those rules were promulgated in 2002. We strongly urge HUD to consider these recommendations informed by the on-the-ground experiences of legal aid attorneys and tenants enforcing these regulations against PHAs and owners across the country.

This comment provides recommendations on (i) definitions, (ii) evidence of disqualifying criminal activity, (iii) admissions, (iv) terminations and evictions, and (v) additional topics.

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DEFINITIONS

HUD should adjust definitions in the proposed rule to eliminate potential loopholes that can harm applicants and tenants with criminal histories.

I. "Currently engaging in"

HUD should revise the proposed definition of "currently engaging in or engaged in" to prevent overbreadth in mandatory admission denials.

A. HUD should remove the phrase "or engaged in" to avoid blurring the line between mandatory and discretionary denials.

Under the existing regulations, the term "currently engaging in" is defined as "the individual has engaged in the behavior recently enough to justify a reasonable belief that the individual's behavior is current."[1] The proposed regulations would broaden this term to "currently engaging in *or engaged in*," widening the reach of mandatory admissions denials beyond what HUD intends.

42 U.S.C. § 13662 dictates starkly different legal consequences depending on whether an applicant is currently engaging in illegal drug use or whether they have engaged in drug-related criminal activity in the past. If the PHA or owner determines that a household member is "illegally using a controlled substance," the PHA or owner "must establish standards that prohibit admission" for such households. 42 U.S.C. § 13662(b)(1)(A). In other words, if an applicant is currently engaging in illegal drug use, denial of admission is mandatory.[2]

By contrast, if an applicant "is or was, during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, *engaged in* any drug-related [..] criminal activity," the PHA or owner has the discretion to admit or deny that applicant. 42 U.S.C. 13662(c) (emphasis added). The term "engaged in" is modified by "during a reasonable time preceding the date of [...] admission" and therefore covers drug-related criminal activity that occurred in the past. In other words, if an applicant has engaged in drug-related criminal activity in the past, denial of admission is discretionary.

The proposed definition of "currently engaging in or engaged in" blends these two terms despite these divergent consequences. As a result, applicants may be deprived of an individualized assessment and access to HUD-assisted housing because of confusion over whether denial of

[1] 24 CFR § 5.853(b).
[2] Although the statute enumerates evidence of rehabilitation that a PHA or owner may consider, 42 U.S.C. 13662(b)(1)(B), the statute is clear that absent such evidence, a person who is illegally using a controlled substance will fall under a mandatory denial of admission.

admission is mandatory or discretionary. **HUD should, therefore, delete "or engaged in" and only define the phrase "currently engaged in," which mirrors the existing regulation.**[3]

B. Instead of 12 months, the final rule should adopt a shorter time period of 3-6 months in the definition of "currently engaging in."

The mandatory denial of applicants who are "currently engaging in" illegal drug use ignores the fact that relapse is part of recovery for substance abuse disorders. By removing the individualized assessment and the housing provider's discretion to admit, this mandatory denial "means that any person with substance abuse disorder, no matter the duration of their abstinence, is one relapse away from losing any protection" from the proposed rule.[4] Because the mandatory denial is statutory,[5] Congressional action is required to change it.

In the meantime, **HUD should minimize the impact of this outdated policy by shortening the time period of when a person can be considered "currently engaging in" disqualifying criminal activity.** Under the proposed rule, the term "currently engaging in" is defined as "the individual has engaged in the behavior recently enough to justify a reasonable belief that the individual's behavior is current."[6] The proposed rule elaborates, providing that "conduct that occurred 12 months or longer before the determination date does not support a determination that an individual is currently engaging … the conduct at issue."[7] Based on this proposed definition, a person who used an illegal drug twelve months ago would be automatically denied housing. It is a stretch of the imagination to characterize activity that took place twelve months ago as "current."

Given the overall purpose of the proposed rule to reduce automatic denials from HUD-assisted housing on the basis of disqualifying criminal activity, **HUD should shorten this time period to 3-6 months.** A significant number of PHAS practices have adopted a time period of 3-6 months in their ACOPs and administrative plans.[8] A shorter time period is also in line with how courts have interpreted "currently engaging in illegal drug use" under civil rights law prohibiting discrimination on the basis of disability.[9] In the employment and disability context, the length of

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[3] 24 CFR § 5.853(b).
[4] *Cf.* Ryan Schmitz, *Substance Use As A Second-Class Disability: A Survey of the ADA's Disarmament of Individuals in Recovery*, 73 Me. L. Rev. 93, 96 (2021) (describing how people with substance abuse disorder face the same problem under the "current use exception" to civil rights laws prohibiting discrimination on the basis of disability).
[5] 42 U.S.C. § 13661(b)(1)(A) (mandating denial of admission of any applicant who a PHA or owner determines is "illegally using a controlled substance").
[6] 89 Fed. Reg. 25361.
[7] *Id.*
[8] Examples include Charleston-Kanawha Housing Authority, West Virginia (3 months); Cheyenne Housing Authority (6 months); Corpus Christi Housing Authority (3 months); Greater Dayton Premier Management (6 months); Lorain Metropolitan Housing Authority (6 months); Opportunity Home San Antonio (6 months); Maine State Housing Authority (3 months); Mobile Housing Authority (6 months); Montgomery Housing Authority (3 months); Olmsted County Housing and Redevelopment Authority, Minnesota (6 months); Panhandle Community Services, Amarillo, Texas (3 months); Town of Mamaronek Public Housing Authority, New York (6 months); Washington County Department of Housing Services, Oregon (3 months).
[9] For example, the 1988 amendment excludes "current, illegal use of [...] a controlled substance." 42 USC 3602(h).

time constituting "currently engaging in illegal drug use" is unsettled, but caselaw ranges from several weeks to several months, far under the yearlong period HUD has proposed.[10] In fact, courts have held that applicants who had not used drugs in three months[11,] and nine months[12] did not qualify as "currently engaging in" illegal drug use. To bring the proposed time period in line with PHAs practice and case law, therefore, HUD should replace 12 months with 3-6 months.

II. "Threatens the health, safety, and right to peaceful enjoyment"

HUD should define "threatens the health, safety, and right to peaceful enjoyment" to preclude overly broad categories of disqualifying criminal activity. The definition should ensure that the threat is actual, substantial, and imminent. It should also emphasize that PHAs and owners should not accept "[g]eneralized assumption," "subjective fears," or "speculation" as conclusive evidence of disqualifying activity.[13]

Despite HUD's attempt to prevent this category "threatens the health, safety, and right to peaceful enjoyment" from being used as a catch-all,[14] the absence of a definition for this category of disqualifying criminal activity has led to overly restrictive and inconsistent policies among PHAs. The case *Housing Authority of New Orleans v. Haynes* illustrates the wide net that PHAs can try to cast with this category. In *Haynes*, the PHA tried to evict a public housing tenant because her daughter had an outstanding warrant for a knife-related incident, even though the incident did not take place on the premises and even though the daughter did not live on the premises and was simply paying her mother a visit. To justify evicting the mother, the PHA tried unsuccessfully to argue that "the nature of [the daughter's] alleged crime" was "a threat *per se* to the health, safety, and right to peaceful enjoyment of the premises by other tenants and [PHA] staff." In rejecting this argument, the court noted that "[t]here was no evidence that any of the other residents were even aware of the arrest, much less that their 'peace' was disturbed by the arrest." Furthermore, the daughter had visited the premises "several times a week for four years and there is no evidence that her presence as a visitor in

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[10] *See* Quinones v. Univ. of Puerto Rico, No. CIV. 14-1331 JAG, 2015 WL 631327 (D.P.R. Feb. 13, 2015) (finding that drug use three months ago was current use); Salley v. Cir. City Stores, Inc., 160 F.3d 977 (3d Cir. 1998) (suggesting that drug use three weeks ago was current use); Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995) (finding that use in weeks and months prior to discharge was current use); Baustian v. State of La., 910 F. Supp. 274 (E.D. La. 1996) (finding that drug use seven weeks ago was current use); *see also* United States v. S. Mgmt. Corp., 955 F.2d 914 (4th Cir. 1992) (finding that one year of abstinence was not considered current drug use).

[11] Lott v. Thomas Jefferson Univ., No. CV 18-4000, 2020 WL 6131165 (E.D. Pa. Oct. 19, 2020) (determining that because plaintiff "had not used illegal drugs in over three months . . . the Court cannot conclude . . . that plaintiff was 'currently engaging [in] the illegal use of drugs' at the time of his termination").

[12] Herman v. City of Allentown, 985 F.Supp. 569 (E.D.Pa.1997) (finding that nine months of abstinence was not current use).

[13] *Cf*. H.R. REP. NO. 711, 100th Cong., 2d Sess. 18, 29, reprinted in 1988 U.S. CODE CONG. ADMIN. NEWS 2173 (regarding whether a person should be considered a direct threat to others under the FHAA).

[14] *See* HUD, Public Housing Occupancy Guidebook 96 (June 2003), superseded by [citation to current PHOG] ("There are a wide variety of other crimes that cannot be claimed to adversely affect the health, safety, or welfare of the PHA's residents.")

anyway disturbed the residents."[15] Although the court reached the right result and overturned the eviction, PHAs and owners continue to use this category liberally to the detriment of applicants and tenants.

Eviction defense attorneys from the Housing Justice Network report adverse actions by PHAs for the following activity under this category: failing to pick up their dog's excrement; getting a speeding ticket, which, according to the landlord, meant that the tenant was a danger to children in the neighborhood; and petty theft. In addition, some PHAs deny admission or terminate assistance for crimes that involve disturbing the peace or for conviction records that indicate the participant may be a negative influence on other residents. The ambiguity of "peaceful enjoyment" is also problematic because they may sweep in noise disturbances and other acts that often indicate gender-based violence and should not be used against survivors under VAWA. These overbroad categories are far more expansive than HUD regulations should allow.

It is especially important to define "threaten" in a manner that prevents PHAs and owners from taking adverse actions based on stereotypes, speculation, protected status, or past activity that does not present a current threat. The NPRM appears to support a narrow interpretation of the term "threaten," with the preamble stating that "[o]ther criminal activity must be criminal activity that would *actually* threaten residents."[16] Moreover, throughout the proposed rules, HUD has replaced "interferes" and "may threaten" with the phrase "would threaten," suggesting a more direct link between the criminal activity and health, safety, and right to peaceful enjoyment. The change in language is important, but too subtle to change PHA and owner practices. A definition of "threatens" would set clearer parameters and ensure that PHAs and owners implement these changes in the way that HUD intends.

A definition that requires an actual threat is supported by case law interpreting this term. As the Supreme Court of Hawai'i explained:

> [T]he mere showing of some criminal activity is not enough to violate this provision; there must be evidence supporting a finding of an actual threat to the health, safety, or peaceful enjoyment of the premises by other residents or management. A conclusory assertion that the removal of a stop sign is a threat to resident safety, or that graffiti is a threat to peaceful enjoyment, or that one resident's theft is a threat to the health and safety of the others is not enough. If it were enough, a violation of the provision could rest on a public housing authority's assumption of facts and circumstances not in the record and would render the limiting phrase "that threatens the health, safety, or peaceful enjoyment of the premises" inoperative. Almost any criminal activity could hypothetically pose a threat to others. Whether criminal activity actually threatens health, safety, or

[15] Hous. Auth. of New Orleans v. Haynes, 2014-1349 (La. App. 4 Cir. 5/13/15), 172 So. 3d 91, 103–04.
[16] 89 Fed.Reg. at 25352 (emphasis added); Cox v. Johnstown Hous. Auth., 212 A.3d 572, 579–80 (Pa. Commw. Ct. 2019) ("[I]t is not the occurrence of the criminal and/or alcohol-related act that is needed to jeopardize [a tenant's] assistance or the possibility that it could occur, but there *must also* be proof that the health, safety or peaceful enjoyment rights of those who reside in the 'immediate vicinity' of [the tenant's] premises was 'threatened' by that act.")

peaceful enjoyment of the premises is a fact-driven analysis, and there must be evidence to support these facts.[17]

Although other state courts have adopted a similar interpretation,[18] a regulatory definition from HUD would ensure that this definition is used consistently across jurisdictions.

Furthermore, a definition that focuses on an actual, substantial, and imminent threat aligns with VAWA and the FHAA, with which PHAs and owners must currently comply. VAWA prohibits termination or eviction of a survivor unless the PHA can demonstrate that an *actual and imminent threat* to others would be present without termination or eviction.[19] "Actual and imminent threat" is defined as "a physical danger that is real, would occur within an immediate time frame, and could result in death or serious bodily harm."[20] Similarly, the FHAA requires landlords to provide necessary and reasonable accommodations to people with disabilities unless their tenancy would constitute a direct threat to the health and safety of other individuals.[21] Joint HUD-DOJ guidance stresses that landlords may not exclude individuals "based upon fear, speculation or stereotype about a particular disability or persons with disabilities in general." Rather, their "determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (e.g., current conduct, or a recent history of overt acts)."[22] Both VAWA and the FHAA can provide models for an objective definition of "threatens" that avoids stereotypes and speculation.

III. Distinguish "criminal activity" from "criminal history" and "criminal record"

To increase precision and reduce confusion, HUD should add a definition of *criminal activity*; eliminate the definition and use of *criminal history*; and adjust the definition and use of *criminal record*.

A. Define "criminal activity"

HUD should add a definition of "criminal activity" in the final rule. Even though the term "criminal activity" is used throughout the relevant statutes and regulations,[23] it is not defined. A definition, long overdue, would help focus PHAs and owners who might otherwise fixate on

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[17] Kolio v. Hawaii Pub. Hous. Auth., 135 Haw. 267, 274, 349 P.3d 374, 381 (2015).
[18] *See also* Guste Homes Resident Mgt. Corp. v. Thomas, 116 So.3d 987 (La.Ct.App. 2013) (no lease violation because theft conviction did not cause other residents to feel an actual threat for their individual health, safety, or peaceful enjoyment of the premises); Sumet I. Assoc., LP v. Irizarry, 959 N.Y.S.2d 254 (2013) (no lease violation because tenant's graffiti in a common area stairwell did not threaten any resident's peaceful enjoyment); Hous. Auth. of City of Bangor v. Bush, 2001 WL 1719230 (Me.Super. Feb. 2, 2001) (no lease violation because tenant's removal of stop sign could not be shown to threaten the health, safety, or peaceful enjoyment of the premises absent further information about whether the stop sign was located in a high traffic area).
[19] 34 USC 12491(b)(3)(C)(iii).
[20] 24 CFR 5.2003.
[21] 42 USC § 3604(f)(9).
[22] [Joint Statement of the Dep't of Housing & Urban Dev. and the Dep't of Justice Reasonable Accommodations Under the Fair Housing Act (2004).]
[23] *See, e.g.,* 42 U.S.C. § 13661(c); 24 CFR § 5.855(a).

whether a criminal record exists as opposed to whether they actually engaged in disqualifying criminal activity. A definition for "criminal activity" also brings clarity to the regulations, just as the proposed rule clarifies that the standard of proof is preponderance of the evidence.

HUD should define "criminal activity" as:

> Conduct that meets the elements of an offense under federal or state criminal law.

A focus on conduct is consistent with the NPRM, where the preamble explains that "[t]he conduct, not the arrest, is what is relevant for admissions and tenancy decisions."[24] Similarly, the proposed definition of "currently engaging in" states that "*conduct* that occurred 12 months or longer before the determination date does not support a determination that an individual is currently engaging … the *conduct* at issue."[25]

A focus on conduct is also consistent with the various HUD guidance and case law interpreting the term "criminal activity" used in statutes and regulations.[26] Furthermore, explicitly including federal and state criminal law distinguishes this conduct from other types of conduct that PHAs and owners should not screen for, such as juvenile adjudications in the juvenile justice system or local ordinance violations in municipal court.

It is preferable to define the statutory term "criminal activity" rather than introduce new terms like "criminal history" and "criminal record," neither of which are used in the authorizing statutes. It also helps to emphasize that the important dates to look back to are the dates on which the criminal activity occurred, not on the dates of charging, conviction, or sentencing, which can occur weeks, months, or over a year from the date of the underlying criminal activity. Because these terms bring unnecessary confusion to the proposed regulations, we recommend that HUD eliminate the definition and use of these terms in the final rule.

B. Eliminate "criminal history"

HUD should eliminate the definition and use of the term "criminal history" in the final rule. It is not found in the relevant statutes, and its inclusion alongside the statutory term "criminal activity" in the proposed rules creates confusion, especially if "criminal activity" remains

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[24] 89 Fed.Reg. at 25341; [add additional references of conduct]
[25] 89 Fed. Reg. 25361.
[26] *See, e.g.,* HUD, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions 5 (Apr. 4, 2016) (discussing how "[i]n most instances, a record of conviction (as opposed to an arrest) will serve as sufficient evidence to prove that an individual engaged in criminal *conduct*") (emphasis added) [hereinafter "2016 OGC Guidance"]; Memorandum from Demetria McCain, Principal Deputy Assistant Secretary for Fair Housing & Equal Opportunity, 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 10 (June 10, 2022) (describing relevant individualized evidence that revolves around the conduct at issue, such as "the facts and circumstances surrounding the criminal *conduct*" and "how long ago the *conduct* occurred") (emphasis added) [hereinafter "2022 FHEO Memorandum"]; *see also* Landers v. Chicago Housing Authority, 936 N.E.2d 735, 742 (Ill. App. Ct. 2010) (overturning denial on the basis of an arrest record because "there was no verifiable criminal conduct to support the rejection of petitioner's application") (emphasis added).

undefined. Eliminating “criminal history” will result in little to no substantive changes to the rule. For example, proposed 24 CFR § 5.851(a)(2) provides that:

> (2) Except in those circumstances where a statute requires you to deny admission based on *criminal history*, any reliance on criminal activity in admissions decisions is not permitted without an individualized assessment.

For this rule, HUD can omit “based on criminal history” in the final version without losing the central meaning of the provision. Similarly, proposed 24 CFR § 5.852(1) provides that:

> If the law and regulation permit you to deny admission but do not require denial of admission based on a criminal record, *criminal history*, a finding of criminal activity, illegal drug use, or alcohol abuse, you may take or not take the action in accordance with your standards for admission.

Here, the inclusion of “criminal record” and “criminal history” are superfluous because federal law allows discretionary denials on the basis of disqualifying “criminal activity,” not on the basis of a criminal record or criminal history.[27] To increase consistency and clarity, therefore, we recommend that HUD delete all references to adverse actions “based on a criminal record [or] criminal history.”[28]

C. Adjust the definition and limit use of “criminal record”

HUD should revise the definition of “criminal record” and minimize unnecessary use of the term in the final rule. We suggest the following changes to the definition:

> *Criminal record* means ~~a history o~~f any report containing information about an individual's past contacts with law enforcement agencies, criminal courts, or corrections related to an offense under federal or state criminal law ~~or the criminal justice system~~. ~~A criminal record may include details of warrants, arrests, convictions, sentences, dismissals or deferrals of prosecution, acquittals or mistrials pertaining to an individual, probation, parole, and supervised release terms and violations, sex offender registry status and fines and fees.~~

The model for this definition is essentially the criminal background check, which usually lists a person’s prior arrests, convictions, and sentences. The laundry list in the second sentence of this definition is far too inclusive and invites PHAs and owners to ask for and rely upon these different types of records in making their housing decisions. Subregulatory guidance is better suited for listing these various records provided that HUD concurrently explains to housing providers how specific types of records may or may not constitute sufficient evidence of disqualifying criminal activity.

In addition to amending the definition, **HUD should eliminate the phrase “any finding of unsuitability that is based on a criminal record”** wherever it appears in the proposed

[27] *See, e.g.,* 42 U.S.C. § 13661(c); 24 CFR § 5.855(a).
[28] *See, e.g.,* 89 Fed.Reg. at 25361.

regulations. Under the statutes, a housing provider's findings of unsuitability should be based on a finding of criminal activity. References to a "criminal record" should be reserved for the information that HUD-assisted housing providers obtain from law enforcement or other sources governed by Subpart J. To the extent that a housing provider uses a person's criminal record, the relevant question is whether this criminal record is sufficient evidence that the person has engaged in disqualifying criminal activity. For similar reasons, **HUD should strike "criminal record" wherever the following provisions appear in the regulations:**

> If the law and regulation permit you to [take an adverse action] but do not require [the adverse action] based on ~~a criminal record~~, ~~criminal history~~, a finding of criminal activity, illegal drug use, or alcohol abuse, you may take or not take the action in accordance with your standards for admission.[29]
>
> Before [taking an adverse action] on the basis of ~~a criminal record~~, criminal activity, illegal drug use, or alcohol abuse, you must conduct an individualized assessment that takes into account circumstances relevant to a particular admission decision.[30]

Finally, **HUD should delete the following provision where it appears in the proposed regulations:**

> A criminal record may be considered in the individualized assessment only if it is relevant to determining the risk that an applicant would threaten the health, safety, or right to peaceful enjoyment of residents or PHA employees.[31]

This provision is out of place given the sequence of events that the NPRM contemplates.

- First, a PHA or owner should consider whether the criminal record provides sufficient evidence of disqualifying criminal activity, including whether the criminal activity would threaten the health, safety, and peaceful enjoyment of others.
- Second, if there is sufficient evidence, then the PHA or owner should conduct an individualized assessment based on the disqualifying criminal activity, evidence of mitigating circumstances, and other relevant information.
- If, on the other hand, there is a lack of sufficient evidence, an individualized assessment is unnecessary.

Given this sequence, the criminal record does not have a place in the individualized assessment; its relevance is limited to the first inquiry of whether the person has engaged in disqualifying criminal activity. Because of both the limited value of the term "criminal record" in the overall proposed regulations and in the specific provision above, HUD should delete this provision wherever it appears in the proposed regulations.

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[29] *See, e.g.,* 89 Fed.Reg. at 25361.
[30] *See, e.g.,* 89 Fed.Reg. at 25361.
[31] *See, e.g.,* 89 Fed.Reg. at 25365.

EVIDENCE OF DISQUALIFYING CRIMINAL ACTIVITY

HUD should adopt more prescriptive limitations on the evidence sufficient to prove that criminal activity occurred.

I. Arrest records

We support the prohibition against relying on an arrest record alone as sufficient proof of criminal activity because of their limited evidentiary value and their high potential for bias and discrimination. **At the same time, we strongly oppose the NPRM allowing PHAs and owners to use an arrest record to trigger an inquiry into whether the underlying conduct occurred.** Allowing such use of an arrest record undermines HUD's prohibition against arrest record screening by opening a backdoor for records frequently found to be inaccurate, unreliable, and discriminatory.

Arrest records are highly prejudicial with limited to no probative value. PHAs and owners who see a person's arrest are highly unlikely to set aside that information. It is too difficult to unring the bell. Confirmation bias will likely lead them to accept evidence that conforms to their theory that the person engaged in the underlying conduct, even if the evidence is shaky and would not be considered reliable in the criminal legal system.

On a practical level, this exception will encourage PHAs and owners to collect information about arrest records under pretext. If confronted with fair housing concerns, PHAs and owners can defend their practice under the proposed rule by saying that they are using these records to investigate whether the underlying conduct occurred, even though they likely lack proper investigatory skills, tools, and training.[32]

HUD's policy of allowing arrests to trigger an investigation of allegations that did not rise to the level of conviction also invites and incentivizes collusion between public housing authorities and local law enforcement to the detriment of applicants and tenants.[33]

> Collaboration between noncriminal and criminal justice actors can lead to important changes in the behavior of both actors. It may modify the way that criminal justice actors conduct interrogations, and it may give criminal justice actors incentives to gather unlawful evidence. The threat of a serious noncriminal action—such as eviction or deportation—also gives prosecutors additional leverage in plea negotiations. Similarly, noncriminal justice actors may have incentives to conduct search and interrogation operations they would not otherwise engage in, with the knowledge that their actions could be of use in criminal proceedings—even if they will not be used in any other proceedings.[34]

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[32] *See* 89 Fed.Reg at 25342 (noting that "HUD recognizes that housing providers often lack resources to investigate and adjudicate whether criminal conduct occurred in the absence of a conviction").

[33] Leah Goodridge & Helen Strom, *Innocent Until Proven Guilty? Examining the Constitutionality of Public Housing Evictions Based on Criminal Activity*, 8 Duke Forum for L. & Social Change 1, 5-6 (2016) (describing how "[o]ne strike also led to unprecedented levels of coordination between local law enforcement and local housing authorities).

[34] Eisha Jain, *Arrests as Regulation*, 67 Stanford L. Rev. 810 (2015).

Another practical consideration of this nuanced use of arrest information is that applicants with arrest records will almost certainly require legal representation, a caseworker, or other advocate to help them navigate the application process and ensure that the PHA and owner are using their arrest record correctly and fairly. Yet, drawing on the experiences of our HJN members, it is unlikely that there are enough available legal aid attorneys to meet the need of applicants with arrest records. As a result, applicants are less likely to appreciate the nuance of this policy and instead self-select themselves out of the application process based on the belief that their arrest record will ultimately be a barrier to HUD-assisted housing.

HUD has suggested types of evidence that could provide an independent basis (other than the arrest) for a finding of criminal activity, such as police reports and witness statements. However, for reasons discussed in detail in the following section, the evidence that HUD suggests also raises reliability issues similar to arrest records, which undermines confidence about a housing provider's ability to re-investigate the conduct underlying the arrest.

While we strongly recommend that HUD completely eliminate the ability of PHAs and owners to re-investigate arrests that did not result in conviction, we request at minimum that HUD refine all provisions on arrest records used throughout the proposed rules to reflect the following:

> An arrest record alone ~~may not be the basis for a determination~~ is insufficient evidence that an individual has engaged in criminal activity ~~that warrants denial of admission~~. You may consider The ~~actions~~ underlying conduct that resulted in the arrest ~~could be relevant to determine the applicant's risk to engage in such conduct provided~~ only if there is sufficient evidence independent of the arrest that the ~~actions~~ underlying conduct occurred.

As noted in the NPRM, HUD has statutory authority under the Quality Housing and Work Responsibility Act of 1998 (''QHWRA'') to create regulations defining what ''evidence is sufficient' to show that a person has not engaged in disqualifying criminal activity.[35] The revisions above reflect this focus on whether an arrest record is sufficient evidence. It also removes the language around risk, which, for reasons explained elsewhere in this comment, housing providers are not equipped to assess.

In addition to these revisions, we urge HUD to issue detailed subregulatory guidance, preferably with illustrative hypothetical examples, to help PHAs, owners, applicants, and tenants understand the type of evidence that is needed to establish that a person has engaged in criminal activity.

II. Other types of evidence

To answer Question #7 for public comment, we strongly recommend further clarification of what evidence may be used to meet the standard for proving that criminal activity occurred for denials, terminations, and evictions in the final rule, rather than in subsequent guidance.

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[35] 89 Fed.Reg. at 25335 (citing 42 U.S.C. 13661(c)(2)).

In this subsection, we discuss different types of evidence that HUD should consider addressing. First, we start with evidence that HUD has suggested could provide proof of criminal activity independent of an arrest record – namely, police reports, witness statements, charges that did not result in a conviction, and other evidence of concern.[36] Next, we will discuss records that HUD included in the proposed rule for "criminal record." To end this subsection, we discuss records that HUD should affirmatively exclude as evidence of criminal activity.

A. Evidence referenced in HUD's 2105 FAQ about the use of arrest records

Police reports: HUD has suggested that "police reports that detail the circumstances of the arrest" may provide evidence of criminal activity independent of an arrest record.[37] Police reports, however, are not uniformly reliable. Similar to an arrest, a police report reflects an allegation, but not proof, of criminal activity. Furthermore, because of the inherently adversarial nature of the relationship between law enforcement and an individual being arrested for an alleged crime, police reports can be "one-sided and self-serving."[38] Police reports have long been considered inadmissible hearsay when offered to prove illegal conduct at a criminal trial.[39] In civil cases, they do not always prove that the underlying criminal activity occurred by the preponderance of the evidence, often because the level of detail in police reports vary. Some simply restate the date and offense for which a person is arrested, making them no more reliable than an arrest record. Others provide more information about the circumstances and individuals involved.

Witness statements: HUD has also suggested that "statements made by witnesses or by the applicant or tenant that are not part of the police report" may provide evidence of criminal activity independent of an arrest record.[40] Like arrest records and police, however, statements by witnesses who have not been cross-examined may be similarly unreliable as sufficient evidence of criminal activity. Police methods of obtaining the witness statement can also heavily influence its reliability.[41] Scientific research has demonstrated that the fallibility of memory and

[36] HUD Office of Public and Indian Housing, FAQs: Excluding the Use of Arrest Records in Housing Decisions 2 (2015) [hereinafter HUD FAQs on Arrest Records]
[37] *Id.*
[38] Erica D. Rosenbaum, *Relying on the Unreliable: Challenging USCIS's Use of Police Reports and Arrest Records in Affirmative Immigration Proceedings*, 96 N.Y.U. L. Rev. 256 (2021) (citing H.R. REP. NO. 93-1597 (1974) (Conf. Rep.), as reprinted in 1974 U.S.C.C.A.N. 7098, 7108–11 (Statement by the Hon. William L. Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, upon Presenting the Conference Report on H.R. 5463 to the House for Final Consideration) (discussing the unreliability of police reports in the context of formulating evidentiary rules).
[39] Nat'l Immigrant Justice Center, Prejudicial and Unreliable: The Role of Police Reports in U.S. Immigration Detention & Deportation Decisions 2 (July 2022) (noting that "[n]early every federal circuit court of appeals and Congress has recognized the inherently unreliable or prejudicial nature of police reports for revealing what actually occurred in any given incident").
[40] *See* HUD FAQs on Arrest Records *supra* note 36.
[41] *See. e.g.*, Katherine Sheridan, *Excluding Coerced Witness Testimony to Protect A Criminal Defendant's Right to Due Process of Law and Adequately Deter Police Misconduct*, 38 Fordham Urb. L.J. 1221 (2011).

stress can contribute to faulty witness statements.[42] Implicit bias, including the race of the accused and the race of the eyewitness, heavily influences the person making an assessment about the value of witness testimony.[43]

Dismissed charges: HUD has also suggested that PHAs and owners can consider "whether formal criminal charges were filed [and] whether any charges were ultimately withdrawn, abandoned, dismissed, or resulted in an acquittal."[44] However, charges that do not result in a conviction do not offer more proof of criminal activity than arrests. As one state supreme court has noted, criminal complaints and indictments only require a showing of probable cause that the defendant engaged in criminal activity and does not satisfy the preponderance of the evidence standard. The same court noted that additional evidence was necessary to meet the preponderance of the evidence standard to prove that a tenant breached her lease by engaging in drug-related criminal activity.[45]

In addition to dismissed charges, HUD should clarify that an owner or PHA may not deny or terminate assistance when a criminal charge is resolved through deferred adjudication, convictions that were vacated or reversed on appeal community supervision, or acquittals. These are all instances in which a determination has been made in the criminal legal system that either evidence is lacking of criminal activity or the facts of the criminal activity are such that the individual is not an ongoing threat to society. In these instances, individuals should not be excluded from federal housing programs or face termination of their federal housing assistance.

Regarding the three types of evidence listed above – police reports, witness statements, and dismissed charges – in the final rule, HUD should explain that such evidence, by themselves, may not provide sufficient evidence of underlying criminal activity. In subregulatory materials, HUD should explain in further detail, including through illustrative hypotheticals, the circumstances under which police reports, witness statements, and dismissed charges may be sufficient evidence. This explanation should be accessible to housing providers, tenants, and applicants to help ensure that all parties understand how to use this information rather than simply take them at face value.

B. Additional types of evidence

In the NPRM, the proposed definition of "criminal record" includes a laundry list of interactions with the criminal legal system, including "details of warrants, arrests, convictions, sentences,

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[42] *See, e.g.,* Hal Arkowitz & Scott O. Lilienfeld, *Why Science Tells Us Not to Rely on Eyewitness Accounts*, Scientific Am. (Jan. 2010).
[43] *See, e.g.*, Justin D. Levinson and Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307 (2010).
[44] *See* HUD FAQs on Arrest Records *supra* note 36.
[45] Nashua Hous. Auth. v. Wilson, 162 N.H. 358, 361, 33 A.3d 1163, 1165 (2011); see also Miles v. Hous. Auth. of Cook Cnty., 2015 IL App (1st) 141292, ¶¶ 49-50, 39 N.E.3d 156, 167 (in case where tenant was facing pending charges, court noted that "even if we assume that there was probable cause that [the tenant] committed the alleged 'violent criminal activity,' the existence of probable cause would not satisfy [the housing provider's] burden of proving that [the tenant] committed 'violent criminal activity' by a preponderance of the evidence").

dismissals or deferrals of prosecution; acquittals or mistrials pertaining to an individual; probation, parole, and supervised release terms and violations; sex offender registry status; and fines and fees." Earlier, we suggested that HUD should remove this list from the definition except for arrests and convictions because otherwise, PHAs and owners may feel like they need to inquire about all of these different records when conducting a criminal background check. The majority of housing providers lack the knowledge of the criminal legal system to understand what these records signify or, more importantly, whether or not they prove by the preponderance of the evidence standard that the underlying criminal activity took place. Whether a person owes fines and fees, for example, reveal more about a person's ability to pay rather than whether they engaged in criminal activity. **Should, however, HUD decide to maintain this list in the definition of "criminal record," HUD should explain in subsequent subregulatory guidance whether and when such records will be sufficient evidence of disqualifying criminal activity.** Here, we discuss some of these records in detail:

<u>Probation, parole & supervised release</u>: For probation, parole, and supervised release, two issues arise: (i) whether a person's sentence is sufficient evidence of criminal activity, and (ii) whether a person's violation of that sentence is sufficient evidence of criminal activity.

The sentence of probation, parole, or supervised release is an alternative to incarceration that allows a person to carry out their sentence while living in the community. Following an arrest, a prosecutor and an accused will negotiate a plea agreement in over 95% of guilty verdicts. This agreement must then satisfy the discretion of the judge, who will, like the prosecutor, weigh factors such as the seriousness of a crime, life circumstances of the accused, rehabilitative expectations, and impacts on public safety. Probation, parole, and supervised release, therefore, reflect a court's approval that this person is not an ongoing threat in the community. Some PHAs, however, conflate probation with criminal activity and deny admission on the basis of probation or start the lookback period only when the probation sentence ends.[46] PHAs should instead view the fact that a person has been sentenced to a probation as probative of their ability to serve their sentence in the community without posing an unreasonable risk to others.

As for violations of probation, parole and supervised release terms, these violations should not, by themselves, be treated as sufficient evidence of disqualifying criminal activity.[47] Often, people on supervised release receive "technical violations," which covers "noncompliant but non-criminal behaviors, like missing meetings with a parole officer."[48] Additional evidence is necessary to determine whether the violation was due to the commission of a criminal offense under state or federal law. HUD should provide guidance for PHAs and owners on their use of probation and probation violations accordingly.

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[46] Hous. Auth. of Prince George's County, Admissions & Continued Occupancy Policy 4 (2021) ("When probation/parole is involved, the three (3) year criminal record search period will begin after the required period of probation/parole has been satisfied. Probation before judgment (PBJ, Stets, Nolle Prosequi) will count as criminal activity whether applicant was charged or convicted.")

[47] Note, however, that 42 USC § 1437f(d)(1)(B)(v)(II) authorizes as an independent basis for termination "a violation of a condition of probation or parole imposed under Federal or State Law."

[48] Andrea Fenster, Prison Policy Initiative, Technical Difficulties: D.C. Data Shows How Minor Supervision Violations Contribute to Excessive Jailing (Oct. 28, 2020).

Plea deals: We echo HUD's caution in the NPRM preamble that "even a guilty plea does not conclusively establish the underlying crime" and encourage HUD to explain in subregulatory guidance how best to treat plea arrangements. A public defender may be working with a household, for example, and advocate for a plea arrangement that will not have unduly adverse consequences on the criminal side and may help ease overburdened caseloads. However, such a plea arrangement can result in unintended consequences on the housing side.

Inclusion in a "gang database": So-called "gang databases" have long been criticized as being unreliable evidence of whether a person is a member of a gang, let alone whether they have engaged in criminal activity. Police can often include young people in a database for arbitrary reasons that have nothing to do with criminal activity, such as what they wear, whether they are victims of assault, or simply whether they associate with another person suspected to be part of a gang.[49] In many places, there is little transparency into how or why a person is included on the database, and no way to challenge their inclusion once it takes place. Such evidence often does not rise to the level of a reasonable suspicion of criminal activity, let alone the preponderance of the evidence. HUD should advise PHAs and owners, therefore, against relying on a person's inclusion in a gang database to take adverse action on them on the basis of criminal activity.

Additional evidence of concern include:

- *False or coerced confessions:* Age, mental status, fear, exhaustion, law enforcement tactics, isolation, and confusion about the criminal legal system are some of the factors that could contribute to false confessions.[50]
- *Evidence produced by artificial intelligence*: Courts of law and legislatures struggle with the best methods to arrive at the truth of who committed criminal activity while navigating race and the rapidly advancing world of artificial intelligence, for which constraints have barely yet been defined.

C. Records that should not be used as evidence of criminal activity

HUD should prohibit PHAs and owners from using the following records as evidence of disqualifying criminal activity:

Expunged and sealed records: HUD should clarify that PHAs and owners cannot inquire about or rely upon expunged or sealed records. Expungement and record sealing are legal methods of removing criminal records from public view and reflect state policy that these records are no longer relevant to public safety concerns. Nearly all states outline a procedure to prohibit non-law enforcement entities from seeing an individual's irrelevant criminal records.[51] Expungement and record sealing regimes grew out of an acknowledgment of the limited value

[49] *See, e.g., Unmasking the Boston Police Department's Gang Database: How an Arbitrary System Criminalizes Innocent Conduct*, 137 Harv. L. Rev. 1381 (Mar. 2024); Targeted, Labeled, Criminalized: Early Findings on the District of Columbia's Gang Database (Jan. 2024); City of Chicago Office of Inspector General, Review of the Chicago Police Department's "Gang Database" (Apr. 2019).
[50] The National Registry of Exonerations, False Confessions (lasted visited June 5, 2024).
[51] Restoration of Rights Project, 50-State Comparison: Expungement, Sealing & Other Record Relief (last updated Mar. 2024).

of the punishing consequences of criminal records over time, particularly when an individual has no subsequent convictions, as well as the need for privacy.[52] Furthermore, recent empirical research has found that people with expunged records pose a lower safety risk not only compared to other people with justice involvement, but also compared to people with no justice involvement whatsoever.[53]

Up to forty percent of people with criminal records who are eligible for their records to be cleared have not completed the process.[54] Factors like expungement filing fees, procedural hurdles, and difficulty navigating the process without an attorney contribute to this unequal access to justice.[55] For many who pose no threat to society, the inability to pay off court fines and fees may be the sole barrier to clearing their record.[56] While automatic record clearing is on the rise, states where this process is effectively implemented is patchwork at best.[57]

Expunged or sealed records have no place in a PHA or owner's assessment of whether a person engaged in criminal activity. Legally, expungement and record sealing laws generally permit an individual to state that they do not have a criminal record on an application form. Sometimes, tenant screening companies collect and distribute this information, but this practice does not negate the confidential nature of these records. A PHA or owner who obtains and then utilizes that record in an admissions process is breaching the trust of the applicant and raising concerns over procedural fairness.

<u>Juvenile records</u>: HUD should also clarify that PHAS and owners should not rely on a person's involvement in the juvenile justice system as evidence of disqualifying criminal activity. The juvenile justice system is separate and distinct from the criminal legal system; therefore, housing providers should not equate involvement in the juvenile justice system with engagement in criminal activity.[58] The distinct nature of the juvenile justice system is supported by the fact that many states treat juvenile records differently than criminal records by making them confidential and, in some places, restricting the ability of public housing authorities to obtain such

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[52] Brian M. Murray, *Retributive Expungement*, 169 U. Penn. L. Rev. 665 (2021); *see also* Jeffrey Selbin et. al., Unmarked? *Criminal Record Clearing and Employment Outcomes* 108 J. Crim. L. & Criminology 1 (2018).

[53]J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 Harv. L. Rev. 2460, 2466 (2020) ("We find very low rates of recidivism: just 7.1% of all expungement recipients are rearrested within five years of receiving their expungement (and only 2.6% are rearrested for violent offenses), while reconviction rates are even lower: 4.2% for any crime and only 0.6% for a violent crime. Indeed, expungement recipients' recidivism rates compare favorably with those of the Michigan population as a whole.").

[54] Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 Mich. L. Rev. 519 (2020). One study demonstrated that only 7% of eligible people obtained expungement. *See* Prescott *supra* note 53.

[55] Nat'l Inst. of J., Expungement: Criminal Records as Reentry Barriers (Oct. 26, 2022).

[56] Gus Tupper et al., Ctr. for Am. Progress, Fines and Fees are a Barrier to Criminal Record-Clearing (Nov. 30, 2021).

[57] Nat'l Conference of State Legislatures, Automatic Clearing of Records (last updated July 19, 2021).

[58] Pacific Juvenile Defender Center, Collateral Consequences of Juvenile Delinquency Proceedings in California 12 (2011).

information.[59] Indeed, 42 USC § 1437d(q)(1)(A) requires law enforcement agencies to provide information to PHAs regarding the criminal convictions of *adult* applicants without mention of juvenile household members. Yet, in some jurisdictions, PHAs have been granted access to juvenile records to deny admission, terminate assistance or evict, thus undermining established public policy regarding the confidentiality of such records. In other jurisdictions, PHAs are evicting families on the basis of juvenile records, even though they do not provide sufficient evidence of disqualifying criminal activity. Given their distinction from criminal records, HUD should ensure that juvenile records do not factor in a housing provider's decision to take adverse action against a household.

DISCRETIONARY ADMISSION DENIALS

I. Admission denials based on failure to disclose record

We support the proposed limitation on when PHAs and owners may deny admission based on an applicant's failure to disclose their criminal record. To avoid loopholes, HUD should eliminate the two exceptions as well.

HUD should eliminate the first exception for PHAs and owners who only rely on self-disclosure. Given the wide availability of criminal background checks, it is rare for a HUD-assisted housing provider to screen solely on the basis of self-disclosed records. Further, self-disclosure is an unreliable means of collecting criminal history information not because people lie, but rather because people often misinterpret or misremember the details of their interactions with the criminal legal system. For example, a legal aid attorney reported that a client had been given a citation for simple marijuana possession. She paid the ticket, which amounted to a guilty plea and conviction, but she didn't realize that. Years later, she was denied admission to a project-based Section 8 property for lying on her application because she denied having been convicted of a crime. The criminal legal system is a vast bureaucracy comprised of different government agencies (police, courts, corrections) in overlapping levels of government (city, county, state, federal), which means that applicants will sometimes report their record incorrectly through no fault of their own. An exception for self-disclosure will incentivize PHAs and owners to adopt such a policy despite its shortcomings.

HUD should also eliminate the second exception allowing PHAs and owners to bar admission for failure to disclose a criminal record that would have been material to the decision. If a person's criminal record provides sufficient evidence of disqualifying criminal activity, then the PHA or owner has grounds to deny admission based on the criminal activity. HUD should not provide a way for the PHA or owner to bypass the individualized assessment requirement when denying applicants, which would happen if HUD fails to eliminate this second exception. Indeed, HUD Office of Fair Housing and Equal Opportunity advises both subsidized and private housing providers to adopt the following best practice: "Housing providers who use

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[59] *See* Cal. Pen. Code, § 11105.03 (b)(3) ("Local law enforcement agencies shall not release any information concerning any offense committed by a person who was under 18 years of age at the time he or she committed the offense.")

automated screenings should consider not asking applicants *any* questions about their history (i.e., not even within the scope of their policies) because such questions can confuse or discourage applicants while not giving the housing provider any information beyond that which they will learn from the automated screening."[60]

If HUD chooses not to eliminate these exceptions, HUD should require that those PHAs and owners who ask about criminal history to include a warning on the application in bold all-capital print that they will conduct an independent criminal background check that will reveal criminal history and that failure to provide the requested criminal history will be viewed negatively. They should be required to inform the applicant that if unsure of criminal history, they should just leave the space blank because a search of criminal records will be conducted.

II. Reasonable time & lookback period

We support the proposed rule providing that a lookback period longer than 3 years is presumptively unreasonable. HUD has refrained from designating a period of time as "reasonable" under the statute, with recent guidance ranging from twelve months to two-to-three years.[61] This restraint has led to great variation in the length of lookback periods by PHAs and subsidized owners across the country. Therefore, the prescription of a maximum lookback period of three years helps to create more consistency and in turn more access for applicants with records.

Three years is a sensible lookback period. Congress considered three years to be a reasonable time period for barring applicants who had previously been evicted for drug-related criminal activity on federally assisted property,[62] which has a much stronger nexus to being a good applicant for HUD-assisted housing than generalized concerns about criminal activity. Adopting a similar lookback period also creates a level of consistency for housing providers and tenants applying to HUD housing to manage expectations.

A number of PHAs and housing providers have either adopted lookback periods that comport with HUD's proposed regulations or operate in jurisdictions that have restricted lookbacks for them. Over the last few years, the Allegheny County Housing Authority in Pennsylvania, Burlington Housing Authority in North Carolina, Tacoma Housing Authority in Washington, and Oklahoma City Housing Authority (OCHA) all reduced their look-back periods to three years or

[60] U.S. Dep't of Housing & Urban Development, Office of Fair Housing and Equal Opportunity, Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing 12-13 (Apr. 29, 2024) [hereinafter 2024 HUD Tenant Screening Guidance].

[61] *See* HUD Notice PIH 2015-19, Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decision 6 (Nov. 2, 2015); HUD, Office of Fair Housing and Equal Opportunity (FHEO) Guidance on Compliance with Title VI of the Civil Rights Act in Marketing and Application Processing at Subsidized Multifamily Properties 7 (Apr. 21, 2022).

[62] 42 U.S.C. § 13661(a).

less.[63] The OCHA notes that their lookback period counts from "the date of conviction to the date that the application is reviewed. Although applicants may be ineligible at the time they submit their applications, the conviction may be outside of the three-year look-back period when the application reaches the top of the waiting list."[64] Other housing authorities have also adopted a three year lookback period.[65]

Other jurisdictions have also adopted fair chance housing laws with lookback periods of three years or less. In 2019, Cook County, Illinois passed the Just Housing Amendment, which limits lookback periods to 3 years from the date of conviction.[66] In 2021, the state of Illinois passed the Public Housing Access Bill, which limited lookback periods to only 6 months back from application.[67] In 2016, Richmond, California passed a Fair Chance Ordinance that restricts lookback periods to two years from sentencing.[68]

We recommend that HUD not establish different lookback periods for different types of criminal activity. Some housing providers adopt a grid system that imposes different lookback periods for different types of criminal activity. Some jurisdictions have also adopted a grid system as part of their fair chance housing laws, but this tends to reflect political negotiations rather than evidence-based practices. Although such a system may arguably work within a given jurisdiction, it would be difficult for HUD to create a user-friendly grid system that accounts for the variations in classifications of offenses in federal law and the laws of the fifty states. Furthermore, such a system in HUD-assisted housing would add a complexity to the admissions process that would hike the administrative costs of housing providers and make the process less accessible and predictable for tenants attempting to gauge their eligibility for housing.

HUD should clarify the event that triggers the lookback period. The proposed rule refers to "prohibiting admission for a period of time longer than three years following any particular *criminal activity*." This suggests that the event that triggers the lookback period is the conduct that the applicant engaged in. In other words, the proposed rule can be read to mean that a PHA or owner's practice of considering criminal activity that took place more than three years ago is presumptively unreasonable. This straightforward interpretation, however, is undermined by the phrase that follows: "including prior terminations from HUD-assisted housing for drug-related criminal activity." Terminations are not a category of criminal activity, but rather a possible consequence of that criminal activity. To make sure that PHAs and owners administer their lookback periods consistently, HUD should clarify the triggering event in the final rule. Otherwise, ambiguity over when a lookback period starts will almost certainly work to the disadvantage of justice-involved individuals looking for housing.

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[63] U.S. Dep't of Justice, Bureau of Justice Assistance, Opening Doors, Returning Home: How Public Housing Authorities Across the Country Are Expanding Access for People with Conviction Histories 4 (Feb. 2022).

[64] *Id.* at 4.

[65] Examples include Charleston-Kanawha Housing Authority, West Virginia; Cheyenne Housing Authority; Housing Authority of Cook County, Illinois; Montgomery Housing Authority; and Olmsted County Housing and Redevelopment Authority, Minnesota.

[66] Cook County, Ill., Code of Ordinances ch. 42, art. II, §42-38 (2019).

[67] *Id.* at 5; 310 ILCS 10/25(e-5)(1)(F).

[68] Richmond, Cal., Richmond Municipal Code art. VII, ch. 7.110 (2016).

Finally, while we support the requirement that housing providers present empirical evidence before they can establish a longer lookback period, more detail is needed. The proposed rule does not specify the process for PHAs and owners to present this evidence, nor does it describe the process for HUD to approve the longer lookback period. Additional guidance from HUD is necessary for PHAs, owners, applicants, and tenants about the approval process. Without a clear approval process, PHAs and owners will be under the mistaken impression that they can adopt a longer lookback period on an applicant-by-applicant basis as long as they have empirical evidence that they can point to. HUD, on the other hand, seems to contemplate a more rigorous approval system for adopting and justifying a longer lookback period. For multifamily housing, one possible solution is to incorporate the process for a longer lookback period into the proposed notice-and-comment process for proposed changes to tenant selection plans. This would require HUD-assisted owners to notify tenants and the local HUD office of the longer lookback period as well as any supporting empirical evidence. HUD could require PHAs to incorporate a similar process during the annual plan process. Whatever process is used, it is critical to have a mechanism in place for PHAs and owners to secure HUD's affirmative approval for the longer lookback period before denying applicants under it.

III. Individualized assessment & mitigating circumstances

We support requiring PHAs and owners to conduct an individualized assessment and consider mitigating circumstances before denial of admission, rather than leaving this process to their discretion. This requirement will ensure that applicants are afforded an accessible and meaningful opportunity for an individualized assessment. Under the current system, some PHAs and owners require applicants to submit additional mitigating evidence and materials before they can request what is essentially an individualized assessment. This sequence of events often disadvantages applicants who do not have ready access to such materials and may deter or intimidate tenants who lack the ability to prepare such review petitions on their own. A "deny first, appeal later" model is a common barrier that keeps people from accessing the housing they need. In mandating an individualized assessment before denial of admission, HUD is helping to catch applicants who might otherwise fall through the cracks.

A. Revise definition of individualized assessment:

HUD proposed the following definition of "individualized assessment."

> *Individualized Assessment,* where required by these regulations, is a process by which an applicant is evaluated for admission to a federally assisted housing program. The point of an individualized assessment is to determine the risk that an applicant will engage in conduct that would adversely affect the health, safety, and peaceful enjoyment of the premises by other residents, the owner, or property employees. An individualized assessment requires consideration of multiple points of information that may include general tenancy history, criminal record, criminal activity, including drug-related criminal activity, alcohol abuse, or other specified activity together with consideration of relevant mitigating factors, including but not limited to those set forth at § 5.852(a)(1) and (2).

This proposed definition falls short for several reasons. First, the description of “a process by which an applicant is evaluated for admission to a federally-assisted housing program” is far too general to be useful to housing providers or applicants. Second, the focus on risk requires housing providers to predict future behavior, which they are ill-equipped to do. Although risk assessments are common in the criminal legal system, they “are not designed to measure housing success” and therefore will likely lead to unintended consequences. [69]

Third, the proposed definition is too specific to the use of criminal history. Besides references to “criminal record” and “criminal activity,” the definition’s inquiry into whether “conduct would adversely affect the health, safety, and peaceful enjoyment” of others is derived from 42 U.S.C. § 13661. In recent fair housing guidance,[70] HUD has emphasized how individualized assessments can help housing providers evaluate applicants beyond negative information on their records, including eviction history and credit history, both of which raise significant fair housing concerns. People with criminal histories often face barriers due to eviction records and credit histories as well, due in part to the employment and other economic barriers that they face after leaving the criminal legal system. A general definition also aligns with the analysis of adverse factors required of HUD-assisted housing providers under the VAWA Final Rule, which discusses economic abuse in addition to criminal history. A narrow focus on criminal history may ultimately make the definition underinclusive and not allow for full relief for justice-involved individuals. We recommend, therefore, generalizing this definition so that it can also apply to other screening criteria.

Even if HUD ultimately adopts a more general definition, HUD should make clear that, in the criminal history context, the key issue for decision in an individualized assessment should always be whether reliable evidence shows that the applicant does not, at the time of admission, conform their conduct to relevant laws having a nexus with housing and the health and safety of other residents and neighbors. Too often PHAs and subsidized owners fixate on irrelevant details of crimes or treat review of a denied application as an evaluation of arbitrary questions, such as whether the applicant “deserves” the housing opportunity. This is not a helpful approach to an individualized assessment. Rather, examination of past criminal conduct should focus on relevant aspects—such as the reasons an applicant engaged in the past criminal activity (which tend to show what changed circumstances might reflect a cessation of that activity) or how the criminal activity related to housing.

Focusing the individualized assessment on the key question of whether the application remains engaged in criminal activity posing threats to the health and safety of other residents also rationalizes and makes more consistent the consideration of mitigating circumstances or rehabilitation. PHAs or subsidized owners conducting individualized reviews can make the best use of mitigating circumstances such as this by viewing it through the lens of whether the

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[69] Rebecca J. Walter et al., *One Strike to Second Chances: Using Criminal Backgrounds in Admissions Decisions for Assisted Housing*, Housing Policy Debate (2017).

[70] See 2024 HUD Tenant Screening Guidance *supra* note 60, at 14 (advising housing providers that applicants should “get the chance to show – even if a negative record is accurate – that they will comply with their tenancy obligations regardless” as well as the chance to “demonstrate that any negative behavior is unlikely to recur by providing evidence of mitigating circumstances”)

applicant remains engaged in criminal activity (dangerous to the project environment) at the time of admission.

To ensure that housing providers focus on these issues, HUD should adopt the following definition of individualized assessment instead:

> *Individualized Assessment*: a process by which the housing provider evaluates the relevance of negative information in light of all evidence of mitigating circumstances provided by the applicant. The purpose of the individualized assessment is to determine, under the totality of the circumstances, whether the applicant will likely comply with their tenancy obligations and whether the applicant remains engaged in the conduct underlying the negative information. The purpose of the individualized assessment is not to determine whether the conduct underlying the negative information occurred.

By incorporating "relevance," this new definition fits better into the current regulatory framework.[71] HUD regulations currently require PHAs to provide applicants with "an opportunity to dispute the accuracy and relevance of [criminal record] information."[72] Once the applicant disputes the relevance of the negative information, the next logical step is for the housing provider to consider the continuing relevance of that information in light of the mitigating circumstances offered by the applicant – essentially, to conduct an individualized assessment. To explicitly tie the individualized assessment with the applicant's opportunity to dispute, HUD should amend the proposed definition of individualized assessment to incorporate the concept of "relevance."

B. Mitigating circumstances

We support HUD improving and building upon the provisions governing mitigating circumstances in the admissions context and offer revisions to strengthen the proposed text.

1. Nature and circumstances of the conduct in question

Proposed § 5.852(a)(1)(i) discusses:

> The nature and circumstances of the conduct in question, including the seriousness of the offense, the extent to which it bears on suitability for tenancy, and the length of time that has passed since the conduct.

For this first factor, we support expanding the focus beyond "the seriousness of the offending action." The inclusion of "the extent to which it bears on suitability for tenancy" can help housing providers shift their focus from the specifics of the criminal activity to the nexus (or lack thereof) between the conduct at issue and the person's ability to meet their responsibilities as a tenant.

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[71] Similarly, Cook County's Just Housing Amendment defines "individualized assessment" as "a process by which a [housing provider] considers all factors relevant to an individual's conviction history and whether that history negatively impacts the individual's ability to fulfill the responsibilities of tenancy." Cook County, Ill., Code of Ordinances §42-38(a) (2019).

[72] *See, e.g.*, 24 CFR § 5.903(f).

As part of this factor, HUD should add whether the conduct in question is part of a pattern of criminal activity. This addition may help PHAs and owners differentiate between isolated incidents and a continuing pattern.

2. Mitigating actions by the applicant or household members

Proposed § 5.852(a)(1)(ii) discusses:

> The extent to which the applicant or relevant household member has taken actions to mitigate the risk that admission of the individual would adversely affect the health, safety, and peaceful enjoyment of the premises by other residents, the owner, or property employees (e.g., evidence of post- conviction rehabilitation, treatment/ recovery, employment, housing history);

For this factor, although we support its overall goal, HUD should consider some language changes consistent with other changes in the proposed rule.

First, HUD should remove the reference to “risk.” Risk assessments are more appropriate in the criminal legal system, and incorporating such language into the HUD-assisted housing setting can create confusion about the ability of housing providers to carry out such an assessment.

Second, HUD should replace “adversely affect” with “would threaten.” The phrase “would threaten” is used throughout the proposed rule, and a different phrase here may have the unintended consequence of imposing a different standard.

3. Medical condition of a household member

Proposed § 5.852(a)(1)(iii) discusses:

> Whether the applicant would like the owner to consider mitigating circumstances related to a medical condition of a household member (which then must be considered);

In this factor, it is unclear whether HUD intends the term “medical condition” to mean a person’s disability status or simply a medical condition that does not rise to the level of disability under federal law. Clarification would help both housing providers and applicants understand how to interpret this phrase. In addition, at the end, HUD should include specific mention of: *disability of one or more household members, presence of children or grandchildren in the household, and presence of persons over 62 years of age*.

In addition, HUD should consider replacing “would like” with the phrase “makes a request for” to clarify the applicant has an obligation to make a request for consideration.” The phrase “would like” is not commonly used in regulatory text.

HUD should also consider deleting “(which then must be considered)” as this language seems redundant with the overall requirement that PHAs and owners must consider all mitigating circumstances.

Finally, it appears that there is a relationship between § 5.852(a)(1)(iii), § 5.852(a)(1)(iv), and § 5.852(a)(1)(v), but the imprecise language of each makes it difficult to discern how these different factors are intended to fit together. HUD should provide further explanation either in the final rule or in subsequent guidance.

4. Substance abuse treatment and rehabilitation

Proposed § 5.852(a)(1)(iv) discusses:

> Whether the relevant circumstances provide reason to believe such conduct will recur and rise to the level that it may interfere with the health, safety, or right to peaceful enjoyment of the premises by others. In making this determination, you must consider relevant evidence, which may include evidence provided by the household that a household member has successfully completed substance use treatment services or has been otherwise rehabilitated successfully along with evidence that the illegal use of a controlled substance or abuse of alcohol (as applicable) has not recurred. For this purpose, you may require the applicant to submit evidence of the household member's current participation in, or successful completion of, substance use treatment services or that the household member is otherwise in recovery from drug use or alcohol abuse; and

In this factor, the first sentence § 5.852(a)(1)(iv) is very similar to the language of § 5.852(a)(1)(ii): "The extent to which the applicant or relevant household member has taken actions to mitigate the risk that admission of the individual would adversely affect the health, safety, and peaceful enjoyment." Both also refer to treatment, recovery, and rehabilitation. The differences are subtle, so HUD should explain how these circumstances differ to help housing providers and applicants better understand its intent.

In addition, HUD should replace the subjective language of "provide reason to believe" with objective language, such as "suggests." This shift will help housing providers move toward a more objective analysis of the circumstances rather than rely on subjective belief.

HUD should also replace the term "may interfere" with "would threaten" to be consistent with similar changes made throughout the proposed regulation and to the proposed definition of "threatens the health, safety, or right to peaceful enjoyment."

In general, we support replacing "successfully completed an approved supervised drug-rehabilitation program" with "participating in or has successfully completed substance abuse treatment services." However, we have concerns about encouraging housing providers to seek evidence that "abuse of alcohol . . . has not recurred." For people recovering from alcohol addiction or dependency, relapse is often a part of the process, and this language risks creating unreasonable and unrealistic expectations for applicants in recovery. Moreover, a relapse would not be relevant to the inquiry where it does not rise to the level of interfering with health, safety or right to peaceful enjoyment.

5. Reasonable accommodations

Proposed § 5.852(a)(1)(iv) discusses:

> Whether further considerations must be made in order to comply with the obligation to consider and provide reasonable accommodations to persons with disabilities. A reasonable accommodation may include, for example, disregarding the conduct or record if it was disability-related.

Here, HUD should replace the existing language with the following straightforward language:

> Whether the applicant or household member is entitled to a reasonable accommodation (e.g., disregarding conduct that was disability-related).

In addition, HUD should clarify in subregulatory guidance that the duty to consider mitigating circumstances under the proposed rule is distinct from reasonable accommodations.

6. Further revisions

Finally, we make two additional comments about HUD's proposed revisions to mitigating circumstances in admissions.

HUD should consider re-adding the following factor: "The effect of denial of admission on household members not involved in the conduct." 24 CFR § 5.852(a)(4) currently includes identical language for both denial of admission and termination of assistance, but the proposed rule carries over this language only for termination of assistance. Adding this language will correct this oversight.

We support HUD's decision to remove factors that reflected outdated attitudes toward low-income people and failed to assist housing providers to evaluate the likelihood that a person with criminal history would be a successful tenant. Factors like "the demand for assisted housing by families who will adhere to lease responsibilities" and "the extent to which [a person] has taken personal responsibility" for example, play into the trope of "deserving versus non-deserving poor." The former is especially unhelpful as a factor because the severe shortage of affordable housing means that there will almost always be a demand for assisted housing. Similarly, "the effect of the responsible entity's action on the integrity of the program" had no relevance to the applicant family and their ability to meet the responsibilities of tenancy and therefore did not belong in the list of mitigating circumstances.

7. Additional mitigating circumstances: gender-based violence and VAWA rights

HUD should amend the list to ensure that PHAs and owners consider the mitigating circumstances when a person's criminal activity is related to their status as survivors of gender-based violence, domestic violence, sexual assault, and stalking, as required by VAWA. Additionally, HUD should include in the NPRM a definition of gender-based violence to

help PHAs and landlords understand its distinctive and harmful nature as well as the disproportionate risk for this type of violence on women, girls, and gender non-conforming individuals. Regarding a definition, HUD can look to the U.S. Department of State for guidance, which included the following definition of gender-based violence as follows:

> "Gender-Based Violence is any harmful threat or act directed at an individual or group based on actual or perceived sex, gender, gender identity or expression, sex characteristics, sexual orientation, and/or lack of adherence to varying socially constructed norms around masculinity and femininity."[73]

Concerning VAWA, its purpose, as applied to covered housing programs, is to reduce domestic violence, stalking, sexual assault, dating violence, and to prevent homelessness among those affected by these criminal acts.[74] To that end, VAWA provides that, in general,

> An applicant for or tenant of housing assisted under a covered housing program may not be denied admission to, denied assistance under, terminated from participation in, or evicted from the housing on the basis that the applicant or tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking, if the applicant or tenant otherwise qualifies for admission, assistance, participation, or occupancy.[75]

Moreover, in the recent reauthorization of VAWA, in addition to expanding its reach to more housing programs through its catch-all provision, VAWA protects the right to report emergencies in one's home free of retaliation and threats of eviction, regardless of whether the housing is assisted under a covered housing program.[76]

Previously, HUD set forth guidance regarding how certain situations that potentially impact tenancy are adverse factors related to domestic violence.[77] Specifically, regarding situations involving domestic violence and tenancy, HUD provides as follows: "On the surface, adverse factors may appear unrelated to domestic violence, dating violence, sexual assault, or stalking and may present legitimate reasons for denial, termination, or eviction. However, the presence of an adverse factor may be due to an underlying experience of domestic violence, dating violence, sexual assault, or stalking. An adverse factor may be present during much of an abusive relationship, or it may present itself only when a victim is attempting to leave, or has left, the abusive relationship."[78]

In the context of criminal activity, depending on the circumstances, a criminal record may be a direct result of domestic violence, dating violence, sexual assault, or stalking. PIH 2017-08

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[73] U.S. Department of State, *United States Strategy to Prevent and Respond to Gender-Based Violence Globally 2022*, available at United States Strategy to Prevent and Respond to Gender-Based Violence Globally 2022 - United States Department of State, last visited on May 9, 2024.
[74] See 42 U.S.C. § 12471.
[75] 34 U.S.C. §12491(b)(1).
[76] 34 U.S.C. §§ 12494, 12495.
[77] *See* HUD Notice PIH 2017-08, Violence Against Women Reauthorization Act of 2013 Guidance (May 19, 2017) 7-8.
[78] *Ibid*.

provides several examples of criminal history, which can result from being a survivor of domestic violence, dating violence, sexual assault, or stalking.[79] This notice further provides that upon being provided with information that an adverse factor is a result of domestic violence, dating violence, sexual assault, or stalking, the PHA or landlord should consider the individual's statement to determine if the adverse factor was the direct result of domestic violence, dating violence, sexual assault, or stalking.[80] Survivors of gender-based violence are often blamed for the actions of those harming them and may suffer negative housing consequences as a result. For example, some perpetrators force survivors to engage in certain illegal activities, such as sex work or theft to benefit the perpetrator, which may result in the survivor having a criminal record. Further, some survivors may engage in coping mechanisms, such as illegal drug or alcohol use, to survive the daily abuse they're experiencing. As such, the final rule should reflect VAWA and gender-based violence as mitigating circumstances and require PHAs and landlords to individually assess a survivor's circumstances to determine whether the criminal history stemmed from conduct that resulted from the survivor experiencing domestic violence, dating violence, sexual assault or stalking. To aid PHAs and landlords in making this assessment, HUD should provide the examples regarding criminal records contained in PIH Notice 2017-08, to be consistent with its past VAWA guidance.[81] While we strongly encourage consideration of additional mitigating circumstances, it is essential for HUD to clarify that these cannot be used to expand the information that PHAs can consider when a survivor makes a VAWA request. For example, PHAs cannot use mitigating circumstances, if presented by a person accused of harming a survivor, as a basis to tell the survivor that their proof of victimization is not valid.

Regarding the crime of human trafficking, following the recent reauthorization of VAWA in 2022, HUD commissioned a study on the housing needs of survivors of human trafficking. In that study, HUD observed that, "[t]rafficking survivors often have criminal records due to the nature of their exploitation, which frequently involves forced or coerced criminal activity."[82] Further, the study gathered data highlighting that over 90% of human trafficking survivors surveyed had been arrested, and over half of those believed that their arrests or convictions were directly related to their experiences as trafficking survivors. Critically, the study explained that "[m]ost of these individuals reported that their criminal record has been a barrier to housing" and recommended efforts to further educate housing providers and reduce the effect of a survivor's criminal history on their eligibility for housing.[83] These realities support requiring housing providers, including PHAs and landlords to take into account the effects and impact of this form

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[79] *Ibid*.
[80] *Id*. at § 7.3.
[81] Id. at §7.2. Examples include forcing a victim to write bad checks, misuse credit, or file fraudulent tax returns; property damage; theft; disorderly conduct; threats; trespassing; noise complaints; family disturbance/trouble; 911 abuse; public drunkenness; drug activity (drug use and the selling of drugs); crimes related to sex work; failure to protect a child from a batterer's violence and/or abuse; crimes committed by a victim to defend him or herself or in defense of a third party from domestic violence, dating violence, sexual assault, or stalking; and human trafficking.
[82] HUD Office of Policy Development & Research, Housing Needs of Survivors of Human Trafficking Study 36 (2024).
[83] *Id*.

of violence as mitigating circumstances for reasons behind criminal conduct engaged in by a prospective applicant or tenant.[84]

8. Considerations where there is a concurrent pending case

If a person has been arrested and the housing provider denies admission on the basis of the underlying conduct after an investigation based on the arrest (as contemplated by the arrest record provisions), the person risks making statements during the individualized assessment that could be used against them in the parallel criminal case. Some legal aid attorneys in the HJN network have cautioned their clients not to inadvertently make admissions. However, more is needed from HUD, such as guidance to PHAs and owners to educate them about these risks to applicants, reasons why applicants may invoke their 5th Amendment rights until the criminal case commences, and reasons why this invocation should not be held against the applicant.

IV. Procedural protections

We support the proposed procedural protections of a minimum time period to dispute the accuracy or relevance of the record before denial. Designating a minimum period of time is appropriate because while some applicants may already have evidence and the ability to present their objections on their own, others may need time to gather documents or an advocate to assist them.

HUD should provide further guidance on when it is appropriate for PHAs and owners to extend the opportunity to dispute beyond the minimum 15 days provided in the proposed regulations. To address inaccurate records, for example, an applicant may need to pursue credit disputes, which can take up to 35 days).[85] Certainly where a disputed record requires an applicant to take more elaborate steps, more time should be given. Some applicants will need assistance with these steps, so the additional time enables them to apply for and receive help from legal aid, or possibly from other service providers like social workers or clergy. PHAs and owners should readily grant additional time when requested by applicants. A request for delay by the applicant suggests a strong need since a delay is against the applicant's self-interest to receive housing expeditiously. Such delays, on the other hand, pose little if any harm to PHAs and owners. Given this imbalance of harm, HUD should encourage PHAs and owners to provide more time to applicants when needed.

A. Information about tenant screening process for applicants

In addition, HUD should ensure that applicants have the information they need to determine the likelihood that they will satisfy the PHA or owner's tenant screening criteria. In line with HUD FHEO's tenant screening guidance, this information should include: (i) information about sources of criminal record information, including their rights under the Fair

[84] We also support the recommendations set forth in the comment submitted by the Safe Housing Task Force around issues specific to survivors of gender-based violence.
[85] See 15 U.S.C. § 1681i.

Credit Report Act,[86] (ii) a written copy of the tenant screening criteria in sufficient detail that an applicant can ascertain whether they are likely to qualify, including the records to be considered, the types of criminal activity that will be disqualifying, and how far back the PHA or owner will look,[87] and (iii) information about how evidence of mitigating circumstances can be submitted and will be treated, how to request a reasonable accommodation for a disability, and how to contest an inaccurate, incomplete, or irrelevant record."[88]

B. Reconciling various procedures related to disqualifying criminal history

In general, HUD should provide more clarity around the sequence of events when a justice-involved individual applies for housing. The proposed rule describes two pre-denial processes that are related, but are never directly connected to one another: (1) the opportunity to dispute the accuracy or relevance of the record, and (2) the individualized assessment. If the PHA or owner's staff member who is processing and determining whether to accept the applicant comes across criminal history information that appears potentially disqualifying, the PHA or owner must provide the applicant an opportunity to dispute the accuracy of the record or its relevance to the PHA's or owner's admission policy. If the applicant's challenge is successful, the record is removed from consideration altogether.

However, if the applicant chooses not to dispute the accuracy or relevance of a criminal record, or attempts unsuccessfully to do so, the PHA or owner must still conduct an individualized assessment of whether evidence of any mitigating factors and changed circumstances rebut the presumption of unsuitability that the criminal record presents. Naturally, the applicant must be given the chance to present evidence of this kind as well. The PHA or owner must then conduct the individualized review and make a decision whether or not to admit the applicant despite the criminal record.

If the applicant is denied, current HUD regulations also entitle the applicant to a post-denial informal hearing, the purpose of which is "to permit the applicant to hear the details of the reason for denial, present evidence to the contrary if available, and claim mitigating circumstances when possible."[89] Critically, "[t]he person who made the original decision to deny, or a subordinate of that person, may not conduct the hearing."[90] The informal hearing provides an opportunity for the applicant to challenge a failure by the PHA or owner staff to exclude an inaccurate or irrelevant criminal record, a failure to properly consider mitigating factors or changed circumstances, or other improper denial.

HUD should spell out the sequences of each process to ensure that PHAs and owners implement them correctly and that applicants, especially those who are navigating the application process themselves, do not get lost in a maze of procedures.

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[86] See 2024 HUD Tenant Screening Guidance *supra* note 60, at 13.
[87] *Id.*
[88] *Id.*
[89] 24 CFR § 966.51(a)(1). The informal hearing is separate from the grievance hearing available to public housing residents. HUD, Public Housing Occupancy Guidebook, Eligibility Determination and Denial of Assistance 23 (2022) [hereinafter HUD PHOG Eligibility Determination]
[90] *Id.*

HUD should clarify the relationship between the opportunity to dispute the relevance of the record in 24 CFR 5.903(f) and the individualized assessment. Under existing regulations, if the PHA or owner proposes to deny an applicant on the basis of criminal activity, the applicant is entitled to a copy of the criminal record and an opportunity to dispute the accuracy and relevance of that record. These rights do not apply for denials other than for criminal activity.[91] The proposed rule adds that the time period for this opportunity to dispute is a minimum of 15 days.

In contrast, the proposed rule is silent on procedural requirements for the individualized assessment, other than that it must take place "before denying admission on the basis of a criminal record, criminal activity, illegal drug use, or alcohol abuse."[92]

The proposed rule treats them as different processes, but the questions at the heart of these processes overlap. In contesting the relevance of a criminal record, the applicant is likely to argue whether the record is sufficient evidence of disqualifying criminal activity and whether mitigating circumstances exist to render that criminal record irrelevant. Similarly, the individualized assessment requires consideration of mitigating circumstances. Furthermore, both the opportunity to dispute and the individualized assessment must take place *before* denial. This overlap suggests that the two processes are interrelated, but the proposed rule never spells this out, nor does it provide a full timeline of the application process contemplated by HUD. To streamline the process and reduce confusion for applicants and housing providers alike, HUD should explain when the opportunity to dispute and the individualized assessment take place during the application process and consider streamlining that process in a way that benefits both applicants and housing providers.

At the very least, to ensure that applicants receive a meaningful chance to present their mitigating circumstances and receive full consideration by the PHA or owner, HUD should require PHAs and owners to provide the following procedural safeguards to applicants when conducting the individualized assessment:

- Reasons for the proposed denial***:*** The PHA or owner should provide the applicant with a pre-denial notice that includes the reasons for the proposed denial in as much detail as possible, including the specific standard(s) that the applicant does not meet and how.[93] If an applicant fails multiple screening criteria, the housing provider should disclose all such criteria.[94] Furthermore, if an applicant has multiple criminal records, the PHA or owner must specify the precise criminal records that contribute to the proposed denial and which records did not. Applicants need this information in a pre-denial notice to prepare and collect relevant evidence of mitigating circumstances for the individualized assessment. Without this information, applicants may fail to understand the basis of the proposed denial or formulate an effective response to it, wasting their time as well as the PHA or owner's time.

[91] *Id.* at 22.
[92] 89 Fed.Reg. at 25361.
[93] *Id.* ("Denial letters should contain as much detail as possible as to all reasons for the denial, including the specific standard(s) that the applicant did not meet and how they fell short.")
[94] *Id.*

- <u>Copy of the criminal record</u>***:*** Although applicants are already entitled to a pre-denial copy of the criminal record,[95] HUD should also make explicit that PHAs and owners must provide a copy of the criminal record before they conduct the individualized assessment. For third-party screening reports, the PHA or owner should disclose the specific ways that the criminal record was sorted, aged, or categorized under any admission policies or procedures. For law enforcement records, the PHA or owner should disclose information even if it is not public-facing, such as information from gang databases. In providing a copy of the criminal record, the PHA or owner should also include an accessible explanation about how it will conduct the individualized assessment; instructions on how to submit evidence of mitigating circumstances, including the time frame for submission; and instructions on how to make a request for reasonable accommodation for a disability if needed.[96] The PHA or owner should also include a detailed description of how they will conduct individualized assessments in the relevant ACOP, administrative plan, or tenant selection plan.

- One best practice is for a three-member panel to conduct the individualized assessment. The panel should include a resident with lived experience with the criminal legal system, and at least one member with legal training. The Housing Authority of New Orleans offers an effective example of how such a panel operates.[97] If review panels are not practical, decision templates that specify the steps to be taken in issuing a decision may also be helpful.

- Finally, if the PHA or owner ultimately decides to deny after conducting the individualized assessment, the applicant should receive a written decision that states the evidence relied upon and delineates the evidence found credible from that found not credible. Pertinent regulations already obligate PHAs and subsidized owners to inform denied applicants of the reason(s) for denial.[98] The PHA must also notify the family that it may request an informal hearing in accordance with 24 C.F.R. § 882.514(f).[99]

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[95] 24 C.F.R. § 960.204(c); see also 2024 HUD Tenant Screening Guidance *supra* note 60, at 13 ("All records relied upon should be attached, including any screening reports").
[96] *Id.* at 13-14.
[97] Hous. Auth. of New Orleans, Bd. of Commissioners, Resolution No. 2013-06 (Mar. 26, 2013) (adopting and describing criminal background check policy).
[98] *See, e.g.,* 24 C.F.R. § 960.208(a) ("PHA must promptly notify any applicant determined to be ineligible for admission to a project of the basis for such determination"); § 880.603(b)(2) ("the owner will promptly notify the applicant in writing of the determination and its reasons").
[99] According to HUD: "The purpose of the hearing is to permit the applicant to hear the details of the reason for denial, present evidence to the contrary if available, and claim mitigating circumstances when possible. The person who made the original decision to deny, or a subordinate of that person may not conduct the hearing. A written record of the hearing decision should be mailed to the applicant and placed in the applicant's file. If the hearing decision overturns the denial, processing for admission should resume." *See* HUD PHOG Eligibility Determination *supra* note 89, at 22.

TERMINATIONS & EVICTIONS

I. Notice of rights regarding mitigating circumstances

While we applaud HUD's proposal to require PHAs and owners to consider mitigating circumstances before termination and eviction, **HUD should elaborate on how it will enforce these protections, including whether and how HUD will engage in compliance monitoring of PHAs and owners.** In subregulatory guidance, for example, HUD could explain that a tenant could defend a termination during a grievance hearing by saying they did not have the opportunity to submit mitigating circumstances. According to members of our Housing Justice Network, PHAs and owners vary significantly in terms of whether and when they consider a person's mitigating circumstances before terminating assistance or evicting, even when, for example, a reasonable accommodation may be required by law. This inconsistency weakens the ability of residents to understand and enforce their rights. This stands in contrast to the admissions context, where the formal requirement of an individualized assessment helps to ensure that PHAs and owners actually consider a person's mitigating circumstances.

To help ensure that residents understand and can enforce their rights, HUD should require PHAs and owners to provide a written notice of their right to present mitigating circumstances. This notice should include instructions on how to submit evidence of those circumstances and a description of the PHA or owner's duty to consider those circumstances in deciding whether to terminate assistance or evict. HUD should require PHAs and owners to provide this notice at the same time that they provide the resident with a copy of their criminal record, which under the proposed rule is at least 15 days before the eviction or lease termination action.[100] Residents should receive this notice before they receive a termination notice or an eviction notice so that they can have enough time to gather the evidence needed to persuade the PHA or owner to take action other than termination or eviction. The latest that the PHA or owner should provide this notice is at the same time as the termination notice or eviction notice, though this timing would not be as conducive to fully effectuating the resident's right to full consideration of their mitigating circumstances.[101]

In addition, HUD should engage in affirmative compliance monitoring to ensure that PHAs and owners are providing residents with the proper notices and fulfilling their duties to consider mitigating circumstances. Such compliance monitoring is sorely needed in places like Chicago, where the consideration of mitigating circumstances is almost non-existent. In Chicago, CHA receives a copy of an arrest report whenever the arrest includes a reference to a PHA address. The property management company forwards the arrest report to an attorney, who then uses the arrest report to write a notice of termination. A legal aid attorney reported two cases in the last few years where a grandson not living at the property was arrested miles away and had his grandmother's PHA address on his ID. The CHA made no allegations that the grandson was an unauthorized occupant; instead, the CHA just processed the case for "criminal activity" eviction based on the description of the incident in the police report. To ensure that harmful practices like this do not continue, HUD needs to engage in affirmative compliance of PHAs and owners.

[100] 89 Fed.Reg. at 25363 (proposing changes to 24 CFR 5.903(f)).
[101] *See* 34 U.S.C. 12491(d).

II. 15-day period for opportunity to dispute

While we are generally in favor of the proposed rule's requirement that tenants have at least 15 days before eviction or lease termination to dispute the accuracy or relevance of the criminal record, HUD should consider specifying that this 15-day period should take place *prior to* the PHA or owner initiating the termination or eviction process**.** Given the overwhelming evidence that criminal records and tenant screening reports contain many errors,[102] a pre-eviction/pre-termination time period will give families the chance to correct a false or misleading report, to prepare mitigating circumstances to present to the PHA, and to obtain an advocate to assist them. Otherwise, as the regulation currently reads, the PHA may send the family a notice of proposed termination and include a copy of the criminal record at the same time or simply reference the record in the termination notice, leaving tenants with little to no time to prepare. Fortunately, the proposed changes to 24 CFR 5.903(f) include a 15-day period before termination, though 24 C.F.R. § 982.553(d)(2) lacks a similar amendment. For consistency, HUD should also amend 24 C.F.R. § 982.553(d)(2) by adding the underlined text:

> *Use of a criminal record for termination of assistance*. If a PHA proposes to terminate assistance for criminal activity as shown by a criminal record, the PHA must notify the household of the proposed action to be based on the information and must provide the subject of the record and the tenant (except where otherwise prohibited by law) with a copy of the criminal record <u>no less than 15 days prior to notification of the termination of assistance. During the 15-day period,</u> the PHA must give the family an opportunity to dispute the accuracy and relevance of that record in accordance with § 982.555.

Moreover, HUD should provide further guidance on when it is appropriate for PHAs and owners to extend the opportunity to dispute beyond the minimum 15 days provided in the proposed regulations. To address inaccurate records, for example, an applicant may need to pursue credit disputes, which can take up to 35 days.

III. Copy of criminal records anytime they are pulled

In addition, HUD should require that PHAs and owners provide tenants with a copy of their criminal background check *anytime* it is pulled, rather than simply when it is the basis of a proposed denial, termination, or eviction action. This requirement would help uncover project-based Section owners who use nonpayment as a pretext for evicting for criminal activity. Some project-based Section 8 owners increase fair market rent when the tenant is unable to rebut a conviction or arrest that appears on the background check at the annual recertification review, leading to their eviction for nonpayment.

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[102] Ariel Nelson, National Consumer Law Center, Broken Record Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing (2019).

HUD permits federally assisted landlords covered by Handbook 4350.3 to terminate the subsidy of tenants in certain limited circumstances.[103] Paragraph 8-5 lists the limited circumstances when the owner must terminate assistance. Although section 8-5 seems clear, some owners have used it to terminate the subsidy and increase the rent to the fair market rent when the tenant is unable to rebut a criminal conviction or arrest that appears on the background check at the annual recertification review. Because the tenant is unable to pay the fair market rent, the tenant is evicted for nonpayment.

The trial courts do not look behind the allegations in the pleadings that the tenant has failed to pay the rent, and tenants are thus evicted for nonpayment of a rent amount far beyond their financial ability to pay. But the conviction on their record may be something that occurred away from the property or that does not fit within one of the categories of disqualifying criminal activity (e.g., shoplifting). Had the landlord pleaded the true reason for the eviction, the tenant would have kept their home.

In one case from a member of NHLP's Housing Justice Network, a project-based section 8 landlord increased the tenant's rent to the fair market rent after she failed to pass the annual tenant screening criteria. She had been arrested and charged with possession of an illegal drug over nine miles from the apartment complex. The legal aid attorney fought the eviction for nonpayment of the fair market rent in court and eventually the landlord's law firm non-suited the eviction shortly before trial in the county court at law. Similarly, in Jessie v. Jerusalem Apartments,[104] the landlord claimed Ms. Jessie had violated the terms of her lease and demanded that she vacate the premises. When she refused to vacate, the landlord increased the rent to the fair market rent and sought to evict for nonpayment of the rent. The appellate court saw through this ruse and reversed the county court judgment in favor of the landlord.

In addition to the regulatory change, HUD should revise Handbook 4350.3 to specifically state that owners may not terminate a tenant's subsidy or increase the fair market rent for any actions related to alleged criminal activity. Rather, the owner must use the court eviction process if the owner chooses to evict for conduct. Additionally, HUD should revise the HUD Model lease to specifically state that owners may not evict by increasing rent to fair market rent for alleged criminal conduct but must base the eviction on the alleged conduct.

IV. Revisions to proposed mitigating circumstances

We support the addition of a list of mitigating circumstances in terminations and evictions separate from the list for admissions. We offer additional revisions to strengthen the proposed text regarding "the circumstances relevant to a particular termination or eviction".

A. Nature and circumstances of the conduct in question

Proposed § 5.852(a)(2)(i) discusses:

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[103] *See* HUD Handbook 4350.3 chapter 8 (Termination), pp. 8-3 – 8-4 at para. 8-5 ("When Assistance Must Be Terminated").

[104] No. 12-06-00113-CV, 2006 WL 3020368 (Tex. App. – Tyler Oct. 25, 2006, no pet.) (mem. op.).

> The nature and circumstances of the conduct in question, including the seriousness of the offense and the extent to which it bears on suitability for continued tenancy.

For this factor, as in the admissions context, we support expanding its focus beyond "the seriousness of the offending action." By referring to "the extent to which [the conduct] bears on suitability for continued tenancy," the proposed rule can help housing providers shift their focus from the specifics of the criminal activity to the nexus, or lack thereof, between the conduct at issue and the person's ability to meet their responsibilities for continued tenancy.

To this factor, HUD should add the omitted phrase "the length of time that has passed since the conduct" because the amount of time that has lapsed is equally relevant in terminations and evictions as it is in admissions. Sometimes, PHAs and owners will conduct a criminal background check that reveals criminal activity that took place pre-admission. If the household has not engaged in criminal activity since that time, the PHA or owner should consider the time lapsed without criminal activity.

HUD should also add the extent to which the conduct in question is an isolated incident or part of a pattern of criminal activity to help PHAs and owners differentiate between isolated incidents and a continuing pattern.

V. Additional mitigating circumstances

HUD should consider adding the following to its list of mitigating circumstances in terminations and evictions.

A. Gender-based violence & VAWA

For reasons similar to those provided in the discussion related to gender-based violence and mitigating circumstances in admissions earlier in this comment, **HUD should add the list of mitigating circumstances whether a person's criminal activity is related to their status as survivors of gender-based violence, including domestic violence, dating violence, sexual assault, and stalking, as required by VAWA.** In addition, HUD should advise PHAs and owners of the VAWA rights afforded to survivors who reside in covered housing, such as protection from being evicted solely on the basis of criminal activity directly relating to the VAWA violence/abuse,[105] and how these VAWA rights intersect with the proposed rule. Further, the NPRM should make clear that covered housing providers under VAWA are required to provide the applicant/tenant with the two HUD approved documents: (1) Notice of Occupancy Rights under VAWA, and (2) VAWA self-certification forms.[106] Courts have invalidated evictions of survivors where covered housing providers have failed to provide these documents before commencing eviction.[107]

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[105] *See* 24 CFR 5.2005(b)(1).
[106] *See* 34 U.S.C. § 12491; 24 C.F.R. § 5.2005(a).
[107] *See, e.g., DHI Cherry Glen Assocs. v. Gutierrez*, 46 Cal.App.5th Supp. 1, 9-11 (Cal. Super. 2019)

B. Available alternatives to termination and eviction

HUD should amend the list to ensure that PHAs and owners consider whether there is an alternative available to PHAs and owners that would allow the tenant to maintain their assistance and housing. This is consistent with HUD's position that evictions should be the last resort, especially given the severe shortage of affordable housing for the extremely low-income households that HUD-assisted housing is designed to help alleviate. Such a factor is also consistent with fair housing laws, which requires housing providers to consider whether its substantial, legitimate, nondiscriminatory interest could be served by another practice that has a less discriminatory effect.[108] In Austin, Texas, for example, tenants facing an eviction on the basis of criminal activity may have the option of maintaining their assistance if they agree to be placed on lease probation. Lease probation agreements can be an effective tool that allows the tenant and family members to retain their housing. Another example would be allowing the household to maintain their subsidy and avoid eviction where the person who engaged in the activity has left the building.

C. Additional mitigating factors

HUD should also spell out for owners and PHAs that they must consider the effects of termination and eviction on children and grandchildren in the household, persons with disabilities in the household, and persons over 62 years of age in the household.

VI. Staying termination and eviction proceedings while the criminal case is pending

We support the addition to 24 CFR § 982.552 giving the PHA discretion to stay the termination hearing while the criminal court case for the underlying activity is pending. Tenants who are facing subsidy terminations and evictions on the basis of criminal activity face unique challenges while a parallel criminal case is pending. When faced with these parallel proceedings, the tenant must decide whether to claim the Fifth Amendment privilege against self-incrimination or to testify at the trial in the eviction action. If the tenant chooses to invoke the privilege, she runs the risk that this will be used as a basis for an adverse inference against her in the civil case. If she chooses to testify, she runs the risk that the prosecutor will use her responses against her in the pending criminal case.

In amending 24 CFR § 982.552, HUD recognizes that proceeding promptly while the criminal matter is pending creates a great risk of compromising important rights. While a PHA or owner may proceed if there are exigent circumstances (such as active ongoing harm), in most instances it should be presumed that there is no harm in waiting and that a stay is appropriate in most circumstances. By encouraging PHAs to stay termination proceedings pending a parallel criminal trial, HUD would help ensure that termination is taking place only where the evidence supports a finding of criminal activity by the preponderance of the evidence and not merely a police officer's summation of various reports, which often can include unsubstantiated or uncorroborated information.

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[108] See 2016 OGC Guidance *supra* note 26, at 7.

In the evictions context, although HUD does not have jurisdiction over whether housing courts grant continuances or stays pending the resolution of a criminal case, **HUD should issue guidance to PHAs and owners to encourage them to exercise their discretion in a way that pauses the eviction proceeding pending the final disposition of the criminal case and in a manner that is consistent with their duty to affirmatively further fair housing.** Such guidance may affect how courts choose to approach this since they will see that HUD is open to this approach and is not pushing for a rush to judgment.

VII. Terminations due to a family break-up related to gender-based violence

Sometimes, a family in federally assisted housing will break up because of gender-based violence. The termination process raises complicated issues that require a thoughtful balance between the survivor's rights under VAWA and the rights of the person accused of doing harm under the proposed rule. VAWA has specific requirements around proof, confidentiality, evictions, and admissions, and PHAs and owners must comply with these requirements when there is an allegation of gender-based violence. Similarly, the proposed rule discusses types of evidence of criminal activity, the relevant standard of proof, and mitigating circumstances that PHAs and owners must consider before taking an adverse action like termination based on the criminal activity. PHAs and owners must balance these requirements while at the same time carrying out the termination process in a way that considers and protects the survivor's ongoing safety.

To this end, HUD should convene listening sessions to hear from gender-based violence experts and others to understand how family break-ups happen on the ground and what reforms are needed to protect the due process rights of both the survivor and the harm-doer. The findings from these sessions should inform robust guidance from HUD to PHAs and owners on a balanced approach to subsidy terminations due to a GBV-related family break-up that works for both parties involved. Because a balanced approach may mean that both parties should receive a subsidy, the HUD guidance should also re-affirm that PHAs and owners have the discretion to issue two subsidies, particularly where there is evidence in mitigation, such as rehabilitation, disability, children, or other factors.[109]

VIII. Additional regulatory changes to reduce "one strike" evictions and terminations

A. Define "on or near the premises"

The existing regulations require PHAs and owners to adopt lease terms that authorize them to terminate tenancy on the basis of drug-related criminal activity that occur "on or near the premises." Yet, some PHAs will justify terminations on the basis of criminal activity that took place miles away and too far to credibly threaten the health, safety, and right to peaceful enjoyment of the premises. To prevent PHAs and owners from eviction or terminating tenancy on the basis of such criminal activity, HUD should define the term "on or near the premises" as "immediate vicinity" or "on or directly adjacent to the premises."

[109] PIH Notice 2017-08 currently suggests that option to PHAs, as does the CoC guidance on VAWA and family break-up.

B. Additional due process protections

Tenants, attorneys, and other advocates regularly complain of inadequate due process for Section 8 Voucher program terminations. Specific complaints include hearing officers who are not impartial, weak evidentiary requirements to prove criminal activity including the reliance on hearsay alone (including police records) to prove criminal activity, and the failure of the PHA to provide essential documents before the hearing. For example, police incident reports in which the police officer records what he was told by the parties are alleged witnesses are hearsay and should be excluded because there is too much risk of an erroneous termination or eviction. Due process issues are especially pronounced in criminal activity cases because of the stigma associated with committing a crime. Tenants are necessarily denied a fair hearing without standardized rules.

To ensure a voucher family's right to due process and a fair hearing, HUD should amend 24 C.F.R. § 982.555 governs hearings to include the following language:

- "The hearing should be conducted by any person or persons not employed or affiliated with the PHA, and under no circumstances by a person who made or approved the decision under review or a subordinate of this person. The PHA and family must select a hearing officer or hearing panel. If the PHA and family cannot agree on a hearing officer, then they must each appoint a member to a hearing panel and the members selected must appoint a third member.[110]"
- "The PHA must make available by the family for cross examination any person on whose information the PHA relies. Termination of assistance may not be based on hearsay."

C. Criminal activity exclusion of public housing residents' right to a grievance procedure

HUD should eliminate or limit the criminal activity exclusion of public housing residents' right to a grievance procedure. A PHA is not required to provide a grievance procedure prior to termination in limited circumstances related to criminal activity.[111] The PHA may argue it has an interest in an expedited process to evict a tenant, particularly if the PHA believed they present a threat to health and safety. However, the grievance process potentially enables a PHA to resolve a matter more expediently and at less expense, and also best allows a PHA to fulfill HUD's directive to consider all circumstances and to determine whether all other options have been exhausted before proceeding with an eviction.

No statute, regulation, or case law requires a PHA to exclude evictions involving these criminal activities from the grievance process. HUD could therefore amend its regulations to eliminate this exception. This is especially important because the right to a grievance hearing is a right retained by tenants in RAD buildings.

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[110] This is taken from the Rural Housing Service regulation 7 C.F.R. § 3560.160.
[111] *See* 24 CFR Sec. 966.51(a)(2).

HUD should consider eliminating the exception by removing 24 CFR § 955.51(2)(i). Short of that, PHAs should only be able to exclude cases based on felonious, serious, or violent criminal activity, or terminations brought after a criminal conviction. Other distinctions could also be made on the basis of where the activity takes place (e.g., on or off the premises), or whether the person accused of perpetrating the criminal activity was an adult tenant or a child, guest, or visitor of the resident. Another option for PHAs is to use an expedited grievance procedure for evictions based on alleged criminal activity, rather than eliminate the grievance altogether. HUD should also make clear that if the person asserts that they are covered by VAWA, then then the exclusion does not apply.

D. Drug-related activity involving drugs decriminalized under state law

Many states and localities have decriminalized drug-related activities that are criminal under Federal law, including marijuana. The definitions in 24 C.F.R. § 5.100 provide*, "*Drug means a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)" and "Drug-related criminal activity means the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug." HUD regulations related to drug-related criminal activity have simply not kept up to reflect the legalization and decriminalization efforts in states throughout the country.

HUD should define "illegal" as being illegal under both Federal and state or local law so that if one is more lenient than the other, the most lenient would apply. In the alternative, HUD should at least provide that a PHA may not terminate the voucher subsidy of a person who has been approved for use of marijuana for medicinal purposes. The need for this rule is illustrated by *Forest City Residential Management, Inc. v. Beasley*, No. 13-14547, 2014 WL 6861439 (E.D. Mich. Dec. 3, 2014) (holding that tenant was not entitled to reasonable accommodation under the Fair Housing Act or Rehabilitation Act of 1973 to use medical marijuana in rental unit).

ADDITIONAL TOPICS

I. Exclusion of landlords in the Housing Choice Voucher program

We strongly urge HUD to extend the proposed rule to HCV landlords so that voucher holders may benefit from increased access for justice-involved individuals. HUD should apply the same protections against a voucher landlord's overbroad and unreasonable use of criminal history, including the duty to consider mitigating circumstances and to conduct an individualized assessment, among other protections.

We understand that HUD wants to avoid placing additional requirements on voucher landlords for fear of creating disincentives. However, voucher landlords must already operate according to HUD requirements, such as passing a housing quality inspection before a participating family moves into the unit. In addition, many voucher landlords are large companies that own huge swaths of multifamily housing and would not be overburdened by the protections that the proposed rule will put into place for justice-involved individuals.

HUD should consider how the positive fair housing impacts of expanding housing opportunities for justice-involved individuals outweigh the potential burden on HCV landlords, especially given HUD's duty to affirmatively further fair housing. Like any other landlord, voucher landlords are subject to HUD's fair housing guidance on the use of criminal history, and the proposed regulations would help landlords avoid fair housing and civil rights violations. Last, HUD could provide technical assistance to voucher landlords directly to help them comply with the rule, which would mitigate the amount of resources required to implement the rule.

This differential treatment of HCV landlords also raises a concern about the lack of consistency of criminal records policies within the HUD-assisted programs. From the perspective of the voucher holder, it does not make sense to go through an individualized assessment that includes consideration of all mitigating circumstances by the PHA, only to be rejected on the basis of the exact same criminal history by a voucher landlord. Yet, the proposed rule maintains this two-tiered system that tenants will have difficulty navigating and that undermines the balanced approach to housing access for people with criminal histories that the proposed rule strives for.

This dynamic is also present in the inconsistent application of PHA policy by third-party property management companies. For example, the Housing Authority of New Orleans (HANO) has long been a model of a reasonable criminal records screening policy that prioritizes housing families rather than screening them out. The third-party property management companies that manage HANO housing, however, often do not adopt HANO's policies, undercutting hard-fought wins and creating confusion about what policies apply where. A tenant's rights should not fluctuate so dramatically depending on which entity manages the property, especially within the same city and the same program. To achieve consistency in tenants' rights, HUD should take steps to ensure that third-party management companies adopt the same policies as the PHAs whose properties are being managed. Consistency across HUD housing programs puts applicants and tenants in a better position to know and enforce their rights.

The final rule should clarify that the revised regulations apply to project-based voucher owners. HUD's concerns about retaining HCV landlords does not apply in the PBV setting. Because the subsidy is tied to the unit, the need to attract an owner to accept the voucher does not exist. The preamble to HUD's proposed rule states incorrectly that the proposed rule does not apply to PBV owners, even though the regulatory text confirms otherwise. The preamble to HUD's proposed rule should be amended so there is no confusion on this point.

II. Portability & rescreening generally[112]

We support the proposed rule's prohibition against the receiving PHA rescreening voucher holders. To prevent PHAs from interpreting this prohibition as applying only to *income* screening or only to participants (as opposed to applicants and participants), **HUD should take one step further and expressly state that *the receiving PHA cannot rescreen for any criteria, including criminal history, eviction history, and credit for both participants or incoming families issued a voucher.***

Rescreening HCV families who port their vouchers is contrary to the aims of the HCV program. Participants have a statutory right to utilize their voucher anywhere in the United States with a participant PHA.[113] Further, incoming families that have been issued a voucher have already been screened and deemed eligible, rendering any additional screening by the receiving PHA redundant. Rescreening threatens the security of a family's voucher both upon porting and indefinitely throughout tenancy in the receiving PHA. Voucher families often understand this threat and may avoid porting for fear of losing their voucher, despite the upsides of moving. The chilling effect of rescreening on the right to move to areas of higher opportunity harms families and undermines the proposed rule's goal of increasing housing opportunities for justice-involved individuals and their families.

The imposition of new or additional screening requirements can have a discriminatory impact on families seeking to move to less segregated communities. Overall, 61% of voucher households are Black or Latino, and the percentage is significantly higher in cities than in suburban or rural areas.[114] Thus, a barrier to porting from a city to a suburban or exurban PHA will have a predictable discriminatory impact and is inconsistent with HUD's AFFH obligations. In addition to being a civil rights issue, mobility also means that families experience greater health, educational, and economic outcomes in areas of greater opportunity, as demonstrated by a conclusive body of research.[115]

Rescreening voucher holders based on their criminal records above the statutory minimum will have predictable discriminatory impact based on race and is not necessary to protect the health

[112] See HUD Question 8.
[113] 42 USC § 1437f (r)(1)(A).
[114] Nat'l Low Income Hous. Coal., *Who Lives in Federally Assisted Housing?*, Hous. Spotlight (Nov. 2012).
[115] *See* Chetty, Raj et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, Opportunity Insights (May 2015); Sard, Barbara and Douglas Rice, *Realizing the Housing Choice Voucher Program's Potential to Enable Families to Move to Better Neighborhoods*, Center on Budget and Policy Priorities (Jan 2016).

or safety.[116] As HUD has acknowledged, higher incarceration rates of Black Americans are attributed to biases in the criminal legal system, rather than disparities in propensity to commit crimes.[117] In some cases, it may even be used to impede the flow of porting participants into an area of high opportunity.

For example, the Housing Authority of Baltimore City screens only for the federally mandated eligibility requirements and allows individual landlords to screen with their own suitability of tenancy criteria.[118] If a voucher family from Baltimore City wishes to move to nearby Baltimore County, Maryland, that housing authority will rescreen the family as though they are a new applicant coming off the waiting list, instead of a participant in good standing.[119] This additional portability barrier is especially concerning given that the population of Baltimore City is 62% Black, compared to just 31% of the population of the surrounding Baltimore County.[120]

As such, we fully support the proposed rule's prohibition against the receiving PHA rescreening voucher holders because it is in line with the aims of the voucher program.

We strongly urge HUD to consider the issue of rescreening comprehensively and for all HUD-assisted tenants. In addition to the context of porting vouchers, HUD should prohibit rescreening upon other moves with continued assistance, such as unit transfers. HUD-assisted tenants may require a unit transfer for a variety of reasons, such as unit conditions, safety concerns, changes in family size or to accommodate tenants with disabilities. Additionally, in some situations, PHAs and owners may require families to transfer to another unit. Where the circumstances necessitate a unit transfer, the household should not be subject to rescreening. Given the lack of unified guidance on rescreening of existing HUD tenants, HUD should explicitly prohibit rescreening, particularly when the lack of available units requires a family to transfer to another PHA or owner.

III. Exclusion of culpable members

To prevent unreasonably long and sometimes indefinite exclusions,[121] we support the proposal to limit the duration of the exclusion to the time a person would be denied admission for similar

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[116] *See* 2022 FHEO Memorandum *supra* note 26, at 1-2; 2016 OGC Guidance *supra* note 26; *see also* Daniel K. Malone, *Assessing Criminal History As A Predictor Of Future Housing Success For Homeless Adults With Behavioral Health Disorders*, 60 Psychiatric Services 224–30 (2009) (concluding that criminal history is not a good predictor of housing success).

[117] *See* 2022 FHEO Memorandum *supra* note 26 (citing Emma Pierson, et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Human Behaviour, 736-745 (July 2020) (showing that black drivers are less likely to be pulled over at night when)); *see also* Susan Nembhard and Lily Robin, Racial and Ethnic Disparities throughout the Criminal Legal System: A Result of Racist Policies and Discretionary Practices, Urban Institute (August 2021).

[118] The FY 2018 Housing Choice Voucher Administrative Plan, Housing Authority of Baltimore City.

[119] Baltimore County Housing Choice Voucher Program Participant Guide 2018.

[120] U.S. Census Bureau, QuickFacts: Baltimore City, Maryland (July 1, 2022); U.S. Census Bureau, QuickFacts: Baltimore County, Maryland (July 1, 2022).

[121] *See, e.g.*, Note, Maia M. Long, *Permanently Excluded*, 95 N.Y.U. L. Rev. 1062 (2020) (describing New York City Housing Authority's practice of exclusions for 10 years and sometimes indefinitely); Manny Fernandez, *Barred from Public Housing, Even to See Family*, N.Y. Times (Oct. 1, 2007).

conduct. We also support the requirement that the exclusion be reasonable in light of the age of the excluded household member, their relationship to other household members, and all other relevant circumstances.

Although these proposed limits are a welcome step in the right direction, HUD should make additional improvements in the final rule. Post-"one strike", the most common scenario involved an adult head of household, such as a mother or grandmother, who was forced to exclude a minor family member who had engaged in disqualifying criminal activity.[122] At the Philadelphia Housing Authority, for example, between 2016 and 2020, nearly 30% of judgment by agreements[123] forced the residents "to choose between family separation or losing housing assistance for the entire household through automatic eviction proceedings."[124] Separating the family preserved housing for the remaining household members, but often left the minor without viable housing options. It also left the family vulnerable to the threat of eviction since a visit by the minor to the family would be a trespass giving rise to a lease violation.[125] Justification for these harms is difficult when exclusion policies result in no significant impact on violent crime, a modest impact on property crime, and an outsized role in sweeping in young people of color in arrests for minor crimes.[126] HUD, therefore, should be taking more affirmative steps to minimize instances where PHAs and owners require the separation of minors from their families.

To prevent the harm of separation, HUD should make three improvements to the final rule. First, HUD should explicitly state that the exclusion of minors from their families should be a last resort and that PHAs and owners should not be routinely offering exclusion as the only means of preserving tenancy. Exclusion of minors should be limited to situations where it is truly in the best interest of the household and the minor, such as if the minor had an alternative housing option or is incarcerated.

Second, since these exclusions will be time-limited, HUD should also address family reunification, i.e., the circumstances under which excluded family members can later re-join the household. In particular, HUD should discuss the process for a household to add their excluded family member back onto the lease, including the criteria that the excluded member will have to meet.

Finally, we recommend that HUD clarify the confusing language around the use of arrests in line with our recommendations on the use of arrest records in the section above.

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[122] *See., e.g., HUD v. Rucker,* 535 U.S. 125 (2002).
[123] A judgment by agreement is a written set of terms agreed by both parties, without the participation of a judge. Erica V. Rodarte Costa, *Reframing the "Deserving" Tenant: The Abolition of A Policed Public Housing*, 170 U. Pa. L. Rev. 811, 835 (2022).
[124] *Id.*
[125] *Id.*
[126] Jose Torres et. al., *Banishment Policies in Public Housing: Testing an Evolution of Broken Windows*, 5 Soc. Sci. 61 (2016).

IV. Tenant selection plans

We support requiring multifamily owners to amend their TSP within a specific period of time after the effective date of the final rule and believe that 6 months is a reasonable time period of time for amendments.

We support requiring owners to post a copy of their TSPs in each office that receives applications and to make free copies available to applicants, tenants, and their legal representatives who request them. HUD should also consider requiring owners to make these policies available online, as opposed to making this an alternative to making copies available in the office. Consistent with tenant screening guidance: "Tenant screening policies should be in writing, made public, and readily available to potential applicants."[127] "Prior to applying, potential applicants should be given a copy of the screening policies or told where they can find them (e.g., the link to a website)."[128] HUD should also ensure that PHAs are making their ACOPs and admin plans available and to consider making them post their tenant screening criteria separately and making that available to applicants.

As HUD recently advised multifamily owners in connection with marketing housing opportunities, criminal history screening policies "should be available to prospective applicants and contain enough detail for an applicant to tell whether they are likely to qualify. For example, a criminal records screening policy should specify the types of records being considered (e.g., convictions) [and] which specific types of crimes are disqualifying, the lookback period (e.g., three years from application date)[.]"[129]

Access to complete criminal history screening policies is essential for rejected applicants to determine whether the policy was applied correctly to their specific cases. Criminal history screening policies often sort criminal convictions into various different categories and may apply different rules to those categories—such as longer lookback periods for certain types of crimes or requiring multiple misdemeanor convictions (compared with a single felony conviction) for denial. Hence an improper categorization could result in the denial of a qualified applicant.

To determine whether a mistake may have been made in such categorization, the applicant need not only to be provided with a copy of the specific criminal record(s) that led to the denial and be informed of any specific ways in which that criminal record was sorted, aged, or categorized, but also have access to the policy showing the range of other possible categories to which those criminal records might have been assigned (and the rules applicable to the other categories). Only complete access to the full criminal screening policy fulfills this need. Ideally, PHAs and subsidized owners should post their complete criminal history screening policies on-line so that any applicant, rejected applicant, advocates, or other person with a need for the information may access it at any time. Applicants should not be denied access to this

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[127] See 2024 HUD Tenant Screening Guidance *supra* note 60, at 13.
[128] *Id.*
[129] See HUD, Office of Fair Housing and Equal Opportunity (FHEO) Guidance on Compliance with Title VI of the Civil Rights Act in Marketing and Application Processing at Subsidized Multifamily Properties at 7 (Apr. 21, 2022); see 2024 HUD Tenant Screening Guidance *supra* note 60.

information simply because the sorting, categorization, or evaluation of criminal history information is contracted to a third-party, such as a tenant-screening company.

Finally, we support the tenant's right to notice of proposed substantive changes, a 30-day period to inspect and copy these changes, and the right to submit written comments to the PHA/owner and the local HUD office. In addition, **HUD should require the owner and the local HUD office to respond to such comments and HUD to engage in compliance reviews to ensure that TSPs reflect the final criminal history regulations**.

V. Interaction with local laws

We also support the proposed clarification that these regulations are not "intended to pre-empt operation of State and local laws that provide additional protections to those with criminal records." In jurisdictions with fair chance housing ordinances, such as Seattle and Chicago, PHAs have often pushed back, saying that they do not need to comply with these local laws because they are superseded by HUD regulations. Specific subregulatory guidance about the interaction of fair chance housing laws and HUD regulations can further educate PHAs, tenants, and applicants about these rules may complement one another.

Several southern California PHAs have contended, and in some cases, continue to contend that the PHA guidance regarding the use of criminal history in housing decisions was persuasive, as opposed to binding on them. As such, they frequently state that HUD regulations mandated their consideration of criminal history in their decision making regarding admission and termination. This broad blanket has resulted in impermissible denials, evictions, resulting in writ actions against PHAs to compel reversals of the PHA relying upon arrests and single convictions to deny housing applicants or evict tenants from federally subsidized housing. As a result, advocates in California have relied on state laws that provide additional protections for persons with criminal history that bar consideration of arrests and certain criminal records and dispositions, as well as bar single convictions, and require individualized assessments and consideration of mitigating evidence regarding the use of criminal history.

In addition, HUD should state explicitly that these regulations create a policy "floor" that restricts the ability of covered housing providers to comply with more aggressive state and local laws that mandate evictions and denials based on any contact with the criminal legal system. Crime-free programs and nuisance property ordinances (CFNO) are a classic example of such a law. CFNOs interfere with important federal good cause requirements, the proposed goals of the NPRM, and federal civil rights laws. Covered housing providers need clear guidance from HUD to counter the often direct and intense pressure from local governments for covered housing providers to evict or deny admission to tenants as a result of any contact with the criminal legal system.

CFNOs threaten the housing of the most vulnerable tenants, particularly low-income tenants of color, survivors of gender-based violence, and tenants with disabilities. While they vary slightly by jurisdiction, these policies generally operate as either: a) crime-free programs, which require or encourage property owners to deny or evict families based on criminal activity, typically

through trainings and the use of a lease addendum, or b) nuisance property ordinances, which label properties a “nuisance” based on things like calls for emergency services or alleged criminal activity and often demand the eviction of tenants (or even entire properties) as a way to “abate the nuisance.”

In 2016, HUD issued guidance to address the growth of these laws and programs and the civil rights impediments created by them. The guidance focused on how these laws and programs harm victims of domestic violence, as acts of violence against survivors can easily be identified as “nuisance” conduct.[130] It also briefly noted that many ordinances and crime-free programs negatively impact communities of color, persons with criminal records, and persons experiencing disabilities, but did not provide a detailed outline of the legal and practical implications for these protected groups. The guidance also failed to note the intersectional discrimination experienced by survivors of color, survivors with disabilities, and people of color with disabilities, all of whom are particularly vulnerable to be targeted under these laws and programs.[131]

Despite this guidance and HUD’s 2016 guidance on criminal records screening, aggressive criminal records screening remains a key aspect of many CFNOs, often done by the local government or at their direction, as well as the aggressive efforts by local governments to force the eviction of tenants if there is any contact with the police. CFNOs, which are rooted in the law enforcement community and seek to foster collaboration between local police and landlords, often direct, instruct, or require landlords to refuse to rent to prospective tenants with a criminal history, including arrests without conviction. These exclusions are imposed regardless of whether an applicant’s record suggests a present risk to the rental property or the safety of other tenants.

CFNOs also frequently involve the attachment of lease addenda requiring a landlord to automatically terminate the lease of all tenants in a home if there is any alleged criminal activity by any tenant, guest, or other person. Such aggressive, strict liability language directly conflicts with the “good cause” eviction protections of tenants living in federally assisted housing programs.[132] The lease addenda and crime-free programs also often require broad and expansive criminal background checks and rely upon some of the very actions HUD is trying to stop with this rulemaking – blanket bans and the use of arrest records to deny admission.

These ordinances and lease addenda also conflict with the Violence Against Women Act (VAWA). Survivors are more likely to have a criminal record related to the violence they experienced. CFNOs fail to make exceptions for survivors of gender-based violence or other crimes who were not at fault or experienced violent crime as a result of their status and

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[130] Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 13, 2016), available at https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF.
[131] *Id.* at 13.
[132] See 24 C.F.R. 247; 24 C.F.R. 966.4(l); 24 C.F.R. 891.770(b); 24 C.F.R. 982.310, 24 C.F.R. 983.257; and 42 U.S.C. 1437d(l)(5).

improperly shift the burden of proof to tenants for alleged lease violations based on alleged criminal activity.

Survivors of gender-based violence and people with disabilities are also more likely to call 911 or other emergency services. Both are often penalized by crime-free programs and nuisance property ordinances. **HUD should clarify that this kind of conduct, and other behavior penalized by crime-free programs and nuisance property ordinances, do not constitute a "threat to health, safety, or peaceful enjoyment" under the proposed rule.**

Localities also seem to be aware of how these programs function and will take the steps necessary to, for example, ensure that in addition to getting the family evicted, that they also lose their tenant-based voucher. PHAs and other covered housing providers are therefore in an impossible position – comply with federal law and the federal effort to move away from a strict liability standard when it comes to the criminal legal system – or comply with the local government's demand to deploy this aggressive, blanket strict liability standard. Indeed, certain PHAs have even insisted that, unless HUD explicitly instructs otherwise, they must follow crime-free policies or nuisance property ordinances in their jurisdictions. **Covered housing providers need to be able to buttress these pressures by pointing to HUD regulations that make clear that HUD's rules in this area are the floor and that they cannot comply with local laws and policies providing fewer protections.**

VI. Tenant screening companies

We support expanding the scope of Subpart J from records from law enforcement to records from "another source," such as third-party tenant screening companies. HUD should also note that "another source" can include public court databases that a number of PHAs consider. HJN members report that a common practice of such PHAs is to send someone to the courthouse to review the court records but not to differentiate between case outcomes. A PHA may see, for example, that an applicant is a defendant in a criminal case, but not factor into its admission decision that the case was subsequently dismissed. HUD should provide guidance on how PHAs and owners use such records as well as the information that they must provide to applicants and tenants so that they can understand what evidence is being used against them.

We support the explicit reminder to PHAs and owners that "HUD standards for nondiscrimination requirements extend to third-party screening services or companies" that they contract with. HUD should remind PHAs, owners, and tenant screening companies that automated decisions are unlikely to satisfy the NPRM's requirement that PHAs and owners consider an applicant's or tenant's mitigating circumstances.

VII. Additional Recommendations related to Enforcement

Many of the policy changes in the NPRM are welcome, but there are concerns that HUD does not provide strong enforcement mechanisms beyond the pre-existing enforcement tools against PHAs and owners. In subregulatory guidance implementing the final rule, HUD should specify the avenues that applicants and tenants have to challenge PHA and owner actions that are

inconsistent with the final rule, such as if the PHA or owner continues to adopt blanket bans or routinely fails to consider a person's mitigating circumstances.

At the very least, HUD must collect more data about the use of criminal history by HUD-assisted housing providers. Given the known impact of criminal records screening and criminal activity evictions, such data collection is necessary for HUD to carry out its duty to affirmatively further fair housing (AFFH). Illinois's Public Housing Access bill provides a good model for collecting such information. The Housing Authorities Act (310 ILCS 10/8.10a) (the Act) was signed into law and became effective on March 23, 2021. Per the Act, all Illinois public housing authorities are to collect and report annually to the Illinois Criminal Justice Information Authority (ICJIA) the following information:

1. The number of applications submitted for admission to federally assisted housing.
2. The number of applications submitted for admission to federally assisted housing of individuals with a criminal history record, if the authority is conducting criminal history records checks of applicants or other household members.
3. The number of applications for admission to federally assisted housing that were denied on the basis of a criminal history record, if the authority is conducting criminal history records checks of applicants or other household members.
4. The number of criminal records assessment hearings requested by applicants for housing who were denied federally assisted housing on the basis of a criminal history records check.
5. The number of denials for federally assisted housing that were overturned after a criminal records assessment hearing.

All reported information must be disaggregated by the race, ethnicity, and sex of housing applicants (310 ILCS 10/8.10a)

Thank you for taking this action to strengthen protections for justice-involved individuals in HUD-assisted housing. For your reference, the National Housing Law Project is also submitting an abbreviated version of this comment that summarizes the recommendations set out above, includes a full list of organizations that have signed on, and is entitled "National Housing Law Project's Sign-on Comment on HUD Notice of Proposed Rulemaking 'Reducing Barriers to HUD-Assisted Housing.'" For questions, please contact Marie Claire Tran-Leung, Evictions Initiative Project Director, National Housing Law Project, mctranleung@nhlp.org.

Sincerely,

National Housing Law Project

Chicago Lawyers Committee for Civil Rights Under Law
The Public Interest Law Project
The Network: Advocating Against Domestic Violence