

# TENANT SCREENING AND SELECTION

How it Works  
in the Twin Cities  
Metro Area and  
Opportunities  
for Improvement

MARCH 2021

# *Opening the Door*

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## Executive Summary

### When an apartment becomes available in the Twin Cities Metro Area, who gets to move in? And, perhaps more importantly, who doesn't?

To answer these questions, the methods and systems used by landlords to screen and select tenants must be examined. While this is a private transaction, the public has an interest in its terms. Landlords typically seek and consider data on the following criteria when screening tenant-applicants and selecting tenants: (1) income level, (2) rental history, (3) credit history, and (4) criminal history.

Use of tenant screening and selection methods and systems is further complicated by the rental housing market, which, depending on the state of the market, can lead to limited access to affordable housing. With limited affordable rental units, competition for available units is fierce, and supportive service providers, such as counties and nonprofits, struggle to secure housing for some clients, particularly those with backgrounds that do not satisfy the current tenant selection criteria used by many landlords. As a result, many prospective tenants find themselves unable to access decent housing they can afford, leaving them to resort to substandard housing or homelessness.

This report assumes that most landlords strive to be fair in their tenant screening and selection processes, and that most act on the best information available to them at the time. However, the tenant screening and selection process is often frustrated by a lack of recognition and understanding of what individual characteristics can be used to accurately predict the success of a tenant-applicant. There does not appear to be a widely accepted set of tenant screening and selection criteria or set of standards used in evaluating the criteria. Nor does there appear to be established and broadly adopted best practices for screening and selecting tenants.

Landlords generally look for prospective tenants they believe will pay rent on time and abide by the terms of their leases. They primarily look to available data related to the criteria set forth above—income level, rental history, credit history, and criminal history—to predict

whether, if selected as a tenant, a tenant-applicant will pay on time and abide by the terms of the lease. Common usage of this criteria data among landlords is largely based upon the belief that the data is predictive of the individual characteristics of tenant-applicants. Landlord use of tenant screening and selection methods and systems varies widely, and this variation makes a significant difference in facilitating access to affordable rental housing.

Even though there are typical tenant screening and selection methods and systems used by many landlords, the screening criteria and their related screening standards are often utilized inconsistently. Strict application of these methods and systems, specifically the screening criteria and standards, without the opportunity for consideration of other factors, individual characteristics, or extenuating and mitigating circumstances, often leads to unfairness in the tenant screening and selection process and, in the worst case, discrimination. This approach can be tempered by thoughtful practices, which can balance some of the disparity that results from inconsistent application of the screening and selection methods and systems currently used in the housing industry.

The use of current tenant screening and selection methods and systems to allocate housing is often unpredictable and can result in disparate treatment, the consequences of which extend beyond the prospective tenants and their families. The consequences extend to communities and society as a whole, who experience not only inefficiency and confusion, but also a lack of justice and fairness. The implications of these consequences span generations, widening racial disparities in housing access, affordability, and quality, and impacting our communities as a result.

**This is where our discussion begins.**

## Introductory Note

This project is based upon the premise that an evidence-based set of tenant screening and selection methods and systems can be developed, which, coupled with informed and appropriate standards and best practices, will treat tenants fairly, while enabling landlords to operate successful properties.

The goal of this project is to encourage voluntary adoption of the recommendations contained in this report by landlords and leaders in the housing industry. The many other stakeholders invested in the housing industry, including those involved in the tenant screening and selection system, must also be involved in the reforms. In addition to the core group of organizations who initiated this project, many stakeholders have been engaged, including private and nonprofit landlords (operating both large and small rental properties and portfolios), industry organizations, tenants from a wide range of communities, lawyers, housing navigators for nonprofit groups, county staff, tenant screening companies, state and local housing agency officials, and others.

The authors of this report hope to facilitate changes to tenant screening and selection methods and systems by illuminating an industry process that operates largely in a way that not only lacks transparency, particularly for tenants, but also does not facilitate information sharing among landlords. Improved transparency will not only give tenants an opportunity to be more effective in applying for rental housing, but it will aid landlords in determining which of their tenant screening standards are outliers among their industry counterparts and which of their assumptions are unsupported by evidence and may require further review.

The first section of this report describes the structure and process of the current tenant screening and selection system. The second section offers recommendations for improving the current system and identifies areas where more research and exploration is necessary.

*For ease of reading, reference, and understanding, the term “landlord” is used to refer to landlords, as well as owners, operators, and managers of rental properties and portfolios.*



*This report was developed by Housing Justice Center and Family Housing Fund, with research support from seven (7) community-based organizations, which are noted on the next page in Sources of Information. Students from the Community Justice Project at the University of St. Thomas School of Law also contributed to the research.*

## Sources of Information

### Information for this report was collected from the following sources:

- Tenant screening and selection policies from various housing providers
- Interviews and surveys with housing providers, tenants, and third-party organizations
- National legal and policy research and data

### The tenant screening and selection policies collected and analyzed by Housing Justice Center include the following:

- Thirty-two (32) publicly assisted, Low Income Housing Tax Credit property policies<sup>1</sup>
- Nineteen (19) private property management company policies covering over 300 properties
- Seven (7) public housing agency's policies governing over 15,000 public housing units and over 17,000 Section 8 housing choice vouchers

### The Alliance coordinated a community data collection effort working with the following organizations:

- African Career, Education & Resource (ACER)
- Community Stabilization Project (CSP)
- Frogtown Neighborhood Association (FNA)
- HOME Line
- New American Development Center (NADC)
- Pueblos de Lucha y Esperanza

The purpose of the community data collection effort was to gather information from individuals and groups through one-on-one discussions, surveys, and community conversations. In total, community partners gathered individual narrative and survey results through ninety-two (92) individual long-form surveys, group meetings representing an additional fifty-eight (58) participants, a database of 193 people who experienced problems in the tenant screening and selection process, and online surveys of an additional sixty-eight (68) people about their experiences with the tenant screening and selection process. These 411 responses represent a range of needs, communities, and experiences.

Family Housing Fund developed a set of twenty-six (26) questions that guided thirteen (13) interviews with and five (5) online surveys from private and nonprofit rental landlords. The portfolios of the participating landlords range in size from three (3) to 34,000 units and include a mix of subsidized/affordable, market rate, and supportive rental properties, and five (5) of the portfolios span multiple states, with the majority of units located in the Twin Cities Metro Area.

*The data gathered from landlords likely reflects the practices of more responsible landlords, as the landlords willing to be interviewed and surveyed were generally those interested in best practices.*

## Part One: The Tenant Screening and Selection Process

When a prospective tenant applies for rental housing, the landlord typically uses the following screening criteria to evaluate the tenant-applicant: (1) income level, (2) rental history, (3) credit history, and (4) criminal history. Most professional landlords hire tenant screening companies to perform background checks and generate a report on each tenant-applicant.<sup>2</sup> The typical rental application fee is approximately \$40.00 per adult in the household.<sup>3</sup>

This report discusses income level, rental history, credit history, and criminal history as the typical *screening criteria* landlords use to evaluate prospective tenants. With respect to each of these criteria, there is a standard against which the landlord weighs the corresponding data collected from the applicant. We will refer to the standards for the above criteria collectively as *screening standards*.

*For example, the income level screening criterion is generally used to establish whether the tenant-applicant has income sufficient to assure the landlord the tenant-applicant will be able to afford and pay the rent, while the standard associated with the income level screening criterion may be a requirement that the tenant-applicant have an income that is at least three (3) times rent.*

Landlords share the desire to rent their properties to tenants who will pay rent on time and abide by the terms of the lease, and otherwise be good tenants. However, landlords exhibit considerable variation in how they identify such tenants, including the screening criteria and standards they use to evaluate prospective tenants. Landlords operating larger rental properties or portfolios, namely property management companies, have the luxury of company guidance and may use historical data based upon experience to guide their assessments. Many landlords operating smaller rental properties or portfolios begin leasing properties without the benefit of such guidance and data, and often seek advice on what screening standards to use.

There is no requirement of landlord training, and many part-time landlords operate without the benefit of training or guidance from experts or peers. In the absence of relevant training or a reliable resource for learning best practices, some landlords seek guidance from third parties, such as the tenant screening companies they use for background checks or from trade groups like the Minnesota Multi Housing Association.<sup>4</sup> Many landlords start with basic or minimal screening standards and, over time and through experience, refine, tighten, relax, or modify those standards. In short, there are a multitude of factors that can influence screening standards, which drives significant variation among landlords.

*The rental housing market can affect screening standards significantly. For example, when the recession hit in 2008, a number of landlords relaxed their screening standards in an effort to keep their buildings fully occupied.*

As discussed further below, tenant screening and selection policies vary widely, particularly in how they evaluate tenant-applicants in light of the screening criteria and standards they use. The extent to which landlords exercise discretion in screening tenants also varies widely. While some landlords believe exceptions to their screening standards are warranted in some circumstances, others fear exercising discretion exposes them to claims that they are treating tenants differently. Until the recent introduction of disparate impact analysis into the tenant screening and selection conversation, “treating everyone the same” was a longstanding approach to fair housing compliance within

the industry. Although treating all prospective tenants the same may seem fair, this approach often overlooks some of the finer points of a tenant-applicant's background. Similarly, although discretion may seem reasonable, it can lead to discriminatory treatment, if not monitored. A more intentional and informed approach to evaluation of tenant-applicants allows for better balance between strict application of screening standards and allowance for discretion in the tenant screening and selection process.

Landlords also vary in their willingness to consider alternative means of demonstrating tenant fitness to rent. Some landlords accept personal references from previous landlords, for example, while others encourage tenant-applicants to submit a supplemental rent resume. Still others will consider statements from employers, case workers, health care professionals, and others who are familiar with the prospective tenant.<sup>5</sup>

One of the most striking aspects of the tenant screening and selection process is how little the prospective tenants know about the process. For example, few tenant-applicants are aware of their legal rights. One woman was denied an apartment because of a criminal matter that did not apply to her, and she had no idea she had the right to have the tenant screening report corrected. Two-thirds (2/3) of the tenants surveyed reported a lack of sufficient information about the tenant application process—this lack of information presents an even greater challenge for non-English speakers. One-third (1/3) of those surveyed feel they experienced discrimination in the application process, indicating they experienced rude behavior, use of racially coded language, or negative comments about children or family size during the process. In some cases, the landlord did not even show up for the apartment showing appointment.

One-third (1/3) of those surveyed never learned why their rental application was denied. Tenants generally perceived landlords operating smaller rental properties or portfolios as more likely to be flexible, while being less likely to be transparent about the application process or reasons for denial. With the application process becoming more and more automated, particularly for larger property management companies, the opportunity to speak to someone about an application is becoming increasingly rare. Among tenants surveyed, the average tenant had to apply and pay the application fee for four (4) apartments before being accepted for an apartment, and some tenants reported submitting as many as ten (10) applications before being accepted.

## *What does the tenant screening and selection process look like in the midst of the COVID-19 pandemic?*

**Landlords report little movement in the rental market, as tenants observe stay-in-place orders and social distancing guidelines. Over time, however, the usual turnover in the rental market will start to re-emerge, and with it will come many prospective tenants with reduced income, unpaid debts, and lower credit scores due to COVID-19 related loss of income. Will this affect how landlords apply their screening standards? How will tenant-applicants be evaluated for circumstances resulting from no fault of their own (i.e. the COVID-19 pandemic and its consequences)? The current environment and questions such as these highlight the need to consider individual circumstances in applying screening standards.**

## Tenant Screening Criteria and Standards: Landlord, Tenant, and Researcher Perspectives

As stated above, landlords typically consider the following criteria when screening and selecting tenants: (1) income level, (2) rental history, (3) credit history, and (4) criminal history. In considering these criteria, landlords establish standards to guide their screening and selection decisions. These primary screening criteria, along with their related screening standards, are discussed below.

### INCOME LEVEL

It is common for landlords to require tenant-applicants to demonstrate income sufficient to pay rent. Typically, landlords set a minimum income that is a multiple of rent; for example, income equal to three (3) times rent, or two point five (2.5) times rent. In some cases, the minimum income requirement functions as a threshold requirement, with some landlords telling prospective tenants it is not worth applying if they do not meet the minimum income requirement. Further, if a prospective tenant does not meet the minimum income requirement, the landlord does not need to conduct a background check.<sup>6</sup>

For market rate rental housing, it is common to require a tenant-applicant to demonstrate a reliable source of gross monthly income equivalent to at least three (3) times rent. This standard is consistent with the most common definition of cost-burdened households, which is those households paying more than thirty percent (30%) of their gross monthly income toward housing costs. For publicly assisted affordable rental housing, the most common income level requirement establishes a lower threshold, requiring a monthly income equivalent to two (2) or two point five (2.5) times the portion of rent to be paid by the prospective tenant.<sup>7</sup>

Common sense tells a landlord the more income a tenant has, the less likely the tenant is to default on payment of rent.<sup>8</sup> But, how does the landlord know how much the tenant needs to live? A minimum income requirement of three (3) times rent translates to paying thirty-three percent (33%) of income for rent, and a minimum income requirement of two point five (2.5) times rent translates into paying forty percent (40%) of income for rent. For publicly funded housing programs, the traditional test of rent affordability is for a tenant to pay no more than thirty percent (30%) of income for rent and utilities, but this standard has eroded over the years. As deep subsidy

federal programs like Section 8 have been replaced with shallower subsidy programs such as the Low Income Housing Tax Credit, more and more tenants pay well in excess of thirty percent (30%) of their income for rent. Previously, federal Section 8 Housing Choice Voucher program participants could not rent a unit with their voucher if they were required to pay more than thirty percent (30%) of their income for rent. Now, however, the program routinely allows households to pay up to forty percent (40%) of their income for rent.<sup>9</sup>

The general shortage of affordable rental housing across the country has contributed to an increasing number of tenants being considered “rent-burdened” or, in other words, paying more than thirty percent (30%) of income for rent and utilities. There is little doubt that being rent-burdened leads to a number of stresses on a household budget, but if a large portion of the tenant population is already paying more than thirty percent (30%) of income for rent, a minimum income requirement of three (3) times rent may be unrealistic and is likely unnecessary. In fact, recent data from the United States Department of Housing and Urban Development (“HUD”) suggests that approximately thirty-seven percent (37%) of metro area tenant households would fall short of an income requirement of three (3) times rent.<sup>10</sup> According to Minnesota Housing Partnership (MHP), among Hennepin County tenants with incomes below sixty percent (60%) of the area median income (AMI), seventy-eight percent (78%) pay more than thirty percent (30%) of their income for rent and would be barred by a three (3) times rent income requirement.<sup>11</sup>

A consortium of Twin Cities Metro Area governmental jurisdictions issued an extensive Analysis of Impediments to Fair Housing in 2014, as required by federal law, along with an update in 2017. Overly strict minimum income requirements were identified as barriers to fair housing in both reports, having



been mentioned over twenty (20) times in the public engagement process. The reports noted that over fifty percent (50%) of Minneapolis tenants pay more than thirty percent (30%) of their income for housing, meaning a three (3) times rent income requirement would bar over one-half (1/2) of Minneapolis renters from housing.<sup>12</sup> This raises concerns about the practical implications of a minimum income requirement of three (3) times rent—a standard that does not reflect the current reality of low income households.

Lower income households who have to pay larger shares of their income for rent predominate in naturally occurring affordable housing, otherwise referred to in the industry as Class C buildings. A recently published survey of property owners published by the Minnesota Multi Housing Association—the statewide, nonprofit trade organization whose membership is predominantly large and professionally managed rental properties—compared rent collections in Class A, B, and C buildings in October 2019 and October 2020.<sup>13</sup> For this purpose, the pre-COVID-19, October 2019 numbers are instructive. First, the percentage of tenants in Class C buildings who paid their rent by the sixth (6th) of the month was ninety-four percent (94%). Second, there was little difference in rent payment rates between the three (3) types of buildings. Class A building tenants paid rent at a rate of ninety-eight percent (98%), Class B building tenants paid rent at a rate of ninety-six percent (96%), and Class C building tenants paid rent at a rate of ninety-four percent (94%).

Further, scholarly research raises serious questions about the validity of using minimum income requirements to make any assessments in the tenant screening context.<sup>14</sup> Professor J. David Hulchanski of Toronto University makes several points which are relevant to the discussion in this report. First, minimum income requirements for housing have been used for multiple purposes, and the use of a minimum income requirement as a standard for designing public assistance programs is very different from using such a requirement for determining the likelihood a prospective tenant will pay rent. Second, the notion that a tenant should have an income equal to three (3) times rent originated as a speculation by a German statistician 150 years ago, based on an ad hoc observation. To Professor Hulchanski's knowledge, this standard has never been empirically tested to see if it actually measures the likelihood a tenant will pay rent. Third, the other fatal flaw with a minimum income requirement is that it fails to accurately assess the income side of the equation,

ignoring the informal income supports and non-cash assistance many low income families rely upon.

So, what do Twin Cities Metro Area landlords require? HousingLink—an affordable housing information clearinghouse whose landlord audience is primarily composed of smaller self-managed rental property owners—captures data on private market rental unit listings (not subsidized housing), including minimum income requirements used for those listings. Data collected in 2019, over the previous six (6) quarters for 1,473 vacancy listings, showed an average minimum income requirement of two point two (2.2) times rent.<sup>15</sup> Fifty-four percent (54%) of the units required two (2) times rent, whereas only twenty-five percent (25%) of the units required three (3) times rent. This suggests many private market landlords are moving away from a minimum income requirement of three (3) times rent.

A recently adopted Minneapolis ordinance addresses the income level issue in a different way. The ordinance provides that if a landlord uses a minimum income requirement of three (3) times rent, an exception must be allowed when a tenant-applicant can demonstrate a history of successful rent payment with an income of less than three (3) times rent.<sup>16</sup>

With any minimum income requirement comes questions related to what counts toward income. This issue arises frequently with tenant-applicants who utilize rent subsidies, such as a Section 8 Housing Choice Voucher. Many landlords either exclude the voucher subsidy from income or apply the tenant-applicant's income toward the full contract rent amount, rather than toward the portion of the rent the tenant-applicant would be responsible for paying. In some cases, this may serve as an indirect way for a landlord to refuse to participate in a program like Section 8.<sup>17</sup> Several jurisdictions around the country have addressed this issue by ensuring the subsidy is included in the tenant-applicant's income calculation.<sup>18</sup>

## RENTAL HISTORY

A nearly universal feature of any tenant screening and selection process is consideration of a tenant-applicant's rental history as a factor in determining their fitness to rent. This is typically reflected in the tenant screening company's background report, which generally includes any history of evictions and relevant debts, such as money owed to previous landlords or utility companies. In addition, the tenant screening company or landlord

may seek to obtain a reference from a previous landlord. Such references are becoming more difficult to obtain, with more landlords declining to provide any information other than that the tenant-applicant “is free to reapply.”

Rental history is often described by landlords using two (2) basic metrics: (1) number of years since any prior evictions; and (2) number of years of positive rental history. An “eviction” means an eviction judgment by a court. Another term for eviction is “unlawful detainer” (commonly referred to as a “UD”). “Positive rental history” ranges in meaning from any history of holding a lease and paying rent, to receiving neutral or better references from previous landlords, to such histories coupled with no late rent payments or other damages prior to the application during a specified “lookback” period.

Some landlords who operate large rental properties or portfolios reported they will consider a tenant-applicant with a prior eviction under certain circumstances; however, what those circumstances are and which tenant-applicants are afforded this consideration remains unclear. One landlord said its primary concern is confirming the tenant-applicant has resolved any debts associated with the prior eviction. Further, how far back landlords look for evictions varies widely. Among landlords of thirty (30) or fewer units, several reject any tenant-applicant with a prior eviction during the previous ten (10) years, and some reject any tenant-applicant who has ever had a prior eviction. A similar number of landlords operating small rental properties or portfolios have no clear standard for considering prior evictions in assessing a tenant-applicant’s fitness to rent. These landlords emphasized the importance of a tenant-applicant’s history of paying rent on time or evidence that the tenant-applicant has learned from prior mistakes.

A majority of the landlords interviewed use a numeric lookback period for prior evictions, commonly looking for two (2) to three (3) years of positive rental history, with no evictions during those two (2) to three (3) years. One nonprofit landlord gives tenant-applicants who have a prior eviction an opportunity to provide an explanation of mitigating circumstances that may include “verifiable documentation of landlord irresponsibility.” Many tenants expressed frustration with rental application denials based on prior evictions, particularly denials based on older evictions, which the tenants felt were no longer relevant in

light of changes they had made in their lives. Compounding this frustration is confusion over what constitutes an eviction, coupled with a common lack of tenant awareness of prior evictions.<sup>19</sup>

In five (5) of the tax credit property tenant screening and selection policies examined, evictions were not considered after two (2), three (3), or five (5) years since the eviction. One provider carved out an exception for more recent evictions where the circumstances leading to the eviction no longer existed, such as the tenant-applicant having since completed drug rehab. However, one (1) tax credit property denies tenant-applicants who have ever had an eviction filed against them. Among the market rate properties, the standards do not appear significantly different. On the more restrictive end of the spectrum, a tenant-applicant cannot have an eviction within the five (5) to six (6) years preceding the application, while on the more inclusive end of the spectrum, a tenant-applicant cannot have an eviction within the year preceding the rental application. Beyond simply indicating an eviction is grounds for denial, one (1) landlord considers only those evictions that are “recent,” another considers evictions within the preceding five (5) years, and another considers evictions occurring within the preceding year.

*Research discussed below regarding the continuing relevance of various kinds of criminal history have enabled landlords to refine lookback periods to judge criminal histories more fairly. Similar research on the relevance of prior evictions should be able to identify appropriate lookback periods for evictions as well. The research and analysis that served as the basis for the Success in Housing Report used resident data to compare criminal histories with tenant housing outcomes. Similarly, eviction histories should be compared with subsequent tenant housing outcomes. A group of private housing providers is contributing data in a subsequent phase of this research and such additional research and analysis is expected to shed light on this issue.*

In addition to prior evictions, landlords typically look for evidence of “positive rental history,” which is most often revealed through prior landlord references and housing-related debts, such as unpaid rent or utility charges. The minimum length of a positive rental history varies widely, even among tax credit rental properties. At the more restrictive end of the spectrum, five (5) properties require tenant-applicants to provide five (5) years of positive rental history. At the more inclusive end of the spectrum, one (1) tax credit property accepts tenant-applicants who have experienced long term homelessness and who are eligible for select units, even if they have a poor rental history. Excluding those units for people who have experienced long-term homelessness, one property requires only four (4) to six (6) months of positive rental history. Most of the properties that require a specific length of rental history require between one (1) to three (3) years, while seven (7) properties do not specify a timeframe, and another eleven (11) properties may accept tenant-applicants who have no rental history. Among the market rate properties, positive rental histories are also routinely required. Two (2) to three (3) years of positive rental history is common, though it may be longer if there is an eviction in the tenant-applicant’s history. One (1) landlord only requires six (6) months of positive history within the past eighteen (18) months.

How landlords and tenant screening companies viewed, and the extent to which they considered, rental history apart from evictions was frustrating, confusing, and the source of trauma and anxiety for prospective tenants, particularly when a prior landlord gave them a bad rental reference. Landlords and tenant screening companies tend to take rental references from prior landlords at face value. However, the prospective tenants who received bad references often felt the bad reference was due to something other than their rental history, such as their requests for repairs and assertion of other rights. Landlords appear to be hesitant to rent to prospective tenants with bad references, even when the basis for the bad reference can be disputed or even proved false. For example, some landlords refuse to accept receipts for rent paid to disprove a reference indicating a prospective tenant has history of non-payment of rent.

*Further research on how far back a prior eviction or instance of negative rental history remains relevant would be very useful.*

## CREDIT HISTORY

The background reports provided to landlords by tenant screening companies typically draw upon one (1) or more of the credit reports generated by the three (3) major national credit reporting companies, which are TransUnion, Equifax, and Experian. Credit reports focus on consumer payment histories on credit-related products, including home mortgages, credit cards, and other debts often paid over time, such as medical bills. Originally developed for use for bank loans and home mortgages, credit reports and credit scores have come to be used for a number of other purposes as well, including by landlords seeking to inform their tenant screening and selection decisions. These reports usually include both a detailed record of a consumer’s credit history, as well as a credit score determined by the FICO system, or a similar model that combines multiple weighted factors into an algorithm. Consumer creditworthiness is often summarized in what is called a Beacon score, which ranges from a low of 350 to a high of 850.

A number of studies have raised concerns about and identified issues with FICO and other credit scoring systems.<sup>20</sup> For example, households of color tend to produce consistently lower scores under these reporting systems, and certain groups seem to be particularly disadvantaged, including those who have made little use of traditional financial credit products.<sup>21</sup> Further, credit scoring derives from a long national history of housing discrimination and the resulting dual credit market.<sup>22</sup> Many factors used in determining credit scores do not assess the risk of the borrower as much as they assess the riskiness of the environment in which the consumer is seeking credit or the riskiness of the type of financial products the consumer uses.<sup>23</sup> Credit scores can also be disproportionately affected by minor debts.

*For purposes of tenant screening and selection, basing decisions on a “score” is particularly problematic because the scores almost never reflect a tenant-applicant’s history of paying rent.<sup>24</sup> According to the website Nerdwallet.com, a FICO spokesman has estimated that less than 1% of credit files contain rental payment entries.<sup>25</sup>*

Staff at Community Action of Ramsey and Washington counties regularly review client credit reports in their efforts to assist clients in stabilizing their housing and finances. These agencies report that the most common debts on these reports are for cell phones, unreturned cable television equipment, utility bills, medical bills, bail bonds (for family members), and student loans. Unpaid bills of \$500 or less can be enough to negatively impact a credit score.<sup>26</sup>

*The COVID-19 pandemic will likely exacerbate this reality. The widespread income losses due to no fault of prospective tenants may drive an increase in unpaid or late paid bills and therefore, lower credit scores for many households, making reliance on such scores for rental applications even less fair.*

Contrary to what credit scores purportedly show, there is good reason to believe many tenant-applicants with low credit scores will reliably pay rent. Many tenants facing medical bills or consumer bills defer payment on these bills in order to pay their rent. As the common maxim goes, this is because “the rent eats first.” Several small studies confirm this practice.

A 2017 TransUnion study followed 12,000 tenants for one (1) year as they reported their rent payments. “Scores rose 16% on average within 6 months after rent reporting began, according to the study. *The largest increase was for scores below 620, which is considered bad debt*” (emphasis added).<sup>27</sup> A small pilot study by Experian in 2017 found that seventy-six percent (76%) of tenants in New York City saw significant credit score increases when rent payments were included.<sup>28</sup>

The problem is that absent small-scale studies like these, the current credit reporting system provides little incentive for landlords to report rent payment by tenants. This problem could be addressed if tenant-applicants were able to include their rent payment histories in their rental applications. However, to be beneficial, a tenant’s rent payment history would have to be presented

in a way that could be verified by previous landlords, so the prospective landlord could be comfortable trusting the information.

Despite the inherent and as-applied flaws with credit scores, they continue to be widely used by many landlords. The tenants interviewed reported that the most common reason for denial of a rental application, as expressed by landlords, is credit history. As one tenant stated, “[i]t is the first thing they ask when you apply. Right on the top of the application. Credit score. I don’t know my credit score. I always pay my rent, but they don’t care.”

*A low credit score or lack of credit history is particularly problematic for prospective tenants who cannot access interest-bearing financing for religious reasons. Of the eighteen (18) households who specifically identified as Somali and were denied housing, credit was cited as the reason for denial for fifteen (15) of the households. Of the families who identified as Somali and were rejected for a low credit score, eighty percent (80%) of the families indicated they have a good rental history and have never had a late rent payment.*

Prospective tenants who were interviewed about their credit scores provided a variety of circumstances that led to the low credit scores, including medical debt, job loss, and student loans. It was common for these tenants to assume they had bad credit and low credit scores, without actually knowing their credit scores. When prospective tenants were rejected because of low credit scores, they rarely requested their credit report, assuming the information used to reject their rental application was accurate.

Interviews with landlords indicated how strikingly divided they are over the relevance of credit scores. Almost one-third (1/3) of landlords said a prospective tenant’s credit score was among the most important factor in their tenant screening and selection process.

In contrast, almost one-half (1/2) of landlords said they do not consider credit score because of the historic bias and discrimination in the United States by lending and wealth building systems, or because of the unreliability of a credit score in predicting on-time rent payments.

Landlords operating market rate housing were more likely to prioritize credit score as a screening criterion, and some of these landlords do not verify income for market rate rental tenant-applicants who meet a certain threshold, such as a credit score of 750. For those landlords who have both market rate and subsidized affordable housing in their portfolio, this approach seems to inform the tenant screening and selection process for their subsidized affordable properties. Landlords who said an attorney or tenant screening company influenced their practices appeared more likely to place a high priority on credit score, perhaps because of the appearance of objectivity associated with a numerical score generated by an algorithm.

While credit scores themselves are poor indicators of tenant fitness to rent, some particular debts listed on credit reports can be relevant for tenant screening and selection purposes. Several landlords were explicit in treating housing-related debt differently than medical, bankruptcy, and other debts that do not arise from prior rental history or homeownership. Most landlords who discussed this treatment of a prospective tenant's debt stated they make exceptions for tenant-applicants with "non-housing debt." Even among landlords who did not rely on credit scores, a majority of those interviewed reject tenant-applicants who owe utilities or rent related to a prior tenancy, unless the tenant-applicant can demonstrate that a payment plan is in place to resolve the unpaid amounts.

### **CRIMINAL HISTORY**

Criminal history is about one-half (1/2) as likely as rental history to be identified by landlords as the most important tenant screening and selection criterion. Landlords consider a variety of criminal offenses and categories of criminal offenses in screening and selecting tenants, and many have developed detailed screening standards for each type of criminal offense. These standards often emphasize crimes of violence or threats of violence against people, crimes against property, crimes involving drug manufacturing or distribution, crimes involving fraud or deception, crimes involving sex, and crimes impacting public order. Some

landlords, in addition to or as an alternative to the above standards, have established blanket bans or lookback periods for felony and misdemeanor classes of criminal convictions.

For instance, one large private landlord operating market rate, affordable, and supportive housing has established a standard with possible results of "pass, fail, or conditional" for each type of criminal conviction, both felony and misdemeanor. This standard includes lookback periods for "fail" results and the details associated with "conditional" results. While the format of the tenant screening and selection processes used across property types is similar, the standards are often more relaxed for subsidized and supportive properties than for market rate properties, which is often driven by the requirements of public funding sources.

*Some landlords have rigid standards for certain types of crimes, while others appear more receptive to a tenant-applicant's presentation of individual circumstances, including mitigating circumstances, and evidence of learning from past mistakes.*

Standards related to the use of criminal history in tenant screening and selection processes in the United States have been significantly impacted by the 2016 publication by HUD of its "Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions" ("HUD Guidance").<sup>29</sup> In light of disproportionate exposure of Black and Hispanic individuals to the United States criminal justice system, the HUD Guidance prohibits the use of prior arrests in tenant screening and selection processes. Further, the HUD Guidance clarifies that tenant screening and selection policies and practices "must be tailored to serve the housing provider's substantial, legitimate, nondiscriminatory interest and take into consideration such factors as the type of the crime and the length of the time since conviction."

Even with well-tailored tenant screening and selection policies, the HUD Guidance explains how "a housing provider will still bear the burden of proving that

any discriminatory effect caused by such policy or practice is justified.” The HUD Guidance further states that “selective use of criminal history as a pretext for unequal treatment of individuals based on race, national origin, or other protected characteristics violates the Fair Housing Act.” The HUD Guidance advises that criminal screening policies which fail to take into account when prior convictions occurred, what conduct occurred, and what the person has done since the offense are particularly vulnerable to legal challenge.

*Recent developments through the courts and from HUD have created some confusion about the current standard for disparate impact analysis under the Federal Fair Housing Act. A new rule was adopted by HUD in October 2020, but the rule is currently subject to an injunction. The Biden administration issued a memorandum indicating an increased interest in redressing discrimination in the housing system including a commitment to examining the rules related to disparate impact. For the time being, the standard for disparate impact is the rule established by HUD in 2013.<sup>30</sup>*

Every professional landlord interviewed cited the HUD Guidance as a significant influence on their tenant screening and selection practices, and most indicated they had completed a thorough review and revamp of their tenant screening and selection policies, informed by the HUD Guidance, often in consultation with an attorney specializing in rental housing. One (1) nonprofit landlord interviewed noted their organization is deliberate in waiting until the final step of their tenant screening process to examine criminal history in an effort to minimize the impact of their own bias, consistent with specific advice provided in the HUD Guidance. Conversely, none of the landlords of properties with thirty (30) or fewer units said they had considered or revised their policies and practices in response to the HUD Guidance, and most had never even heard of the HUD Guidance.

Information gathered from tenants confirms that the kind of carefully tailored approach the HUD Guidance calls for is not uniform throughout the rental housing industry. Highlighting the arbitrary nature of criminal history tenant screening practices, forty percent (40%) of rejections based on criminal history, as reported by tenants, were for offenses more than ten (10) years old. There also seems to be a disconnect between the stated criminal history tenant screening standards and how those standards are applied in practice. One tenant stated, “[d]o what you say. If you say you are only going back 7 years for criminal history, only go back 7 years. Mine is 23 years old and I was rejected.”

Rejections based on criminal history can present significant and unique barriers for multigenerational households and can prevent people who are leaving incarceration from creating and maintaining the social support systems they need to be successful. For example, a tenant living with his adult son who had a seven (7) year-old criminal conviction was rejected from multiple apartments despite sufficient income and a good rental history. This tenant stated, “[t]hat just hit me so hard because my son has been doing so good for so long and has a full-time job. I can’t receive the medical care I need if I can’t live here.” There are also a number of specific requirements and considerations related to the range of programs that subsidize affordable rental housing. The National Housing Law Project created a comprehensive guide for advocates to understand the legal rights of people who have exited incarceration and are seeking affordable homes that rely on federal subsidies.<sup>31</sup>

Although prospective tenants can seek to have their criminal records expunged, the results of these requests are mixed. Only a small number of prospective tenants who pursued expungement were successful in having their criminal records expunged. Of these tenants, criminal history was still cited as a reason for rejection in about one-half (1/2) the cases. While criminal history was not the most common reason for rejection, it was the reason for rejection that appeared most difficult for prospective tenants to overcome.

Since they are subject to HUD requirements, many landlords operating federally subsidized properties establish standards that prohibit admission of households that contain members with certain events in their criminal histories. The following is a list of household members who are often excluded based upon such standards:

- Those who have been evicted from federally assisted housing for drug-related activity
- Those who are currently engaged in illegal use of drugs or for which the landlord has reasonable cause to believe their illegal use of a drug may interfere with the health, safety, and right to peaceful enjoyment of the property by other residents
- Those who are subject to state sex offender lifetime registration requirements
- Those whose behavior, from abuse or a pattern of abuse of alcohol, may interfere with the health, safety, and right to peaceful enjoyment of the property by other residents

*Nationally and locally, the criminal history screening criterion has received by far the most attention to date and has been the subject of the most study. As a result, there is now a wealth of information related to the connection, or lack thereof, between criminal history and the likelihood of a successful tenancy.*

Perhaps the most ambitious effort to study whether a link exists between criminal history and subsequent success as a tenant is a recent local study. Four (4) local nonprofit affordable housing providers—Aeon, CommonBond Communities, Project for Pride in Living, and Beacon Interfaith Housing Collaborative—pooled their tenant data to compare the criminal histories of individuals admitted to their housing with the subsequent housing outcomes of those tenants, which they classified as positive, negative, or neutral.<sup>32</sup> In January 2019, Wilder Research, a division of the Amherst H. Wilder Foundation, in partnership with these nonprofit affordable housing providers, published a report titled, “Success in Housing: How Much Does Criminal Background Matter?” (“Success

in Housing Report”).<sup>33</sup> The key findings of the Success in Housing Report include the following:

- Eleven (11) of the fifteen (15) categories of criminal offenses examined in the research had no significant impact on housing outcomes (including marijuana possession, prostitution, and alcohol offenses)
- Some more serious criminal offenses, such as major drug offenses, fraud, assault, and property offenses, may increase the likelihood of a negative housing outcome
- With the passage of time, the connection between criminal offenses and housing outcomes disappeared—for misdemeanors, the connection typically disappeared within two (2) years, while for felonies, the connection typically disappeared within five (5) years
- The likelihood of a negative housing outcome is reduced for households with multiple adults, with more than one (1) child, with older individuals in the household, and with more income or deeper rent subsidies

The nonprofit housing providers explained that they initiated this research in order to review and revise their own criminal history screening standards.<sup>34</sup>

*Many of the criminal offenses regularly cited in tenant screening and selection policies and used by landlords as a basis for rejecting tenant-applicants were found to be erroneous predictors of future negative housing outcomes. These criminal offenses include marijuana possession, alcohol-related offenses (such as driving while intoxicated), disorderly conduct, prostitution, and domestic violence.*

The Success in Housing Report quickly provoked a discussion in the Twin Cities Metro Area rental industry about the applicability of the findings beyond nonprofit affordable housing providers, specifically their extension to the private rental housing industry. Some private landlords rejected the report’s applicability to their own practices, with some arguing the rate of negative housing outcomes acceptable to the nonprofit housing providers

was much higher than the rate they could tolerate in their private businesses. It is difficult to assess this argument, in part because landlords have different opinions as to what outcomes should be measured and what constitutes success. While it is true that nonprofit housing providers are mission-driven, as opposed to profit-driven, even nonprofit housing providers must follow fundamental principles of sound property management. This is an issue that needs more analysis and discussion.

Private landlords have also argued that the conclusions set forth in the Success in Housing Report do not apply to them because, unlike nonprofit housing providers, they cannot reduce risk by offering supportive services to ensure the stability and success of their tenants. According to the Success in Housing Report:

- Approximately one-half (1/2) of households studied live in properties with “Level 3” services, which generally include staff on-site for several days per week, in-depth case management services, and programming in employment services, health and wellness, youth development, etc.
- About one-quarter (1/4) of households studied live in properties with “Level 2” services, which generally include staff on site for fewer days and more limited programming
- About fifteen percent (15%) of households studied live in properties with “Level 1” services, which generally include “lighter-touch” services and a focus on eviction prevention<sup>35</sup>

This study used a robust regression analysis to control for the existence of supportive services in order to make the data and conclusions set forth in the Success in Housing Report generally applicable throughout the rental housing industry.

Still, many private landlords are skeptical of the broader applicability of the findings in the Success in Housing Report. In an effort to overcome this skepticism, Family Housing Fund is working with several private housing providers that operate larger rental properties or portfolios to make their resident data available so that a separate, but similar study can be performed. This research will be focused on tenant screening and selection barriers and successful housing outcomes related to private rental housing. The results will be directly applicable to and serve the needs of the private housing providers.

### *At this point, several things are clear:*

**Arrests should not be considered in screening and selecting tenants.**

**Some crimes have no bearing on housing success and should not be considered in screening and selecting tenants.**

**Even if we disagree about the appropriate lookback periods for some crimes, it is clear that most crimes have a diminishing relevance to future housing success over time, and therefore, reasonable lookback periods must be established.**

**Individual or mitigating circumstances must be considered in screening and selecting tenants.**

The Minneapolis “Renters Protection Ordinance,” adopted in September 2019 and effective in 2020, addresses criminal history screening as well as other screening practices.<sup>36</sup> The ordinance bars certain crime-related events from consideration by landlords, including arrests, diversions or deferrals, and expunged convictions. In addition, misdemeanor lookback periods are limited to three (3) years and felony lookback periods are limited to seven (7) years. The ordinance states that landlords may look back ten (10) years for a number of specific crimes or may consider such crimes a permanent bar.<sup>37</sup> The City of Saint Paul “S.A.F.E. Housing Tenant Protections,” adopted in July 2020 and effective March 2021, create similar limitations on the tenant screening process.<sup>38</sup>

A number of cities around the country, along with the State of Maine, have enacted ordinances that regulate screening and selection of tenants using criminal history criteria, including Washington D.C., Detroit (Michigan), Seattle (Washington), Portland (Oregon), San Francisco and Richmond (California),



Newark (New Jersey), and Urbana, Champaign, and Chicago (Illinois).<sup>39</sup> The most common features of these ordinances are to “ban the box,” requiring that criminal history screening be the final step in the screening process, limiting the time allowed for consideration of criminal convictions, and allowing tenant-applicants to present individual, extenuating or mitigating circumstances. Seattle’s ordinance includes a provision precluding landlords from inquiring about a tenant-

applicant’s criminal history or from taking adverse action against a tenant-applicant because of criminal history. Landlords have challenged this provision in court, asserting it violates their free speech and substantive due process rights.<sup>40</sup> Texas has enacted a statute that protects landlords from liability for accepting a tenant with a criminal history, though the statute still allows a claim for negligence.<sup>41</sup>

*Among landlords interviewed as part of this research, a tenant-applicant’s rental history was cited most often as the most important criterion, followed by criminal history, income level, and finally, credit history. Tenants have a different perception of the relative impact of each of these criteria on acceptance, or denial, of their rental housing applications. Tenants cite income level and credit history as the most common reasons they are rejected. A likely explanation for this disconnect is that minimum income requirements and credit scores become a form of preliminary screening before a landlord engages in the more time-consuming and expensive process of obtaining a tenant screening report and prior landlord references.*

## Regulatory Framework of Tenant Screening and Selection

There is no single source of regulation of tenant screening and selection processes. Rather, both tenants and landlords face a complicated system of federal, state, and local law that regulates some, but not all, aspects of the tenant screening and selection process. There are some notable gaps in regulation of such processes, which leads to misinformation, misunderstanding, confusion, and frustration.

### FEDERAL REGULATION

Because the background reports landlords obtain and use are considered “credit reports” under the Fair Credit Reporting Act (“FCRA”), landlords must comply with the FCRA. This means, if a landlord denies a rental housing application, in part, based on information contained in a tenant applicant background report, it must advise the tenant applicant they can obtain a copy of the report for free from the screening company, and that they can also correct or supplement any incomplete or incorrect information in the report.<sup>42</sup>

Screening practices can also trigger the Fair Housing Act (“FHA”). If not developed with care and attention to applicable regulations, tenant screening and selection processes can lead to FHA violations, either due to intentional discrimination or, more often, as a consequence of the disparate impact of facially neutral screening standards.<sup>43</sup> Use of tenant screening and selection processes as a means of intentionally discriminating on the basis of race or disability are unambiguously prohibited by the FHA, though such intentional discrimination can be difficult to identify when screening standards are used as pretext for discrimination.<sup>44</sup> Further, tenant screening

and selection processes that are not intentionally discriminatory, but have a disparate impact on a protected class of individuals also violate the FHA.<sup>45</sup>

The HUD Guidance regarding criminal records and the FHA applies the disparate impact analysis to screening prospective tenants using the criminal history criterion.<sup>46</sup> The HUD Guidance begins by noting that individuals of color, particularly African Americans, disproportionately have criminal records. Landlords can and should, understandably, screen prospective tenants for criminal history. However, under the FHA, landlords have an obligation to design and implement a tenant screening and selection process that has the least possible discriminatory effect, while still allowing them to select tenants who will comply with lease obligations and do not pose an undue safety threat. As the HUD Guidance notes, processes that are overly broad, such as processes that screen out tenant-applicants on the basis of arrests only or for very old or irrelevant criminal records, can violate the FHA.<sup>47</sup>

Although the HUD Guidance only discusses criminal history screening, the same legal rationale can be applied to other screening processes, specifically those screening processes that are not carefully tailored to accomplish their objectives, such as consideration of rental history, specifically prior evictions. National and local studies have found that women of color are disproportionately represented among defendants in eviction courts.<sup>48</sup> Further, a recent survey of first-time defendants in Hennepin County eviction court found that sixty-seven percent (67%) of these first-time defendants self-identified as African American. In these situations, a policy requiring no history of eviction, for example, may violate the FHA if a means exists to achieve a similar objective without having a disparate impact on a population protected under the FHA.

Another example of a screening process that may violate the FHA is the use of credit scores in screening prospective tenants. National research has identified disparate effects on households of color related to the determination of credit scores, finding that households of color tend to have lower credit scores.<sup>49</sup> There are indications that this pattern also exists locally. The Federal Reserve Bank of Minneapolis analyzed creditworthiness by certain Twin Cities Metro Area neighborhoods and Minnesota towns and found that seven (7) out of ten (10) tenant households in North Minneapolis had credit scores below 620, while in St. Cloud, four point five (4.5) out of ten (10) tenant households had credit scores below 620.<sup>50</sup>

An argument can be made that if a landlord relies on a minimum credit score that results in a disparate impact, they are obligated to use a less discriminatory means of predicting the likelihood of a prospective tenant paying rent, if such means is available. An alternative means of such screening might be reviewing past history of rent payment or nonpayment. Landlords have an obligation to carefully tailor their tenant screening and selection processes where application of the screening standard results in disparate impact.

Finally, along with intentional discrimination and disparate impact, tenant screening and selection processes can run afoul of the FHA in relation to prospective tenants with disabilities. Where a tenant-applicant with a disability seeks a reasonable accommodation from a landlord to allow the tenant-applicant to live in a rental unit, and the landlord refuses the accommodation, the FHA provides for a claim by the tenant-applicant.<sup>51</sup>

*Landlords of public housing, project-based Section 8 housing, Housing Choice Voucher program housing, and other HUD assisted housing are subject to certain federal statutory and regulatory requirements related to tenant screening and selection. Due to the sources of funding for these types of housing, landlords are required to be both more inclusive and more restrictive in their screening. For example, tax credit properties must accept Housing Choice Vouchers as a condition of funding, but they are restricted by a requirement that they screen for drug-related criminal records. Public funders have also created requirements and recommendations for screening and selection processes in this area. For example, Minnesota Housing has adopted a policy for tenant screening and selection processes of tax credit developments that it funds that encourages landlords to adopt inclusive screening standards and clarifies landlord responsibilities for providing information to tenant-applicants.<sup>52</sup>*

## STATE REGULATION

If a landlord charges an application fee and the tenant-applicant is rejected, Minnesota law requires the landlord to notify the tenant-applicant of the grounds for the denial.<sup>53</sup> Tenant screening and selection processes are also regulated by the Minnesota Human Rights Act, which prohibits discrimination.<sup>54</sup> Tenant screening and selection processes can be modified by local authorities, through local ordinances and policies governing everything from screening criteria and standards to compliance with “crime-free” property requirements.<sup>55</sup>

## LOCAL REGULATION

Minneapolis and Saint Paul have each adopted ordinances regulating tenant screening and selection processes.<sup>56</sup> Based upon a similar ordinance from Portland, Oregon, the Minneapolis ordinance provides landlords a choice of either doing an individualized assessment of a tenant-applicant or using “inclusive screening criteria.” Inclusive screening criteria in

the Minneapolis ordinance include criminal history screening lookback periods limited to a three (3) years for misdemeanors, seven (7) years for most felonies, and ten (10) years for a few of the most serious felonies. In addition, landlords cannot screen tenants based upon credit score or insufficient credit history, and eviction judgments are only relevant for three (3) years, while eviction settlements are only relevant for one (1) year. Further, if a landlord uses a minimum income requirement of three (3) times rent, the tenant-applicant must have an opportunity to prove an exception should be made if they can demonstrate a history of successful rent payment at a lower income to rent ratio. The Saint Paul ordinance largely tracks the requirements of the Minneapolis ordinance, but eliminates the option for a landlord to use more restrictive criteria through an individualized assessment, prohibits the use of eviction filings that did not result in a judgment against the tenant-applicant, and limits the minimum income requirement to two point five (2.5) times rent.

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## Third Party Involvement in the Tenant Screening Process

When landlords screen prospective tenants, they typically hire tenant screening companies to perform background checks.<sup>57</sup> These tenant screening companies provide the landlord with an individual screening report for the tenant-applicant, which usually includes publicly available information related to the tenant-applicant’s background. This background information typically includes eviction records, credit history, criminal history, and other information gleaned from reference checks with prior landlords, which can be included upon the landlord’s request. This information is obtained with the tenant-applicant’s consent, obtained as part of the rental application. In the Twin Cities Metro Area, four (4) companies dominate the tenant screening industry.<sup>58</sup>

Tenant screening companies generally portray themselves as simply providing objective information to landlords who can use the information, as applied to their tenant screening criteria and standards, to make their own tenant screening

decisions. However, the reality is more complicated. The consequences of involving tenant screening companies in the tenant screening and selection process can be seen throughout the rental housing industry.

## *When does a tenant screening company take over so much of the tenant screening process that it, rather than the landlord, makes the decision on the application?*

In a recent case, a court found that a tenant screening company went too far. CoreLogic, one of the primary tenant screening companies in Connecticut, produced a background report disqualifying a tenant-applicant based on a prior arrest that did not result in a conviction. The court found that CoreLogic could be liable under the FHA on a disparate impact claim, even though it was not the party who directly denied the housing.<sup>59</sup>

### **BACKGROUND REPORTS CAN INCLUDE IRRELEVANT INFORMATION**

One (1) tenant screening company typically compiles a report for each tenant-applicant, with the report being an aggregation of both publicly available data and data the company gathers through reference calls to prior landlords. In cases where input from a prior landlord conflicts with or cannot be corroborated by public records, the company still includes the input of the prior landlord in the report, explaining that the company's job is to provide all gathered data to its clients. Unfortunately, history regarding domestic violence, expunged eviction records, and other matters are often erroneously included in background reports, even though such information is not relevant to any of the tenant screening criteria and should not be included in the background report.

### **INTEREST IN MARKETING NEW PRODUCTS**

In exchange for a fee, the tenant screening company takes on more of the tenant screening process for landlords. Companies often offer automated systems through which a landlord supplies basic tenant screening criteria and the company simply provides the landlord with a thumbs up or thumbs down outcome for a tenant-applicant. The tenant screening company's pitch is that this system eliminates the "guesswork" for landlords. However, this system effectively precludes application of judgment or discretion on the part of landlords, which is often necessary to accurately assess the individual circumstances of a particular tenant-applicant.

### **INFLUENCE ON TENANT SCREENING AND SELECTION PROCESSES**

Tenant screening companies can influence the tenant screening and selection processes of landlords in other ways, too. According to an estimate from one (1) local tenant screening company, as many as forty percent (40%) of its customers, primarily those who operate small rental properties or portfolios, or those who are new to the rental housing industry, seek its advice in deciding what tenant screening criteria and standards they should use. This company also indicated that it is careful not to tell landlords what screening criteria or standards to use, but it will tell them "where the market is going." In other words, they tell them what the prevailing tenant screening criteria and standards are within the market(s) in which the landlord is operating rental properties. This company will also tell a landlord when it is applying a screening criteria or standard that could be considered an "outlier."

### **MISTAKES IN IDENTIFYING TENANT-APPLICANTS**

Issues with proper identification of tenant-applicants have chronically plagued the tenant screening industry. There are likely to always be some issues with the tenant screening process, given the potential inaccuracy of information gathered from public records. But the problem is particularly acute and persistent when people with common names are involved, such as with the expanding immigrant populations in the region, where names are often similar or, in some cases, identical.<sup>60</sup> The inability

of tenant screening companies to accurately match public records with the proper person threatens the integrity of the tenant screening process and can lead to rejection of a tenant-applicant based on information that does not relate to them.<sup>61</sup> The Fair Credit Reporting Act (FCRA) requires that companies adopt procedures to ensure reasonable accuracy of their reports.<sup>62</sup> Some tenant screening companies address the common name problem by not including any records that are doubtful. Other companies rely on disclaimer language, advising the landlord they cannot be sure the reported items relate to the tenant-applicant. At least one screening company executive referred to this as “outsourcing” the company’s FCRA obligation. The concern with this “outsourcing” is that a busy landlord faced with multiple tenant-applications, with multiple tenant screening reports, may not take note of the fine print of a disclaimer.

*In 2018, the Federal Trade Commission (“FTC”) brought an enforcement action against the tenant screening company RealPage, based on its failure to use procedures to ensure maximum possible accuracy in their reports. RealPage’s software matched criminal records with tenant-applicants based upon minimal matches that could easily attribute criminal records to the wrong person.<sup>63</sup> The resulting settlement for three (3) million dollars, along with injunctive relief, has been the largest FTC case against a tenant screening company to date.<sup>64</sup>*

In cases involving a mix-up of data due to similar names, courts have generally found liability on the part of the tenant screening company where obvious internal inconsistencies were not first investigated, or more commonly, where the company failed to require sufficient data matches to avoid mismatching.<sup>65</sup> Data matches typically include first name, middle name, last name, social security number, and date of birth—the more matches required, the greater the likelihood the data is accurate.<sup>66</sup> Accurately matching reports to tenant-applicants is particularly challenging for new immigrant populations, because many immigrants are assigned

arbitrary and duplicate birthdates by immigration authorities and tenant-applicants might not have social security numbers. There are other forms of identification such as individual taxpayer identification numbers (“ITIN”), which are more commonly available, even amongst undocumented tenant-applicants.<sup>67</sup> Courts, state attorneys general, and the Consumer Financial Protection Bureau have all taken the position that stricter matching criteria and requirements are necessary in common name situations.<sup>68</sup>

It is beyond the scope of this report to determine whether local tenant screening companies are using sufficient criteria matches to ensure accurate reporting, particularly for immigrant populations and others with common names. In theory, if consumers obtained their background reports and identified inaccuracies, screening companies would be held accountable for their obligation to address reporting errors, such as errors related to common names. In practice, however, this rarely happens, largely because people do not know they can correct their reports, nor do they know how to do so. This is an issue that deserves greater attention moving forward. Housing Justice Center is launching a pilot project directed at identifying common name issues and other errors in tenant screening reports and how to utilize the protections of FCRA to resolve such errors.

### MANUFACTURED HOME PARKS

Manufactured home parks present a special case for examining tenant screening processes, primarily because there are unique implications for prospective tenants in this type of housing. These prospective tenants are both potential homeowners in manufactured home parks and potential sellers of manufactured homes in land-lease communities. In-park sales of manufactured homes are contingent on acceptance of the potential purchaser into the manufactured home community. Due to the high cost of moving a manufactured home and park-imposed limits on accepting manufactured homes, in-park sales are the only viable option for homeowners who want to sell their homes. Due to the unique nature of manufactured home communities, where tenants are both owners of individual homes and tenants of the underlying land, Minnesota law provides for additional processes and responsibilities for manufactured home park owners under Minnesota Statutes, Section 327C. The process does not, however, create any limitations or provide any guidance on the types of tenant screening criteria and standards that can be used for evaluating potential manufactured home park tenants.

## Specialized Models for Specialized Needs

### “HARD TO HOUSE” AND CONDITIONAL APPROVALS

A number of efforts are currently underway to help “hard to house” prospective tenants obtain housing. These efforts employ strategies directed at landlords who are willing to provide housing to individuals whose criminal, rental, or credit history, or income level would otherwise disqualify them from housing, and offer these landlords assurance of reimbursement for any losses, or assistance if challenges arise.<sup>69</sup>

Some counties in the Twin Cities Metro Area, such as Hennepin County and Ramsey County, work with housing “navigators” from nonprofit organizations to house clients who are homeless or otherwise encountering barriers to accessing housing. These navigators have some unique insights into the challenges their clients face, including:

- They have more success with landlords operating smaller rental properties or portfolios, with whom they “can at least have a conversation,” than with management companies that just tell them to fill out an application, which is often a dead end.<sup>70</sup>
- They report that their most useful tool in getting clients housed is provision of case management or similar supportive services, should a client get in trouble, but landlords are often reluctant to accept a tenant when supportive services expire after a temporary period.
- Landlords who work with these programs tend to be acutely aware of which programs and social workers they trust, to the point where some landlords are often more interested in the particular social worker than in the prospective tenant.

“Risk mitigation” funds are also a useful tool, though navigators have to be careful not to promise more than they can deliver, to both landlords and their clients. Some landlords are adept at identifying opportunities to capture as much rental revenue as possible through the county’s emergency assistance program. According to navigators, the biggest barriers for prospective tenants are the presence of evictions in their rental history and the prospective tenant’s criminal history. The groups that are hardest to get into housing are Native Americans and young mothers with multiple children, and Hennepin County staff expressed a particular frustration in getting their homeless clients into tax

credit properties, even where units are earmarked for Long Term Homeless (“LTH”).<sup>71</sup>

The “Beyond Backgrounds” program operated by HousingLink is a risk mitigation fund that provides landlords who accept prospective tenants with criminal, credit, or rental histories creating barriers with up to \$2,000 in insurance payments in the event of loss due to nonpayment of rent or other damages. Of the first 126 clients housed through this program, eighty-eight (88%) remained housed after one (1) year. Of the first seventy-two (72) landlords participating in this program, only two (2) have made claims on the risk fund, which suggests this is a promising model.<sup>72</sup>

*Where a tenant-applicant’s criminal, rental, or credit history, or income level does not meet a landlord’s screening standard, the landlord may still accept the application with conditions, such as payment of a larger damage deposit, a co-signer on the lease who will guarantee payment of rent, or another condition, to mitigate the additional risk.*

### HIGH-TOUCH MANAGEMENT MODELS

An interesting example of “low barrier” housing is a program run by Alliance Housing in Minneapolis. Alliance Housing has been building and managing rental properties in South Minneapolis since 1991, with an emphasis on housing people with very low incomes and those who need a second chance. They currently own and manage ninety-six (96) scattered site units,

including rooming houses, as well as two (2) tax credit developments. Alliance Housing is known for its low barrier screening standards, and in its scattered site properties, it accepts prospective tenants who have any kind of criminal history, except recent arson or a Level 3 sex offense. Even in its tax credit properties, the screening standards are much more inclusive than what is typical, with felonies acceptable if more than one (1) year old and evictions acceptable if there has been at least one (1) year of housing stability since the eviction. The housing outcomes associated with these more inclusive screening standards of low barrier housing are as follows:

- Of the ninety-six (96) scattered site units, five (5) evictions were filed in 2018
- Of the 397 units in the two (2) tax credit developments, one (1) eviction was filed in 2018
- Rental losses in 2018 were four percent (4%), which is significantly better than the norm in the industry

Part of what makes this program successful in housing individuals experiencing barriers to accessing housing is that Alliance Housing takes a very hands-on approach to management, developing relationships with tenants and providing training to landlords.<sup>73</sup>

## SUPPORTIVE HOUSING MODELS

Supportive housing programs typically provide deep rent subsidies, along with services to ensure prospective tenants with challenging rental histories succeed. In order to successfully compete for an award of Low Income Housing Tax Credits, many developers commit to setting aside a handful of units for tenants classified as LTH. With LTH comes a Section 8 subsidy and access to supportive services. When these subsidies and services are available, landlords will often relax their tenant screening standards for LTH units. As Minnesota Housing notes in its guidance on tenant screening and selection policies for the developments it funds, “[p]oor rental and credit history may be evidence of financial and personal stress that will be alleviated by living in affordable supportive housing. As a result, an applicant’s poor rental or credit history may not be a reliable indication of future behavior.”<sup>74</sup>

## Part Two: Recommendations for Improvement

There are a number of opportunities to make tenant screening and selection process work better for both tenants and landlords. In order to take advantage of these opportunities, all key stakeholders, including landlords, tenants, government agencies, screening companies, and other interested parties, must be engaged and involved in implementing change. Below are a number of actionable recommendations directed at taking advantage of these opportunities.

### GENERAL RECOMMENDATIONS

#### REQUIRE MORE TRANSPARENCY

More transparency in the rental application and tenant screening and selection processes should be required. As noted above, tenant screening and selection policies are not always available to the public, and if they are, the versions available to the public are often too general to be helpful to tenants in deciding whether to apply for a particular rental unit.

Most rental applications require an application fee to be submitted with the rental application. Many prospective tenants, especially those applying for affordable rental housing, have limited funds and must be mindful of how much they spend on rental applications. Understandably, this affects the number of applications prospective tenants can submit. If available, tenants can use tenant screening and selection policies to determine if they meet the landlords screening standards, allowing them to decide if it is worth their time and money to submit an application. However, if the publicly available policy is too general, the policy is not helpful to prospective tenants, and in some cases can do more harm than good. Further, a lack of specificity in the publicly available policy can result in a prospective tenant paying application fees for applications for rental units they are not likely to qualify for based upon the landlord's screening standards. For example, requiring a "positive rental history" or a "positive credit history" does not aid a tenant-applicant in deciding whether investing their time and money in applying for the rental unit is prudent or a good use of their available funds, because these terms are not defined.

In some cases, tenant screening and selection policies state that certain background characteristics "may" disqualify a tenant-applicant, implying that discretion will be exercised in making a determination. In order to ensure that prospective tenants are not spending time and money applying for rental units for which they are not qualified and cannot access, it is advisable to not only identify discretionary factors, but also describe how those discretionary factors will be used in screening tenant-applicants and making decisions on their applications. The more clarity a policy provides regarding discretionary and nondiscretionary screening standards, the better the process will work, for both tenants and landlords.

#### CONSIDER MITIGATING CIRCUMSTANCES EARLY

Mitigating circumstances should be considered at the beginning of the tenant screening and selection process. As previously noted, in order to minimize the risk of violating the FHA, the HUD Guidance requires a criminal background screening policy that allows for consideration of individualized or extenuating circumstances.<sup>75</sup> The rationale for this requirement, and for prohibiting policies that may have a disparate impact, applies not only to the criminal history criterion, but to the other screening criteria as well. Therefore, consideration of mitigating circumstances should be built into tenant screening and selection policies, generally.

In addition, the stage of the tenant screening and selection process at which mitigating circumstances are considered is significant and can make a difference. Some nonprofit housing providers consider this



## GENERAL RECOMMENDATIONS

information only if a tenant-applicant chooses to appeal the provider's denial of housing. However, prospective tenants whose focus is on finding housing rarely exercise their appeal rights. Consideration of individual circumstances is much more meaningful, and practical, as part of the initial rental application process and at the outset of the tenant screening and selection process, as opposed to consideration of such circumstances only after a denial and an appeal of the denial.<sup>76</sup> Inviting prospective tenants to disclose any mitigating circumstances in their initial rental applications is likely to be the only way that such circumstances will ever be taken into consideration in the tenant screening and selection process.

Sometimes landlords are advised to use only "objective" screening criteria, with no allowance for the exercise of discretion, on the grounds that the best way to avoid liability is "to treat everyone the same." However, as long as the status of a prospective tenant as a member of a protected class is not used as a basis for making a decision, consideration of mitigating circumstances does not constitute discrimination. As the HUD Guidance indicates, consideration of mitigating circumstances is not only consistent with the FHA, but it may also be required. If a housing provider spells out which screening criteria and standards are subject to discretion and possible exception, and under what circumstances that discretion will be exercised and when an exception will be granted, the landlord should be protected from any liability.

There is an increasing trend toward automated tenant screening processes, whereby a prospective tenant does not interact with a prospective landlord. In this type of screening process, the prospective tenant applies online and the system for making a decision on the suitability of a tenant is determined entirely through the use of algorithms. Unfortunately, these automated screening practices often provide little or no opportunity for a prospective tenant to present mitigating circumstances. As automation in this area continues to expand, building in an opportunity for tenants to present mitigating circumstances will be essential to ensuring that access to housing is not curtailed by a system that is designed to maximize efficiency.

## FACILITATE GOVERNMENT OVERSIGHT

Government oversight should be encouraged to ensure the tenant screening and selection process is fair. Public bodies interact with landlords and their tenant screening and selection processes in at least four (4) ways.

First, regulators, such as the Minnesota Department of Commerce, the Minnesota Attorney General, and the Minnesota Department of Human Rights, are or could be in a position to tune into and oversee the role of tenant screening companies as gate-keepers in the tenant screening and selection process. Currently, there is no effective oversight of tenant screening companies and there is no mechanism to ensure their reports are accurate. Most often, oversight of tenant screening companies falls to prospective tenants, who are expected to review and correct their reports when there are inaccuracies. This is an unreasonable and unrealistic expectation to place on prospective tenants, particularly when there are other means of oversight. In addition, as with any technology-oriented business, the reporting models of tenant screening companies are evolving rapidly and must be monitored by both regulators and advocates to protect the public.

Second, local housing authorities administering housing programs, such as public housing and housing choice vouchers, are subject to federal regulation of their screening practices, but they also have considerable discretion in shaping their tenant screening and selection policies.

Third, agencies that award funds for affordable housing development have a unique opportunity to shape tenant screening and selection processes. The Low-Income Housing Tax Credit program, for instance, allows allocators of tax credits to encourage or require fair and inclusive practices for the housing developments they fund, through their Qualified Allocation Plans and compliance handbooks. Minnesota Housing, for example, has a policy on tenant selection plans for the tax credit housing developments it funds, which requires landlords to adopt tenant selection plans and generally encourages the use of fair and inclusive standards.

## GENERAL RECOMMENDATIONS

Finally, local governments are in a position to influence tenant screening and selection processes in the private market, in both helpful and harmful ways. A growing number of cities across the country have adopted local ordinances regulating rental screening, including Minneapolis and Saint Paul.<sup>77</sup>

Further, many Twin Cities Metro Area cities employ crime-free ordinances that are, theoretically, designed to reduce crime in rental housing by imposing certain obligations on landlords. However, these ordinances often create their own barriers to accessing housing. The obligations imposed on landlords include the duty to screen prospective tenants and requiring landlords to participate in training, which is typically conducted by the local police department.<sup>78</sup> Cities should review crime-free ordinances to ensure they do not create barriers to accessing housing and adjust their training curriculum to ensure training on tenant screening and selection processes reflects best practices, such as those discussed in this report.

### ENCOURAGE STRATEGIES TO MITIGATE FINANCIAL RISK

Creative risk mitigation strategies should be encouraged. Inevitably, there will be prospective tenants in need of housing who fall short of meeting even the most inclusive screening standards. Strategies to reduce risk for landlords who are willing to take a chance on such prospective tenants must be implemented.

Such strategies are being utilized by landlords and third parties, such as nonprofit agencies and counties working to house their clients. A number of landlords will accept tenant-applicants who fall short of certain screening standards under certain conditions. For example, where the landlord's primary concern is financial, a co-signer with good credit or an increased deposit may be required. For tenant-applicants of limited means, however, these additional mitigation measures can still pose significant barriers. One interesting approach taken by a local landlord is to require payment of an extra deposit equal to half of one month's rent, and if the tenant pays rent on time for 6 months, the extra deposit is converted to a credit toward the rent due. This landlord reports that this approach works extremely well. More broadly, this approach suggests that where landlords impose extra requirements to mitigate potential financial risk, rolling

back those requirements once the tenant has proven themselves reliable could be beneficial.

Low barrier tenant screening and selection policies, like those utilized by the Alliance Housing, should be adapted and utilized by other landlords, if and when appropriate and feasible. Housing navigators continue to generate creative ideas that facilitate their clients in obtaining housing. Landlord risk mitigation funds, like that of Beyond Backgrounds, should continue to be explored, monitored, and expanded, as warranted.

The ability to create mitigation strategies can also be influenced by and incorporated in to local policy making. For example, the Minneapolis and St. Paul ordinances both limit the amount of security deposits that can be charged, but both also recognize circumstances where an extra deposit requirement puts a landlord in a position to take a chance on a prospective tenant with barriers to accessing housing in their history. Minneapolis limits this to circumstances where a prospective tenant is referred through a third party program, whereas St Paul permits it anytime a tenant-applicant cannot meet the lower barrier screening standards set out in the St Paul ordinance, which is broader in its applicability.<sup>79</sup>

### EMPOWER TENANTS

Tenants should be empowered to present the best possible application for rental housing, including presentation of mitigating circumstances, and to challenge denial of rental housing when such denial is based upon inaccurate information. Prospective tenants are generally unaware they have the right to be informed of the basis for the denial of a rental housing application. Further, prospective tenants often do not know their credit scores, that they can obtain their credit and tenant screening reports, or that they can correct those reports. Further, these tenants often do not know how to improve their credit histories or that they have an eviction on their record. Providing information, education, support, and guidance to prospective tenants regarding tenant screening and selection processes will lead to improved accountability and legal compliance by landlords and screening companies, which will lead to more effective and successful tenant applications for rental housing, benefiting both prospective tenants and landlords.

### FOCUS ON RELEVANT CRIMINAL HISTORY

Landlords should tailor their criminal history screening standards to focus only on relevant criminal history. The HUD Guidance and studies such as the Success in Housing Report provide solid direction to landlords on how to limit their criminal history screening to only those matters directly relevant to future tenancies. While debate continues on how long the lookback period should be for various crimes, indefinite bans for most crimes or bans for matters other than criminal convictions should no longer be permitted.

At least two (2) things need to happen. First, avenues need to be created for landlords operating smaller rental properties and portfolios to understand the HUD Guidance and its impact on tenant screening and selection. Once these avenues are created, these landlords can incorporate the guidance into their tenant screening and selection processes in ways similar to how landlords operating larger rental properties or portfolios have adjusted their screening criteria and standards. Second, once Family Housing Fund's private market study is completed, it should be shared with all landlords, as it is likely to provide solid data for further refinement of criminal history screening standards, as well as other screening standards.

### CONSIDER ONLY RELEVANT ASPECTS OF CREDIT HISTORY

Only relevant aspects of credit histories should be considered. While some aspects of credit histories are relevant, credit scores, per se, are not. For the reasons discussed above, denial of a rental application because the tenant-applicant's credit score does not meet a minimum score is inappropriate and short-sighted. Although some information in credit reports, such as rent owed or unpaid utility bills, may be relevant, credit scores themselves shed very little light on whether a prospective tenant is likely to pay rent on time.

### FURTHER INVESTIGATE IMPACT OF PRIOR RENTAL HISTORY

The impact of prior rental history, particularly evictions, and the appropriateness of considering rental history when screening tenants, should be investigated further. Despite what has been learned to date, there remains more to learn about when a prior eviction, or other negative rental history event, can predict the likelihood of a future rental issue. Common sense suggests the longer it has been since an eviction or other negative rental history event, the less likely it is that there will be a future rental issue, such as conduct resulting in an eviction. However, beyond the use of common sense, any determination of the lookback period appears to be mostly the result of guesswork. The private market study noted above should help answer this question.

It is worth noting that the most commonly used lookback period for evictions is in the two (2) to three (3) year range. Landlords using a lookback period of five (5) or six (6) years, or in some cases, even permanent bans for evictions, should consider bringing their policies in line with the more commonly used period of two (2) to three (3) years.

### INVESTIGATE APPROPRIATENESS OF INCOME LEVEL REQUIREMENTS

Whether income level requirements are appropriate should be investigated further, as income level requirements are often unnecessarily strict. Publicly assisted housing providers tend to require income equal to two (2) or two point five (2.5) times rent, if they set minimum income requirements at all. Private landlords often require income equal to three (3) times rent, though some require two point five (2.5) times rent. A three (3) times rent income requirement bars about forty percent (40%) of the existing tenant population currently paying rent on a lower income to rent ratio. Clearly, many rent-burdened tenants are paying the rent on time. A ratio of income equal to two point five (2.5) times rent might more accurately reflect how tenants manage in the current economic climate. The private market study should also shed light on this issue.

## Conclusion

So, when an apartment becomes available in the Twin Cities Metro Area, who gets to move in? And, perhaps more importantly, who doesn't? As it stands with the current tenant screening and selection system, the answer is, "it depends." What does it depend upon? It is typically based upon the landlord's consideration of the following tenant screening and selection criteria: (1) income level, (2) rental history, (3) credit history, and (4) criminal history. Beyond that, assessment of prospective tenants seems to be fairly landlord-specific and rather unpredictable. This lack of clarity, left unchecked, results in confusion, frustration, unpredictability, injustice, unfairness, and a system that does not really serve landlords or prospective tenants and their families, or the communities in which they operate and live.

*Now, imagine you are applying for housing in the Twin Cities Metro Area and you fully understand the landlord's tenant screening criteria and selection standards, as well as the screening and selection process. Further imagine the relief you feel when you are able to identify the housing for which you are eligible and the standards you need to meet to qualify for that housing. We have the information and data to make this a reality. So, what are we going to do with this information and data? As set forth in the above recommendations, there are a number of opportunities to craft a tenant screening and selection system that is not confusing, frustrating, or unpredictable, and is just, fair, and serves landlords and prospective tenants and their families, as well as the communities in which they operate and live.*

A screening and selection system that is responsive to both tenant needs, primarily their need for housing, and landlord interests, primarily their interest in identifying and selecting tenants who will pay rent on time and abide by the lease, can be created. The challenges, obstacles, and barriers presented by the current tenant screening and selection system can be overcome by development of an intentional, thoughtful, and innovative tenant screening and selection system, a system that is responsive to both tenant and landlord needs, while facilitating access to affordable, quality rental housing. To do this, landlords must be open to considering and tenants must be comfortable disclosing individual characteristics, extenuating and mitigating circumstances, and other factors related to their ability to be a "good" tenant.

**This is where our work begins.**

## END NOTES

- <sup>1</sup> In recent years, tax credit properties have often been awarded deeper subsidies for units designated for Long Term Homelessness (LTH). The screening standards for LTH units are usually more inclusive than for the other units in the development, reflecting an awareness of the barriers typically experienced by homeless tenant-applicants. This is discussed further elsewhere in this report.
- <sup>2</sup> For an overview of problems with the tenant screening process, including issues relating to tenant screening companies, see “Background Checks and Social Effects: Contemporary Residential Tenant Screening Problems in Washington State,” *Seattle Journal for Social Justice*, Fall/Winter 2010 (Dunn and Grabchuk).
- <sup>3</sup> Paying multiple application fees when applying for housing can get quite costly, especially for lower income households. The concept of a single application fee to cover multiple applications has been a goal of reformers, but has been difficult to accomplish to date.
- <sup>4</sup> Minnesota Multi Housing Association provides educational services to landlords who are members of the association, including training on legal considerations related to developing screening standards. A MMHA official indicated that one reason it does not promote a set of best practices in tenant screening and selection is due to a concern that it would appear to be an anti-competitive trade practice, akin to uniform rent setting among association members.
- <sup>5</sup> Some landlords mistakenly believe tenant-applicants must provide a social security number or driver’s license in order for the landlord to run a background check. This can create an arbitrary barrier for tenant-applicants with undocumented immigration status. In fact, multiple other forms of identification can be used for this purpose. “Myth Busting: Screening tenant-applicants without a social security number or driver’s license,” CoreLogic Safe Rent Program, 2014.
- <sup>6</sup> Notes from conversation with Rapid Re-Housing of Community Action Partnership of Ramsey and Washington Counties.
- <sup>7</sup> Minimum income is not an issue in U.S. Department of Housing and Urban Development’s income-based programs like public housing or Section 8 because rent is based upon 30% of income. But that is not the case, for example, with most tax credit units where tenants often have to pay more than 30% of their income, making income level at least somewhat relevant for those landlords.
- <sup>8</sup> Common sense is not always correct, however. After reviewing internal data, one local nonprofit housing provider reported it was surprised to learn that tenants within its buildings with relatively lower incomes had performed better on rent payments than those with higher incomes. The representative speculated that those with higher incomes may have been encountering problems with the “benefits cliff,” the tendency to lose eligibility for various public benefits as household income increases.
- <sup>9</sup> 24 C.F.R. Section 982.508 reads, in part, “[a]t the time the PHA [Public Housing Authority] approves a tenancy for initial occupancy of a dwelling unit by a family with tenant-based assistance under the program, and where the gross rent of the unit exceeds the applicable payment standard for the family, the family share must not exceed 40 percent of the family’s adjusted monthly income.”
- <sup>10</sup> U.S. Department of Housing and Urban Development, Comprehensive Housing Affordability Strategy data for 2013-2017 indicates that 33% of households are paying more than 30% of their income toward housing costs.
- <sup>11</sup> Minnesota Housing Partnership, “Market Watch Hennepin County: Trends in the unsubsidized multifamily housing market,” October 2019.
- <sup>12</sup> [Twin Cities Regional Analysis of Impediments to Fair Housing, 2014, updated in 2017](#)
- <sup>13</sup> “Renters financial stress emerges,” *Star Tribune*, October 14, 2010.
- <sup>14</sup> Declaration of J. David Hulchanski, Project Sentinel, et al v. 140-20th Avenue Associates, et al (Feb. 2000, on file with authors).
- <sup>15</sup> HousingLink data provided to Housing Justice Center, September 10, 2019.
- <sup>16</sup> Minneapolis City Code, Section 244.2030 (c)(3)( c).
- <sup>17</sup> The Minnesota Supreme Court upheld the Minneapolis ordinance prohibiting discrimination against Section 8 Housing Choice Voucher holders, although the case is subject to remand on a number of issues. Under the ordinance as written, using minimum income requirements in this way would probably not be legal under the Minneapolis ordinance.
- <sup>18</sup> See, for example, the Washington Source of Income law requiring that if a landlord using an income ratio as a condition of tenancy, it must use the tenant’s share of the rent rather than the entire rent. Wash. Rev. Code Sec. 59.18 (3).
- <sup>19</sup> The term “eviction” can be interpreted to mean a number of things, from court judgments for landlords in eviction cases, to settlements in eviction cases, to simply filing an eviction action. Only judgments for landlords establish fault on the part of the tenant. Although the second and third outcomes do not necessarily establish fault on the part of the tenant, they can still create barriers for tenants, depending on how landlords define “eviction.” An increasingly common means of ending a tenancy short of filing an eviction case is by way of a mutual lease termination agreement.
- <sup>20</sup> “Credit Scores, Reports, and Getting Ahead in America,” Metropolitan Policy Program of the Brookings Institution, May 2006 (counties with relatively high proportions of racial and ethnic minorities are more likely to have lower average credit scores); “Hitting the Wall: Credit as an Impediment to Home Landlordship,” Joint Center for Housing Studies, Harvard University, Bostic, Calem and Wachter, February 2004 (minority and low income have worse credit quality than other population subgroups, and that deterioration in credit quality has occurred almost exclusively among tenants); “Bridging the Gap: Credit Scores and Economic Opportunity in Illinois Communities of Color,” Woodstock Institute, September 2010 (highly African American communities were almost four times as likely to have individuals with credit scores in the lowest range as predominantly white communities); but see, Avery, Brevoort, and Canner, “Does Credit Scoring Produce a Disparate Impact?,” Finance and Economics Discussion Series, Division of Research and Statistics and Monetary Affairs, Federal Reserve Board, # 2010-58, 2010 (finding no disparate impact for most groups).
- <sup>21</sup> Roughly 25% of Black and Latino consumers are credit unscorable, meaning these consumers, who disproportionately access credit outside of the financial mainstream, do not have enough visible credit to yield a score. Davies, Sarah F., “Alternative Data and Credit Scoring: Going Beyond the Usual,” *Urban Institute*, March 2015.
- <sup>22</sup> Rice and Swesnick, “The Discriminatory Effect of Credit Scoring on Communities of Color,” 46 *Suffolk University Law Review* 935, 2013.
- <sup>23</sup> *Id.*
- <sup>24</sup> Under the Fair Credit Reporting Act, a landlord using a credit score to deny a tenant an apartment must tell the tenant-applicant the credit score they used. 15 U.S.C. 1681m(a).
- <sup>25</sup> Newer credit scoring models such as FICO 9 and Vantage Score 3.0 attempt to incorporate rental payment history into credit score calculations. Ortiz, “Challenging the Almighty Credit Score,” *Shelterforce Magazine*, July 2016.

## END NOTES

- <sup>26</sup> Notes from conversation with Brooke Walker at Rapid Rehousing program of Community Action of Ramsey and Washington counties, January 2018. Notes on file with author.
- <sup>27</sup> [Nerdwallet.com](https://nerdwallet.com).
- <sup>28</sup> [The Power of Rent Reporting Pilot: A Credit Building Strategy, Sarah Chenven and Carolyn Schulte](#)
- <sup>29</sup> Retrieved from [www.hud.gov](https://www.hud.gov)
- <sup>30</sup> See [Massachusetts Fair Housing Center v. United States Department of Housing and Urban Development, Case 3:20-cv-11765-MGM](#)  
See also [Memorandum on Redressing Our Nations' and the Federal Government's History of Discriminatory Housing Practices and Policies](#)
- <sup>31</sup> "An Affordable Home on Reentry: Federally Assisted Housing and Previously Incarcerated Individuals," 2018.
- <sup>32</sup> The four (4) providers are Aeon, Beacon Interfaith Housing Collaborative, CommonBond Communities, and Project for Pride in Living.
- <sup>33</sup> Available at [www.wilder.org](https://www.wilder.org)
- <sup>34</sup> A 2009 study by Daniel Malone, "Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders," *Psychiatric Services*, Washington, D.C., 60(2):224-30, found that criminal history was largely unrelated to success in housing.
- <sup>35</sup> "Success in Housing: How Much Does Criminal Background Matter?," fn. 4, p.8.
- <sup>36</sup> Minneapolis City Code, Section 244.2030 (c)(1).
- <sup>37</sup> A group of Minneapolis landlords filed a lawsuit seeking to enjoin the Minneapolis Renters Protection Ordinance. U.S. District Court Judge Magnuson denied the landlords' request for a preliminary injunction, concluding that the landlords were unlikely to prevail on the merits of their claims. *301 LLC v. City of Minneapolis*, D.Minn. # 20-CV-01904 (November 6, 2020). An appeal is pending.
- <sup>38</sup> Saint Paul City Code, Chapter 193.
- <sup>39</sup> See, for example, Code of the District of Columbia, Chapter 35B; Seattle City Code Chapter 14.09; Champaign City Code, Section 17-4.5.
- <sup>40</sup> The federal court has put a hold on the lawsuit while certifying to the Washington State Supreme Court the question of what is the proper standard under Washington law for determining a substantive due process claim. *Yim v. City of Seattle*, 2019 WL 446633, W.D. Wa. 2019.
- <sup>41</sup> Texas Property Code, VTCA 92.025.
- <sup>42</sup> 15 U.S.C. §§ 168 et. seq.
- <sup>43</sup> 42 U.S.C. §§ 3601 et. seq.
- <sup>44</sup> See, for example, *Allen v. Murillo*, 217 F. 3d 517 (7th Cir. 2000) (black tenant-applicant for federally assisted housing who alleged that his application was handled differently as to alleged criminal history than two (2) similarly situated white tenant-applicants state a prima facie claim for disparate treatment under the Fair Housing Act.)
- <sup>45</sup> The disparate impact rule is currently in a state of flux. The most recent iteration of the rule was adopted by HUD in October 2020, but is currently subject to an injunction by the courts. This means the prior rule adopted in 2013 remains in effect. See 24 C.F.R. Part 100.
- <sup>46</sup> U.S. Department of Housing and Urban Development, 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, April 4, 2016.
- <sup>47</sup> In *Fortune Society Inc. v. Sandcastle Towers Housing Development*, 388 F. Supp. 3d 145 (E.D. N.Y. 2019), the court upheld a disparate impact challenge to an alleged policy of denying tenant-applicants with any criminal history, allowing the case to proceed to trial. The case just settled with the landlords agreeing to pay \$1.1 million to victims. Available at <https://www.relmanlaw.com/news-206>.
- <sup>48</sup> "The Illusion of Choice: Evictions and Profit in North Minneapolis," Dr. Brittany Lewis, Center for Urban and Regional Affairs (CURA), 2019, p.3.
- <sup>49</sup> "Credit Scores, Reports, and Getting Ahead in America," Metropolitan Policy Program of the Brookings Institution, May 2006 (counties with relatively high proportions of racial and ethnic minorities are more likely to have lower average credit scores); "Hitting the Wall: Credit as an Impediment to Home Landlordship," Joint Center for Housing Studies, Harvard University, Bostic, Calem and Wachter, February 2004 (minority and low income have worse credit quality than other population subgroups, and that deterioration in credit quality has occurred almost exclusively among tenants); "Bridging the Gap: Credit Scores and Economic Opportunity in Illinois Communities of Color," Woodstock Institute, September 2010 (Highly African American communities were almost four (4) times as likely to have individuals with credit scores in the lowest range as predominantly white communities).
- <sup>50</sup> Federal Reserve Bank of Minneapolis, FRBNY Consumer Credit Panel/ Equifax data, 2018.
- <sup>51</sup> *Martinez by Martinez v. Lexington Garden Associates*, 336 F. Supp. 3d 270 (S.D. N.Y. 2018). An tenant-applicant for housing with severe disabilities sought permission for her mother to live with her as a reasonable accommodation. The landlord refused, citing the mother's poor credit and rental history. The court rejected this justification, pointing to the mother's history of paying rent. See also, Minn. Stat. 363A.10, Minnesota Human Rights Act.
- <sup>52</sup> "Minnesota Housing Tenant Selection Plan Guidance," March 2020.
- <sup>53</sup> Minn. Stat. Section 504B.173 regulates application fees and notification of denial. It also includes other provisions beyond what is described here, including when a fee can be charged, and when it must be returned.
- <sup>54</sup> Minn. Stat. Section 363A.
- <sup>55</sup> For example, the City of Minneapolis became the first Minnesota city to adopt a Tenant Protections Ordinance ("TPO") regulating tenant screening and selection. The ordinance generally requires landlords to agree to a set of screening standards set out in the ordinance or alternatively commit to considering individualized circumstances of tenant-applicants. The TPO went into effect June 1, 2020, for landlords operating larger rental properties or portfolios, and December 1, 2020, for landlords operating smaller rental properties or portfolios, with fewer than 15 units.
- <sup>56</sup> Minneapolis Code of Ordinances, Chapter 244.2030; Saint Paul City Code, Chapter 193.
- <sup>57</sup> The information in this section comes from multiple interviews with tenant screening companies and landlords.
- <sup>58</sup> Because screening reports meet the definition of credit reports, company practices are governed by the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq.

## END NOTES

- <sup>59</sup> Connecticut Fair Housing Center v. CoreLogic Rental Property Solutions, 369 F. Supp. 3d 362 (D.Conn. 2019).
- <sup>60</sup> “How Automated Background Checks Freeze Out Renters,” Lauren Kirchner and Matthew Goldstein, New York Times, May 28, 2020.
- <sup>61</sup> It is also highly likely that tenant-applicants who have been denied housing because of records that do not apply to them are unaware of this. Most tenant-applicants who learn they have been turned down for an apartment do not have the luxury of investigating why, as they are focused on finding a place to live.
- <sup>62</sup> Issuers of credit reports must use reasonable procedures to ensure maximum possible accuracy in their reports. 15 U.S.C. § 1681 e(b). This means both doing all they reasonably can to assemble an accurate report in the first place, and once they are on notice of inaccuracies, to correct them.
- <sup>63</sup> If the first three (3) letters of the first name had various phonetic matches, RealPage’s software would report a criminal record match. For example, if an Anthony Jones born on 10/15/1967, it would be applicable to an Antony Jones, Antonio Jones, and Antoinette Jones born on the same day. If the date of birth and last name matched with various individuals, then RealPage would report a criminal record match for the first letter of a first name. If there was an exact match on the first name and last name, and the middle name either matched or was blank, RealPage’s software reported a criminal record match when the date of birth was a year apart. For example, an Anthony Jones born on 10/15/67 would match to Anthony Jones born on 10/15/68.
- <sup>64</sup> Federal Trade Commission v. RealPage, Inc., (N.D. T.X. 2018).
- <sup>65</sup> Thompson v. San Antonio Retail Merchant Assn., 682 F. 2d 509 (5th Cir. 1982); Dively v. TransUnion LLC, 2012 U.S. Dist. LEXIS 9314 (E.D. Pa. 2012); Smith v. Lexis Nexis Screening Solutions, 138 F. 3d 872 (E.D. Mich. 2015).
- <sup>66</sup> One of the major local companies does not require a social security number, meaning the company can still run a background check without it, unlike some companies. But a search without a social security number will be less reliable. The company’s forms do request it, and tenant-applicants may be including it.
- <sup>67</sup> Issues related to data matching are not unique to tenant screening. In particular, the health care industry has made significant progress in increasing accuracy of records. See, for example, “Enhanced Patient Matching is Critical to Achieving the Promise of Digital Records,” Pew Trusts, October 2, 2018.
- <sup>68</sup> “Fair Credit Reporting,” National Consumer Law Center Manual, Sec 4.4.6.6; Smith v. Lexis Nexis Screening Solutions, 138 F. 3d 872 (E.D. Mich. 2015).
- <sup>69</sup> “Hard to House: Addressing Barriers to Housing that Go Beyond Affordability,” Minnesota Housing discussion paper, August 2015.
- <sup>70</sup> Notes from housing navigator focus group, November 19, 2018.
- <sup>71</sup> Hennepin County staff interviews, October 2017.
- <sup>72</sup> Information from HousingLink, April 7, 2020 email.
- <sup>73</sup> Interview and data provided by Barb Jeanetta, Executive Director of the Alliance, on file with authors.
- <sup>74</sup> Minnesota Housing, “Tenant Selection Plans,” p. 3, 2016.
- <sup>75</sup> 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, April 4, 2016.
- <sup>76</sup> The nonprofit housing providers conceded that tenant-applicants rarely appeal denials.
- <sup>77</sup> Minneapolis Code of Ordinances, Chapter 244.2030; Saint Paul City Code, Chapter 193.04.
- <sup>78</sup> There can be a number of issues with crime-free ordinances and their impact on households of color related to the criminal justice system, which are beyond the scope of this report. For more information on this issue, see “[The Problem with Crime Free Ordinances](#),” and [HUD guidance on Crime-Free ordinances](#).
- <sup>79</sup> Minneapolis Code of Ordinances, Chapter 244.2030; Saint Paul City Code, Chapter 193.04.



310 4th Ave South / Minneapolis, MN 55415  
Suite 9000 / MAIN 612.375.9644



275 E. 4th Street, #605 / EMAIL [mkaplan@hjcmmn.org](mailto:mkaplan@hjcmmn.org)  
Saint Paul, MN 55101 / MAIN 612.807.1139