



**RBD FASTFACTS –  
CRIMINAL SCREENING  
AND DISPARATE IMPACT  
– HUD PROGRAMS**

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FASTFacts  
Criminal Screening and Disparate Impact – HUD Programs

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Disclaimer

The material contained in this document is not comprehensive of the continually emerging issues surrounding policies in The Multifamily Housing industry. In addition, the handbook guidance is derived from The HUD Handbook 4350.3 Rev 1 Change 4 released in August 2013 and in December 2013 and subsequent notices and memos from HUD.

These materials were updated 1/2021.

The reader should understand that these materials are not designed for, nor should be relied upon, as a source of legal guidance or as a final authority with respect to any particular circumstance.

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# FASTFacts

## Criminal Screening and Disparate Impact – HUD Programs

### FAIR HOUSING

Fair Housing refers to the collection of laws and regulations that make it illegal to discriminate against any person based certain standards.



You should know that there are federal, state and local laws - some specific to your area - that affect the way you do business. These include the Fair Housing Act, the Fair Housing Act Amendment, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, The Equal Access Rule, the Age Discrimination Act. The Violence Against Women Reauthorization Act and Title VI.

### DISPARATE IMPACT



**Disparate Impact** is a legal doctrine under the Fair Housing Act which states that a policy may be considered discriminatory if it has a disproportionate “adverse impact” against any group based on race, national origin, color, religion, sex, familial status, or disability when there is no legitimate, non-discriminatory business need for the policy.

In a disparate impact case, a person can challenge practices that have a “disproportionately adverse effect” on those protected by the Fair Housing Act and are “otherwise unjustified by a legitimate rationale.”

For example, a lender’s requirement that borrowers prove a certain length of employment history may seem reasonable and neutral on its face, but in fact might have a disparate impact on people with disabilities, whose full-time employment history could be limited even though an individual with a disability may have enough income to cover loan payments.



Owner/agents cannot be liable under a disparate-impact theory if they can show that a policy is necessary to achieve a valid goal.

A recent Supreme Court decision supporting disparate impact theory has caused many owner/agents to reevaluate screening/termination policies.



### CRIMINAL HISTORY

While the use of criminal history as a basis for terminating tenancy or rejecting applicants is common, this practice may be challenged under fair housing law because of its disparate impact on certain protected classes.

To quote, “*A policy or practice of denying housing on the basis of their conviction records has an adverse impact on African American and Latino men in light of statistics showing that they are convicted at a disproportionately higher rate than their representation in the population. As a result, blanket policies denying housing to individuals with criminal records have a disparate impact on these protected classes.*”

### RENTAL HISTORY

Eviction screening data may be deceptive and reliance on them problematic, because even if the tenant was the winning party in the action or a settlement was reached, the report may say nothing about these critical details.

Even in the rare case where the screening company provides information about the outcome of the case, owner/agents may deny housing based simply upon the tenant’s involvement in an unlawful detainer.



As stated by one tenant lawyer, “*Many landlords refuse to rent to tenants named in a housing court case, regardless of its outcome. An eviction notation in a tenant screening report may result in a lower score or*

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*recommendation from a tenant screening company and frequently results in a negative determination by the landlord.”*

Studies from across the country indicate that women and people of color are evicted at rates that far outpace their representation in society. Discriminatory effect might be shown by demonstrating that a housing provider’s policy to deny based on information included in criminal or eviction records would result in under-representation of people-of-color or women.

### **GUIDANCE FROM THE OFFICE OF GENERAL COUNSEL**

On April 4, 2016, HUD released a new memo entitled - *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.*

In this memo, the OGC states that owner/agents should complete a three-step analysis to determine if current criminal history review has a discriminatory effect on any protected group.

- 1) Evaluate whether the Criminal History Policy or Practice Has a Discriminatory Effect
- 2) Evaluate Whether the Policy or Practice is Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest and
- 3) Evaluate whether there is a less discriminatory alternative

Excluding every applicant with any criminal history, without regard to the crime and its relationship to the applicant’s ability to meet tenancy obligations is likely to create fair housing concerns. Owner/agents should also consider the length of time since the resident was involved in criminal activity.

It is also important for the owner/agent to ensure that screening products adhere to the rules set forth in House Rules and in the Tenant Selection Plan.



### **Review of Current Policy**

Owner/agents need to answer key questions.



1. What are we doing now?
2. Is our policy in compliance with HUD guidance and requirements?
3. Do we need to modify our policies?
4. What steps do we need to take to implement changes?

### **Modification of Tenant Selection Plans & House Rules**

Owner/agents should review current policy and make modifications as appropriate.

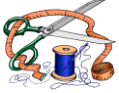
The RBD **TSP FASTForms and House Rules FASTForms** were modified with the following legitimate business goals in mind.

1. Address and respond to HUD requirements and recommendations regarding development of policies calling for action when an owner/agent discovers that a resident, resident’s guest or residents service provider has been involved in a crime and
2. Attempt to ensure that the property is decent, safe and affordable and is monitored to ensure that residents, their children and their other family members are allowed to live in peaceful, quiet enjoyment of their home on the property
3. Ensure that the staff is safe
4. Protect the fiscal health of the property



## FASTFacts Criminal Screening and Disparate Impact – HUD Programs

Your screening and eviction criteria must be narrowly tailored to avoid illegal discrimination, while also serving legitimate business goals.



Your policies should be designed to help select and provide housing for individuals who are able to fulfill their tenancy obligations without excluding others – specifically large groups of people included in a specific protected class. The purpose is to identify past bad conduct that is relevant, based on a reasonable belief that the prospective resident may be a direct threat to persons or property.

For example, the following crimes are more likely to be found relevant when an applicant is seeking housing (note: this is not a comprehensive list): violent crimes, destruction of property, burglary, manufacture/distribution of controlled substances, human trafficking, arson, illegal use/possession of weapons crimes involving terrorism.



By contrast the following crimes, while serious, do not reflect as much on an individual's ability to fulfill the obligations of tenancy (note: this is not a comprehensive list): transportation of water hyacinths, driving with a suspended license, mailing lottery tickets via U.S. Post Office, criminal infringement of a copyright.

If owner/agents wish to review criminal history at annual certification or terminate residents because of their involvement in certain criminal activity, House Rules may need to be updated as well.

Owners should consult with an attorney when they develop screening or termination criteria.

### **HUD GUIDANCE THAT AFFECTS SCREENING & TERMINATION**

#### **HUD HANDBOOK 4350.3 PARAGRAPH 4-7-C**

At minimum, owner/agents must implement minimum screening criteria established in October 2002 and introduced via HUD HSG Notice [2002-22 Screening and Eviction for Drug Abuse and Other Criminal Activity - Final Rule](#).

#### ***Screening For Drug Abuse and Other Criminal Activity***

1. *Tenant selection plans must contain screening criteria that include standards for prohibiting admission of those who have engaged in drug-related or criminal activity. The plan may, under certain circumstances, include additional provisions that deny admission to applicants for other drug and criminal activity.*
2. *Owners must establish standards that prohibit admission of:*
  - a. *Any household containing a member(s) who was evicted in the last three years from federally assisted housing for drug-related criminal activity. The owner may, but is not required to, consider two exceptions to this provision:*
    - (1) *The evicted household member has successfully completed an approved, supervised drug rehabilitation program; or*
    - (2) *The circumstances leading to the eviction no longer exist (e.g., the household member no longer resides with the applicant household).*
  - b. *A household in which any member is currently engaged in illegal use of drugs or for which the owner has reasonable cause to believe that a member's illegal use or pattern of illegal use of a drug may interfere with the health, safety, and right to peaceful enjoyment of the property by other residents;*
  - c. *Any household member who is subject to a State sex offender lifetime registration requirement; and*
  - d. *Any household member if there is reasonable cause to believe that member's behavior, from abuse or pattern of abuse of alcohol, may interfere with the health, safety, and right to peaceful enjoyment by other residents. The screening standards must be based on behavior, not the condition of alcoholism or alcohol abuse.*

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3. Owners may establish additional standards that prohibit admission if the owner determines that any household member is currently engaging in, or has engaged in, the following activities during a reasonable time before the admission decision:

- a. Drug-related criminal activity.
- b. Violent criminal activity.
- c. Other criminal activity that threatens the health, safety, and right to peaceful enjoyment of the property by other residents or the health and safety of the owner, employees, contractors, subcontractors, or agents of the owner.

*NOTE: If an owner's admission policy includes any of the activities above or similar restrictions that uses a standard regarding a household member's current or recent actions, the owner may define the length of time prior to the admission decision during which the applicant must not have engaged in the criminal activity. The owner shall ensure that the relevant "reasonable" time period is uniformly applied to all applicants in a non-discriminatory manner and in accordance with applicable fair housing and civil rights laws.*

4. An owner's screening criteria also may include the following provisions:

- a. Exclusion of culpable household members.
- b. Drug or alcohol rehabilitation.
- c. Length of mandatory prohibition.
- d. Reconsideration of previously denied applicants.
- e. Consideration of the circumstances relevant to a particular case.
  - (1) The seriousness of the offense;
  - (2) The effect denying tenancy would have on the community or on the failure of the responsible entity to take action;
  - (3) The degree of participation in the offending activity by the household member;
  - (4) The effect denying tenancy would have on nonoffending household members;
  - (5) The demand for assisted housing by persons who will adhere to lease responsibilities;
  - (6) The extent to which the applicant household has taken responsibility and takes all reasonable steps to prevent or mitigate the offending action; and
  - (7) The effect of the offending action on the program's integrity.

### **DAS MEMO – HOUSE RULES**

On January 12, 2015, Deputy Assistance Secretary (DAS) Ben Metcalf released a memo entitled, *Occupancy Protections for HUD-assisted Households in Properties with Low-Income Housing Tax Credits*.

The memo provided a reminder to owner/agents that residents could not be terminated (evicted), when a new Tax Credits contract was awarded, just because the resident does not meet the Tax Credits eligibility criteria – namely income.

Many people did not read the entire memo and missed the additional language.


*"The restriction also covers any proposed termination due to criminal activity, which generally is limited to specific activity during the term of the lease or when an owner discovers there was fraud in the application process. Owners may conduct criminal background checks on existing tenants at recertification for lease enforcement or eviction if permitted by House Rules or any legally adopted changes to them. ...If this change constitutes a change to the existing House Rules, owners must first notify residents" (in compliance with HH 4350.3, R1, C4, Paragraph 6-12).*

Owner/agents should review the lease and the property House Rules to evaluate all reasons to evict.



## MARIJUANA – DAS MEMO

### USE OF MARIJUANA IN FEDERALLY FUNDED PROGRAMS – APPLICANTS

In January 2015, Deputy Assistance Secretary (DAS) Ben Metcalf expanded criminal screening requirements (outlined in the Quality Work and Housing Responsibility Act – QWHRA) when he released a memo  Use of Marijuana in Multifamily Assisted Properties that specifically states...

*“...owners must deny admission to assisted housing for any household with a member determined to be illegally using a controlled substance (e.g., marijuana).”*

Your Tenant Selection Plan must include language that specifically states that an applicant will be denied if the owner/agent discovers that any member of the applicant household is using marijuana – even medical marijuana.

### USE OF MARIJUANA IN FEDERALLY FUNDED PROGRAMS – EXISTING RESIDENTS




In the January 2015 DAS memo, Mr. Metcalf expanded guidance in regards to eviction when it is discovered that a resident or resident’s guest/service provider is using marijuana. This must be considered when reviewing House Rules or a Crime Free lease addendum.

*“...Further, owners may not establish lease provisions or policies that affirmatively permit occupancy by any member of a household who uses marijuana. Owners must establish policies which allow the termination of tenancy of any household with a member who is illegally using marijuana or whose use interferes with the health, safety or right to peaceful enjoyment of the residents. Section 577 of QHWRA affords owners the discretion to evict or not evict current tenants for their use of marijuana.”*

## USE OF ARREST RECORDS

In November 2015, HUD issued HSG Notice 2015-10 [Guidance for Public Housing Agencies \(PHAs\) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions.](#)

The purpose of the Notice is to inform owner/agents of federally-assisted housing that an applicant’s arrest record(s) must not be the sole basis for rejecting an applicant. A resident’s arrest record(s) must not be used as the sole basis for terminating assistance/tenancy. 

HUD has reviewed relevant case law and determined that the fact that an individual was arrested is not evidence that he or she has engaged in criminal activity.



If your Tenant Selection Plan includes screening criteria or if your House Rules include eviction criteria that indicates you would deny/terminate an applicant based solely on an arrest record (versus a conviction), you should modify the criteria.

If your House Rules indicate that you would terminate assistance and/or tenancy based solely on an arrest (versus a conviction), then your House Rules should be modified.

The Notice does not prohibit the use of arrest records. HUD just specifies that you cannot deny or terminate someone just because they were ever arrested. There must be other supporting information.

## CRIMINAL HISTORY DISCOVERIES – CONFLICTING INFORMATION

What happens when you discover criminal history **that has not been disclosed by the applicant or resident?**

Because criminal records are not maintained by Social Security Number, the risk of “false hits” is high and could result in wrongful denial or wrongful termination.

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HUD requires that you notify the household if your policy indicates that you should deny or terminate due to criminal history discovery. See HH 4350.3 R1, C4, Paragraph 8-14-C-7.

*The owner may deny admission to an applicant using his/her standard for admission screening or may evict a tenant in accordance with his/her standard for termination of tenancy if the criminal background or State lifetime sex offender registration check indicates that the applicant or tenant provided false information. If the household is to be denied admission or evicted, the PHA /owner making the determination must:*

- a. Notify the household of the proposed denial of admission or termination of tenancy.*
- b. Provide the subject of the record and the applicant or tenant, with a copy of the information the action is based upon.*
- c. Provide the applicant or tenant with an opportunity to dispute the accuracy and relevance of the information obtained from any law enforcement agency.*

**NOTE:** *Persons who are subject to a lifetime sex offender registration requirement who were admitted prior to June 25, 2001, the effective date of the Screening and Eviction of Drug Abuse and Other Criminal Activity final rule, must not be evicted unless they commit criminal activity while living in federally assisted housing or have some other lease violation, in which case the owner may terminate the tenancy and pursue eviction to the extent allowed by their lease and state or local law.*



Policies developed for our customers provide residents/applicants with ten (10) business days to prove that they did not commit the crime in question. Owner/agents should establish timeframes for applicant and resident response; HUD has no requirements.

If the resident/applicant fails to contact the owner/agent or indicates that he/she cannot provide documentation to refute the criminal discovery, the owner/agent can reject the application or begin the process to terminate the resident.

### **NEW BAN-THE-BOX INITIATIVES**

Under state or city legislation, owner/agents may not be allowed to ask about prior convictions before extending a conditional housing offer.

In some cases, all other eligibility and screening criteria must be reviewed and a preliminary unit offer is made.

Once an owner/agent makes a unit offer, they are allowed to take into account convictions. In some states/cities, owner/agents are limited as to the type of conviction that may be used to deny housing or assistance to an applicant. In other cases, the owner/agent may have a limited “look back” period.

For example, in Washington, D.C., owner/agents may consider the following when reviewing criminal history - certain types of convictions — including rape, murder, assault, arson, robbery, sex abuse and fraud — if they’ve occurred in the past seven years.

For HUD programs, regulatory and statutory requirements remain dominant. Owner/agents may not provide HUD housing assistance to anyone who is subject to any state lifetime sex offender registry.

However, it is up to the owner/agent to develop screening criteria defining unacceptable criminal history.

Owner/agent must stay abreast of any legislation that may require edits to the Tenant Selection Plan and to internal screening practices.