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Via Online Platform at www.regulations.gov

June 10, 2024

Demetria McCain
Principal Deputy Assistant Secretary for Fair Housing and Equal Opportunity
Department of Housing and Urban Development
Office of Fair Housing and Equal Opportunity
451 7th Street SW, Room 5250
Washington, DC 20410–8000

RE: California Civil Rights Department Comments on FP-6362-P-01, "Reducing Barriers to HUD-Assisted Housing" (HUD-2024-0031-0001)

Dear Ms. McCain:

The Civil Rights Department (CRD) is a California agency charged by statute with investigating complaints of unlawful discrimination filed pursuant to the California Fair Employment and Housing Act (California Government Code § 12900 *et seq*.), and other civil rights statutes, including the federal Fair Housing Act. In support of HUD's proposed rule reducing barriers related to HUD-assisted housing, CRD provides the following comments on the proposed rule, including answers to some of the questions posed by HUD about which CRD has experience or expertise.

Since 2020, California regulations have: prohibited landlords and other housing providers, including HUD-subsidized properties in California, from having blanket bans against renting to individuals with criminal histories; limited how housing providers can use criminal history when screening applicants for housing; and forbade housing providers from using criminal history in a way that created an unjustified disparate impact, or involved intentional discrimination, on the basis of race, national origin, or another protected characteristic. Cal. Code Regs. tit. 2, §§ 12264–12271.

In addition, CRD is charged with enforcing the Fair Chance Act, which since 2018 has prohibited employers from asking job applicants about their conviction history prior to extending them a conditional offer; limited which convictions an employer can consider disqualifying; and required employers to allow applicants a chance to respond to concerns about their conviction history before making a final decision. Cal. Gov't Code § 12952. CRD's comments take into consideration its experience investigating violations of and enforcing these laws.

I. CRD's Responses to Questions for Public Comment

Question for comment #2: Lookback period for criminal activity. *The proposed rule would provide that it is presumptively unreasonable for PHAs and owners to consider convictions that occurred more than three years ago in making admissions decisions. This is based in part on research on recidivism that indicates that people's risk of committing a crime drops precipitously after the person has not reoffended for a period of three years. The proposed rule would provide, however, that this presumption can be overcome based on evidence that, with respect to specific crimes, older convictions are relevant to individualized assessments of current suitability for tenancy.*

CRD believes that the three-year proposal is reasonable in light of the research cited by HUD. HUD may consider a more nuanced approach to "look-back periods," such as the approach California takes. While California does not have an enumerated lawful "look-back period," California regulations provide that courts should consider, in assessing the legality of a housing provider's criminal history policy, whether the look-back period is sufficiently limited to ensure that "criminal history information considered is relevant to the decision being made." Cal. Code Regs. tit. 2, § 12269(b).

Question for comment #3: Opportunity to dispute criminal records relied upon by PHA or owner (Denials). *The proposed rule would provide that PHAs and owners provide applicants with relevant criminal records no fewer than 15 days prior to notification of a denial of admission, as well as an opportunity to dispute the accuracy and relevance of the records relied upon. Is 15 days prior to notification of a denial of admission an appropriate timeframe? Do the processes described in §§ 5.855(c), 882.518, 960.204, and 982.553 adequately balance the needs of applicants and housing providers? If not, what additional processes or measures would be helpful?*

CRD supports an opportunity for applicants to dispute the denial of admission, based on mitigating circumstances of their convictions, rehabilitation since those convictions, inaccuracy in criminal history records, and/or other bases, and believes fifteen days is an appropriate timeframe. CRD suggests that HUD consider requiring a housing provider to provide notification in alternative formats, to accept in-person submissions in addition to written responses, and to offer to engage in person or by phone or video call with the applicant if the applicant requests it or does not respond to written notice. CRD also suggests that HUD consider allowing extensions of this time period, when necessary, especially for people with a disability-related need for an extension.

In enforcing the Fair Chance Act, CRD has observed that many applicants with criminal histories do not take advantage of the opportunity to dispute a rejection in writing. While there are various reasons why this may be in a particular instance or as a general matter, we have heard from advocates working with those with criminal histories that many people do not dispute the rejection because they may believe that disputing the rejection will not matter, may not believe they could articulate themselves adequately in writing, or may not have time to gather the mitigating information in the five days that the Fair Chance Act provides. These experiences are likely

correlated with lower education levels and literacy rates among individuals who have been convicted of crimes versus the population at large. A 2003 survey of incarcerated Americans found that only 35% of those in prison had graduated from high school or obtained any kind of college degree, versus 77% in the general population, and a majority of prisoners scored at "Basic" or "Below Basic" in three forms of literacy assessment, versus a majority of the population at large scoring at "Intermediate" or "Proficient" in those same measures. *See* U.S. Dept. of Ed., National Center for Education Statistics, Literacy Behind Bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey 116-117 (May 2007) (NCES 2007-473), *at* https://nces.ed.gov/pubs2007/2007473.pdf.

In light of this experience, CRD recommends requiring that notice be given both in writing and orally when possible; that applicants be guaranteed the opportunity to respond in writing or by other means, including by phone or in person; that decisionmakers be required to discuss the notice at the applicant's request; and that decisionmakers be required to affirmatively offer such a discussion where the applicant has not responded to written notice. California regulations limiting the use of criminal history information in housing provide that in determining whether a housing provider's use of criminal history information is lawful, one consideration is "Whether the practice provides the individual . . . an opportunity to present individualized, mitigating information either in writing or *in person*." Cal. Code Regs. tit. 2, § 12266.

CRD also recommends that HUD provide PHAs with a sample letter to applicants that outlines in plain language their right to provide mitigating information. HUD should also consider creating sample worksheets or other assessment tools to aid PHAs in implementing these requirements. CRD has produced a sample letter to applicants and worksheets for individualized assessments as part of implementing California's Fair Chance Act, which can be found here: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/03/Fair-Chance-Act-Sample-Forms-Packet.pdf.

Question for comment #4: Mitigating factors. *The proposed rule would provide that PHAs and owners consider the following set of mitigating factors when a decision to deny or terminate assistance or to evict is predicated on consideration of a criminal record: the facts or circumstances 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. Are there other mitigating factors that should be considered? Should HUD define these mitigating factors in greater detail in regulation or guidance? Please provide suggested definitions or standards.*

CRD supports the use of enumerated mitigating factors that PHAs should consider when determining whether to accept an applicant. California regulations include the following factors that HUD may wish to consider as mitigating factors that PHAs should consider: 1) whether the individual was a minor or young adult at the time of the conduct; 2) the amount of time that has passed since conviction; 3) whether the individual has maintained a good tenant history; 4) evidence

of rehabilitation efforts; 5) whether conduct stems from being a victim of domestic violence, stalking, or similar offenses; 6) whether the conduct arose from an individual's disability; and 7) any other relevant factors. Cal. Code Regs. tit. 2, § 12266(e).

Based on our experience enforcing the Fair Chance Act, HUD may also wish to consider articulating as a specific additional mitigating factor the underlying circumstances that gave rise to the criminal activity. Consider the following hypothetical: A housing applicant has a conviction for possession of burglary tools, as part of a longer conviction history that includes multiple trespass convictions. The individual had been unhoused for a number of years, which provides relevant context for their criminal history. In the absence of a background of offenses involving violence, the individual's life circumstances at the time of the conviction could contextualize it as a crime of necessity that does not, without more, indicate a future threat to other tenants. Similarly, survivors of domestic violence may have criminal histories arising out of incidents in which they were victims of abuse, including because they acted in self-defense. Federal law already recognizes the importance of considering these circumstances—under the Violence Against Women Act (VAWA), victims of abuse are protected from eviction on these grounds; the regulations should reference that protection explicitly.

Question for comment #5: Justifying denial of admissions. *The proposed rule would provide that criminal activity in the past can be the basis for denying admission only if it would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA/property employees. Should HUD provide additional specificity in the rule or in subsequent guidance on this requirement, and if so, on what aspects?*

CRD believes the rule would benefit from additional specificity with respect to the phrase "threaten the health, safety, or right to peaceful enjoyment." HUD could use language similar to California regulations that limit authority to consider criminal history to convictions with a logical relationship to potential dangers to other tenants, defined as "a criminal conviction that has a direct and specific negative bearing on the identified interest or purpose supporting the practice." Cal. Code Regs. tit. 2, §§ 12266(e); 12005(k). California regulations also specifically prohibit the use of criminal history related to arrests, diversion programs, any sealed, vacated, or expunged criminal convictions, and any juvenile justice-related records. Cal. Code Regs. tit. 2, § 12269.

California regulations set out the following examples as to what constituents a health and safety exemption: "For example, a ten-year-old misdemeanor conviction for a driving offense would not likely be directly-related to fulfilling financial obligations because there is no rational relationship between the violation and the identified business interest. In contrast, a recent criminal conviction for residential arson could be directly-related to the risk that an individual may injure other residents or property because there is a rational relationship between recently committing residential arson and injuring residents or property." Cal. Code Regs. tit. 2, § 12266(b)(2).

The absence of any standards for determining whether an individual's criminal history would establish a threat to other tenants' healthy, safety, or right to peaceful enjoyment would undermine enforcement and likely incentivize providers to implement blanket rules in practice. CRD has observed in investigating potential violations of the California Fair Chance Act that employers may

comply with the letter but not the spirit of the law by following necessary procedures while making substantively unfounded decisions. For instance, one employer excluded more than one applicant from a position as a clerk based on a single excessive noise violation. Having a more defined standard could protected against such practices.

Question for comment #8: Rescreening of tenants for criminal activity. *At §§ 982.301 and 982.355, HUD proposes to prohibit the receiving PHA from rescreening a family that moves under the portability procedures of the HCV program (including for criminal activity). HUD is aware that there are other circumstances under which a PHA or an owner might rescreen a tenant for criminal activity, and HUD would like to consider the issue of rescreening for criminal activity in a comprehensive manner. As such, HUD specifically seeks comment from PHAs and owners on whether there are circumstances under which rescreening a tenant for criminal activity is appropriate, and if so, an explanation of the precise circumstances and reasons therefore. Specifically, for those PHAs and owners who rescreen, under what circumstances do you rescreen after an initial screening, how often do you conduct such rescreening, how long have you been conducting such rescreening, on approximately how many tenants/participants, and what has been the results of your rescreening? Specifically, has your rescreening then led to any evictions or terminations? If so, how many, what were the specific offenses for which they were evicted, what was the case outcome for those offenses, and when did the offense occur in relation to the eviction or termination? Other than the offense in question, were there other concerning factors raised by the tenant/participant? Do you believe your rescreening serves a legitimate purpose? For all members of the public, how, if at all, should HUD address comments about rescreening in the final rule?*

As far as CRD is aware, housing providers screen applicants for criminal history because it can be circumstantial evidence of a danger presented by the applicant if they were to become a tenant. If an applicant is currently a tenant in assisted housing, the best evidence for whether they would present a danger to others in their new public housing placement is their tenancy history in their current placement. Rescreening upon transfer appears unnecessary to determine whether a particular tenant should be placed and increases the likelihood that applicants will be denied on an unjustified basis.

Question for Comment #10: Screening Requirements for HCV and PBV Owners. *As noted earlier, HUD is requesting comments on owner screening requirements for the HCV and PBV programs with respect to criminal records and criminal activity. Specifically, should HUD establish the same or similar requirements for HCV and/or PBV owners as proposed for owners under part 5? If not, what, if any, requirements should be established for denials on the basis of criminal records, current or recent criminal activity, illegal drug use, or alcohol abuse?*

CRD supports extending the rule to Housing Choice and Project Based Voucher holders. As in most states, the vast majority of those receiving HUD-assisted housing in California use Project Based or Housing Choice vouchers. In California, that number is particularly high, with less than 5% of HUD program participants in public housing and the remainder receiving program-based assistance. By limiting the rule to only public housing and HUD multifamily housing, the rule, if finalized, would have extremely limited impact, and will not expand housing choice for the over 600,000 low-income individuals in the HCV and over 160,000 in the PBV programs who may have been impacted by the criminal legal system.

II. CRD's Additional Comments

HUD is proposing language to clarify when a failure to disclose criminal history can be used to justify exclusion, providing that except in those circumstances where a PHA or owner solely relies on self-disclosure in reviewing an applicant's criminal record, the PHA or owner may deny admission for failure to disclose a criminal record only if that criminal record would be material to an admissions decision pursuant to this rule and the PHA's or owner's admissions standards. The importance of this language is reflected in CRD's experience enforcing limitations on using conviction history in housing and employment decisions. Applicants often fail to report convictions not because they are attempting to conceal past criminal activity but because criminal histories are often complicated and difficult to remember with precision. Applicants may disclose a more serious conviction but forget a less serious one adjudicated at the same time, or remember a probation violation as a separate conviction or vice versa, not out of dishonesty but through a failure of memory. Others may not understand that failure to disclose prior conviction history may be held against them, especially where they are authorizing a commercial criminal history background check that will compile all their convictions in any case. To further strengthen the proposed rule, CRD recommends that the rule provide that failure to disclose a conviction is not a basis for adverse action unless the provider has reason to believe, based on evidence independent of the mere fact of nondisclosure, that the failure to disclose was a willful or reckless attempt to conceal a material fact.

Thank you for the opportunity to provide comments. If you have any questions, you can reach Renée Paradis at (510) 972-6820 or renee.paradis@calcivilrights.ca.gov.

Sincerely,

Renée Paradis, Associate Chief Counsel
Nadia Aziz, Assistant Chief Counsel