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HUD Proposes to Amend Regulations on Criminal Justice and Reducing Barriers to Housing



On April 10th, the U.S. Department of Housing and Urban Development (HUD) published a proposed rule (“Reducing Barriers to HUD-assisted Housing”) (the “Draft Rule”) that seeks to amend existing program regulations on the admission of individuals with a criminal record to public and HUD-assisted housing as well as the eviction of or termination of assistance to tenants based on criminal activity. HUD is accepting public comment on the Draft Rule through Monday, June 10th at [Regulations.gov](https://www.regulations.gov).

The goals of the Draft Rule are (1) to clarify and standardize program guidelines that public housing authorities and HUD-assisted housing providers find to be confusing; and (2) to reduce unnecessary barriers to housing based on factors that do not accurately reflect a person’s current fitness for tenancy.

While the Draft Rule’s additional requirements with respect to criminal screening would only directly apply to public housing and Section 8 assisted housing programs, as well as housing assisted under HUD programs such as Section 811, Section 202, Section 221(d)(3), and Section 236,[1] the proposal is part and parcel of HUD’s broader effort to reduce exclusionary screening and termination practices among housing providers generally. All providers are potentially subject to Fair Housing Act (FHA) liability for policies that create an unjustified disparate impact based on race,[2] and the FHA also obligates providers to evaluate whether criminal records or activity that are disability-related should be disregarded as a form of reasonable accommodation.[3]

As a result, housing providers for whom the Draft Rule does not impose additional new requirements may nevertheless find it a useful source of guidance regarding what practices HUD considers to “reduce the risk of violat[ing] nondiscrimination laws.”[4]

The Draft Rule proposes the following regulatory changes:

- **Three-Year Lookback Period:** An admissions screening lookback period of longer than three years would be presumptively unreasonable, based on research indicating that a person’s risk of recidivism drops sharply after a three-year period without subsequent offenses. Providers could continue to exercise discretion in establishing a lookback

period, but would need to justify any window of longer than three years with empirical evidence that certain older convictions remain relevant to assessing tenant suitability.

- **Defining a Criminal Record:** The definition of “criminal record” would be broadened to include interactions with the criminal justice system such as arrests; warrants; prosecution dismissals or deferrals; not-guilty verdicts; and probation, parole, and supervised release violations.

HUD cautions that such records tend to be “less accurate, reliable, and instructive” than criminal conviction and sex offender registry information obtained directly from law enforcement agencies, yet the agency also acknowledges that many providers already receive the information from sources such as third-party screening companies.^[5] The agency therefore seeks to clarify that program regulations regarding the use of criminal records in admissions, lease enforcement, or evictions—either as it pertains to provider discretion or provider obligations—encompass all of the aforementioned records.

- **Individualized Assessments:** Providers would be required (rather than merely permitted) to conduct an individualized, fact-specific assessment of each applicant or tenant whose suitability for housing is in question based on his or her criminal history. An individualized assessment would be defined as holistic consideration of “multiple points of information,” including relevant mitigating factors, in order to assess “the risk that an applicant would adversely affect the health, safety, and peaceful enjoyment of the premises by other residents, the owner, or property employees.”^[6]

The mitigating factors that providers would be required to consider include, but are not limited to, those listed in 24 CFR § 5.852(a). Other potentially mitigating circumstances include “[the facts] surrounding the criminal conduct, the age of the individual at the time of the conduct, evidence that the individual has maintained a good tenant history before and/or after the criminal conviction or the criminal conduct, and evidence of rehabilitation efforts.”^[7]

- **Notice and Opportunity to Dispute an Admissions Denial:** At least fifteen days prior to denying an applicant for housing based on his or her criminal history, a provider would be required to notify an applicant of an anticipated denial; provide a copy of the criminal record in question; provide the applicant an opportunity to dispute the accuracy or relevance of the record; and provide the applicant an opportunity to raise mitigating factors (which, if submitted, the provider must subsequently consider).
- **Defining “Current” Criminal Activity:** The definition of “currently engaging in” illegal drug use or other criminal activity would be revised to clarify that only behavior that occurs within the preceding twelve months qualifies as current.
- **Standard of Proof for Denials and Evictions:** Existing program regulations are clear that a provider does not need to satisfy a criminal conviction standard of proof in order to exclude an applicant from housing or to evict a tenant based on criminal activity. However, the regulations do not state what standard of proof a provider should employ.

The Draft Rule would require such decisions to be based on a preponderance of the evidence, a standard that the agency defines as “[it is] more likely than not that a claim is true when all evidence is taken together and its reliability or unreliability is considered.”^[8] Importantly, the mere fact of an arrest record would not be sufficient to support a determination that an applicant or tenant has engaged in criminal activity absent independent evidence that the underlying criminal behavior did in fact occur.



- **Re-screening Existing Tenants:** A public housing authority would not be permitted to re-screen a tenant for criminal activity when the tenant already participates in the HCV program and is seeking to port a mobile voucher between jurisdictions.

HUD encourages public housing authorities and HUD-assisted housing providers to reach out with feedback as to whether the agency's proposals adequately balance the needs of applicants, tenants, and providers, or whether different or additional amendments would be preferable. HUD also specifically seeks comment from HCV and PBV owners on owner screening requirements with respect to criminal records and criminal activity.

Should you have any questions about this KH Housing Alert or require further information, please contact Emily Blumberg or Claudia Wack.

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[1] HUD explains that most of the changes proposed under the Draft Rule would not apply to housing providers who accept Housing Choice Vouchers (HCVs) and Project Based Vouchers (PBVs), in order not to discourage provider participation. The Draft Rule does update regulations to provide that HCV and PBV owners must conduct any criminal activity screenings in accordance with the FHA, together with other limited changes. For full discussion of the updates that would affect PBV and HCV providers, see Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. 70, 25334 (April 10, 2024).

[2] See, e.g., *id.* at 25346 n.102 (listing examples of provider liability); see also *id.* at 25340 ("Black Americans make up thirty-eight percent of the incarcerated population despite representing only twelve percent of the U.S. population. Black men are incarcerated at nearly six times the rate of White men. Black men with disabilities account for less than 2% of the overall U.S. population but more than 18% of the state prison population. Hispanic men are incarcerated at nearly two-and-a-half times the rate of White men. Native Americans overall are incarcerated at more than twice the rate of White Americans.").

[3] See, e.g., U.S. Department of Housing and Urban Development, Examples of Reasonable Accommodations 4 (2024), https://www.hud.gov/sites/dfiles/FHEO/documents/RA-RM_Website_Examples.pdf ("A housing provider that screens applicants for criminal history may need to make a reasonable accommodation to that policy when considering [an] application. For example, [the] application could still be considered if [the applicant has] received treatment related to [the] disability that resulted in the prior conduct.").

[4] *Id.* at 25359.

[5] *Id.* at 25350.

[6] Id. at 25347.

[7] Id. at 25348.

[8] Id. at 25349.

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