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The Federal Housing Finance Agency
Office of Multifamily Analytics and Policy
400 7th Street S.W., 9th Floor
Washington, DC 20219

Submitted via fhfa.gov

Re: Request for Input on Tenant Protections for Enterprise-Backed Multifamily Properties

Introduction

Thank you for the opportunity to provide input on tenant protections for enterprise-backed multifamily properties. We commend the Federal Housing Finance Agency (FHFA) for exploring ways to promote tenant protections through its supervision of Fannie Mae and Freddie Mac (the Enterprises). We write to discuss the importance of protecting renters from unnecessarily restrictive tenant screening practices that disproportionately exclude Black and Latine renters, renters with disabilities, and low-income renters from accessing affordable, stable, and dignified housing.

Upturn is a non-profit organization that advances equity and justice in the design, governance, and use of technology. Through research and advocacy, we drive policy change by investigating specific ways that technology and automation shape people's opportunities, particularly in historically disadvantaged communities. Our housing work is focused on understanding and challenging the tools, data, practices, and policies that housing providers and tenant screening companies use to screen rental housing applicants. Upturn recently submitted comments to the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB) describing in depth how tenant screening reports are created and used to screen out tenants in ways that have discriminatory impacts and frustrate the federal government's objectives of expanding

access to affordable housing.¹ While this comment briefly summarizes our findings and observations, we are also attaching our full FTC/CFPB comments.

Too many tenants are locked out of dignified, stable, affordable housing because of exclusionary tenant screening practices. Housing providers often rely on tenant screening reports, which are sold by hundreds of different companies with little regulation or oversight.² Applicants can spend hundreds of dollars on rental applications often without even knowing the screening criteria being used to evaluate them.³ In its Blueprint for a Renters Bill of Rights, the White House acknowledged that “[h]ousing discrimination [] results from algorithms and credit reports used routinely in background checks and screening reports . . . which can have a negative effect on housing options, particularly for Black, Latino, and Asian households”⁴ As Freddie Mac’s tenant protections white paper shows, many states offer little to no protection from these practices.⁵ As guarantors of roughly 70% of the mortgage market, the Enterprises can play a crucial role in implementing tenant protections that would benefit a significant number of tenants and advance FHFA’s mission of promoting equitable access to affordable and sustainable housing.

This comment summarizes the impact that tenant screening has on renters and recommends protections that FHFA and the Enterprises can advance through oversight, guidance, mortgage instruments, and other tools.

I. Housing providers often rely on unaccountable tenant screening companies when making rental decisions.

Tenant screening is the process by which landlords evaluate and determine whether to accept or reject a potential tenant.⁶ Landlords often purchase reports from third-party

¹ Natasha Duarte & Mariah de Leon, Upturn, Response to the FTC’s Request for Information on Tenant Screening Technologies, May 5, 2023,

<https://www.upturn.org/work/response-to-the-ftcs-request-for-information-on-tenant-screening/>.

² See Consumer Financial Protection Bureau, Tenant Background Checks Market at 10, Nov. 2022,

https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_tenant-background-checks-market_report_2022-11.pdf [hereinafter “CFPB Tenant Screening Market Report”]; Eric Dunn, The Case Against Rental Application Fees, 30 Geo. J. on Poverty L. & Pol’y 21, 28–33, 2022,

<https://www.law.georgetown.edu/poverty-journal/wp-content/uploads/sites/25/2023/01/The-Case-Against-Rental-Application-Fees.pdf>.

³ *Id.* at 2, 22–24.

⁴ U.S. Domestic Pol’y Council & Nat’l Econ. Council, The White House Blueprint for a Renters Bill of Rights 11, Jan. 2023,

<https://www.whitehouse.gov/wp-content/uploads/2023/01/White-House-Blueprint-for-a-Renters-Bill-of-Rights.pdf>

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⁵ Freddie Mac Multifamily, A National Survey of Tenant Protections under State Landlord Tenant Acts 3–4, Jan. 2023.

⁶ See Duarte & de Leon, *supra* note 1, at 8–15.

tenant screening companies. These reports largely repackaging credit, criminal, and eviction records.⁷ They often include an algorithmically-generated score, prediction, or other type of eligibility determination.⁸ Recent research and litigation suggest that housing providers are inclined to defer to the conclusions in a tenant screening report in making the ultimate decision about whether or not to rent to an applicant.⁹

The content of and criteria used to generate tenant screening reports are subject to minimal regulation,¹⁰ and tenant screening companies are largely unaccountable to renters.¹¹ Tenant screening companies disclaim any responsibility for rental decisions,¹² and often fail to investigate or respond to disputes about the accuracy of information in their reports.¹³ Because there are hundreds of different tenant screening companies, each with its own proprietary report, prospective tenants cannot find out what their report will look like ahead of time or whether it will contain errors.¹⁴

Tenant screening companies exist to profit from housing providers' subscription fees, which housing providers pass on to applicants in the form of non-refundable application fees.¹⁵ Without tenant screening protections and fee caps, tenant screening companies have no incentive or accountability to do right by tenants.

II. Renters are screened out of housing based on discriminatory and unreliable information.

Tenant screening practices heavily rely on criminal, credit, and eviction histories, which are artifacts of historically discriminatory practices that disproportionately impact people

⁷ See *Id.* at 16–18.

⁸ See *Id.* at 30–32.

⁹ Wonyoung So, Which Information Matters? Measuring Landlord Assessment of Tenant Screening Reports Housing Policy Debate, 2022, <https://www.tandfonline.com/doi/full/10.1080/10511482.2022.2113815>; Memorandum of Decision and Order at 20, *Conn. Fair Housing Ctr. et al. v. CoreLogic Rental Property Solutions*, 3:18-cv-705-VLB, Jul. 20, 2023, <https://storage.courtlistener.com/recap/gov.uscourts.ctd.125021/gov.uscourts.ctd.125021.317.0.pdf>.

¹⁰ See Duarte & de Leon, *supra* note 1, at 36–42.

¹¹ See, e.g., Consumer Financial Protection Bureau, CFPB Reports Highlight Problems with Tenant Background Checks, Nov. 15, 2022, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-reports-highlight-problems-with-tenant-background-checks/>.

¹² See, e.g., Memorandum of Decision and Order at 8–9, *Conn. Fair Housing Ctr.*, 3:18-cv-705-VLB; Duarte & de Leon, *supra* note 1, at 30 n.144.

¹³ Consumer Financial Protection Bureau, Consumer Snapshot: Tenant Background Checks 18–20, Nov. 2022, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_consumer-snapshot-tenant-background-check_2022-11.pdf [hereinafter “CFPB Tenant Screening Consumer Snapshot”].

¹⁴ *Id.* at 21–22.

¹⁵ See generally CFPB Tenant Screening Market Report, *supra* note 2, at 10; Dunn, *supra* note 2.

of color, people with disabilities, and low-income individuals.¹⁶ Furthermore, these types of records are rife with inaccuracies and are not valid predictors of tenant outcomes.

- ***Credit reports***

Credit reports and scores are ubiquitous tenant screening criteria, yet they were not designed for use in housing decisions. Credit scores reflect an applicant's past ability to fulfill credit obligations, which are distinct from the obligation to pay rent, which is more likely to be paid before any other monthly expense.¹⁷ Furthermore, credit history reflects significant disparities based on race and other intersecting identities.¹⁸ For example, median credit scores in predominantly white neighborhoods can be 100 or more points higher than those in nonwhite areas.¹⁹ Credit reports are also prone to errors.²⁰

- ***Criminal records***

As the Department of Housing and Urban Development (HUD) has repeatedly acknowledged, criminal history screening produces racial disparities, and criminal history does not predict housing outcomes.²¹ Yet research suggests that landlords

¹⁶ See Duarte & de Leon, *supra* note 1, at 16–29.

¹⁷ Chi Chi Wu & Ariel Nelson, Nat'l Consumer Law Ctr., Mission Creep: A Primer on Use of Credit Reports & Scores for Non-Credit Purposes 7, Aug. 2022, https://www.nclc.org/wp-content/uploads/2022/08/Mission_Creep_rpt.pdf.

¹⁸ See, e.g., Chi Chi Wu, Reparations, Race, and Reputation in Credit: Rethinking the Relationship Between Credit Scores and Reports with Black Communities, Aug. 7, 2020, https://medium.com/@cwu_84767/reparations-race-and-reputation-in-credit-rethinking-the-relationship-between-credit-scores-and-852f70149877.

¹⁹ Caroline Ratcliffe & Steven Brown, Urban Institute, Credit Scores Perpetuate Racial Disparities, Even in America's Most Prosperous Cities, Nov. 20, 2017, <https://www.urban.org/urban-wire/credit-scores-perpetuate-racial-disparities-even-americas-most-prosperous-cities>.

²⁰ Syed Ejaz, Consumer Reports, A Broken System: How The Credit Reporting System Fails Consumers And What To Do About It 15, June 12, 2021, <https://advocacy.consumerreports.org/wp-content/uploads/2021/06/A-Broken-System-How-the-Credit-Reporting-System-Fails-Consumers-and-What-to-Do-About-It.pdf> (At least 30% of credit reports have an error which can require significant time and energy for consumers to fix and have a negative impact on one's credit and life opportunities, including access to housing).

²¹ Calvin Johnson, Tenant Screening with Criminal Background Checks: Predictions and Perceptions are Not Causality, Dep't of Housing and Urban Development Office of Policy Development & Research, May 17, 2022, <https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-051722.html>; Dep't of Housing and Urban Development, Memorandum from Demetria L. McCain, Principal Deputy Assistant Secretary for Fair Housing & Equal Opportunity, to the Office of Fair Housing & Equal Opportunity, Fair Housing Assistance Program Agencies, and Fair Housing Initiative Program Grantees, on the Implementation of the Office of General Counsel's Guidance on Application of the Fair Housing Act Standard to the Use of Criminal Records by Providers of Housing & Real Estate-Related Transactions 8, June 10, 2022, <https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf>.

tend to reject tenants with a criminal record on their tenant screening report.²² Criminal records are not standardized, so housing providers rely on tenant screening companies and other data brokers to collect, maintain, categorize, and label them, which results in high numbers of errors, incomplete information such as missing dispositions, and outdated records.²³

- ***Eviction records***

Almost all tenant screening includes a search for eviction records, and research shows landlords tend to reject applicants with eviction records regardless of the outcome of the case.²⁴ Only a small percentage of eviction cases result in judgments in favor of the landlord,²⁵ and even those that do are products of an unjust, “factory-like” court process where few tenants have access to counsel.²⁶ This makes eviction records unfit and unreliable for predicting future housing outcomes. Eviction history also reflects racial disparities — Black renters, especially Black women, are more likely to experience evictions and eviction filings.²⁷ At least 22% of eviction records contain ambiguous information on how a case was resolved or falsely represent a tenant’s eviction history.²⁸

As HUD acknowledged in its application processing guidance for subsidized multifamily properties, these criteria “may operate unjustifiably to exclude individuals based on race, color, or national origin.”²⁹

²² So, *supra* note 9, at 1, 16–17. *See also, e.g.*, Lucius Couloute, Prison Policy Initiative, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, Aug. 2018, <https://www.prisonpolicy.org/reports/housing.html>.

²³ Martin Wells et al., US Department of Labor, *Criminal Record Inaccuracies and the Impact of a Record Education Intervention on Employment-Related Outcomes* 2, Jan. 2, 2020, https://www.dol.gov/sites/dolgov/les/OASP/evaluation/pdf/LRE_WellsFinalProjectReport_December2020.pdf; CFPB, *Tenant Screening Market Report*, *supra* note 2, at 35.

²⁴ *See generally* So, *supra* note 9.

²⁵ *See, e.g.*, Tinuola Dada & Natasha Duarte, Upturn, *How to Seal Eviction Records: Guidance for Legislative Drafting* 21, July 2022, <https://www.upturn.org/work/how-to-seal-eviction-records/>; *Id.* at 21 ns. 48–52.

²⁶ Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 4 *Housing Policy Debate* 461, 478. *See also* Dada & Duarte, *supra* note 25, at 8 n.3.

²⁷ Peter Hepburn, Renee Louis & Matthew Desmond, *Eviction Lab, Racial & Gender Disparities Among Evicted Americans*, Dec. 16, 2020, <https://evictionlab.org/demographics-of-eviction/>.

²⁸ Adam Porton, Ashley Gromis & Matthew Desmond, *Inaccuracies in Eviction Records: Implications for Renters and Researchers*, 6 *Housing Policy Debate* 377, 2020, <https://www.tandfonline.com/doi/full/10.1080/10511482.2020.1748084>.

²⁹ Dep’t of Housing & Urban Development Office of Fair Housing & Equal Opportunity, *Guidance on Compliance with Title VI of the Civil Rights Act in Marketing and Application Processing at Subsidized Multifamily Properties* 6–7, Apr. 21, 2022, <https://www.hud.gov/sites/dfiles/FHEO/documents/HUD%20Title%20VI%20Guidance%20Multifamily%20Marketing%20and%20Application%20Processing.pdf>.

Tenant screening companies often use these same criteria to automatically generate **eligibility determinations**, such as 3-digit tenant screening scores.³⁰ These proprietary scores resemble credit scores — but without any standardization or independent validation — and reports usually indicate a good/bad or passing/failing score range.³¹ There is very little public information about the algorithms that tenant screening companies use to produce scores or recommendations; however, marketing materials point to credit, eviction, and criminal histories as primary factors.³² Tenant screening reports may also provide a conclusion about whether the applicant meets or does not meet the housing provider’s criteria or whether a disqualifying record was found.³³ Eligibility determinations are intentionally designed to encourage landlords to rely on tenant screening reports’ conclusions and skip their own independent, individualized evaluations.³⁴ These features can obscure housing discrimination and make it harder for tenants to advocate for themselves.

FHFA and the Enterprises should seek to limit or prohibit housing providers with Enterprise-backed mortgages from using criminal, eviction, and credit histories to screen tenants. Housing providers should also be prohibited from relying on tenant screening scores and other eligibility determinations provided by tenant screening companies.

III. Tenant screening reports screen out qualified voucher holders and exacerbate discriminatory housing practices.

The above tenant screening practices also counteract the potential benefits of housing subsidies for low-income tenants. Qualifying for and receiving a housing voucher can be a lengthy, complicated process, yet background checks can result in denial before an applicant even has a chance to use their voucher.³⁵ In a recent case, applicants with housing vouchers — which guarantee rental payments — were denied housing because of

³⁰ See Duarte & de Leon, *supra* note 1, at 13–14.

³¹ See, e.g., *Id.* at 31 n.150; *Id.* at App. D; *Id.* at App. C, F.

³² See, e.g., *Id.* at App. F.

³³ See, e.g., Conn. Fair Housing Ctr. v. Corelogic Rental Property Solutions, 369 F. Supp. 3d 362, 367 (D. Conn. 2019), <https://storage.courtlistener.com/recap/gov.uscourts.ctd.125021/gov.uscourts.ctd.125021.41.0.pdf> (“After Defendant conducts the screen, it returns a one-page report which indicates whether disqualifying records were found.”); Duarte & de Leon, *supra* note 1, at 13.

³⁴ See Duarte & de Leon, *supra* note 1, at 30–32; *Id.* at 14 (citing SafeRent, Resident Screening, <https://saferentsolutions.com/resident-screening/> (noting that its scores are intended to “. . . eliminate reliance on judgment calls by the leasing staff”).

³⁵ See, e.g., Corina Knoll, A Homeless Student Received Aid for an Apartment. Then Came the Hard Part, N.Y. Times, Feb. 17, 2023, <https://www.nytimes.com/2023/02/17/us/housing-voucher-search-los-angeles.html>; Brandon Block, Housing Vouchers Sit Unused at Some Rural Washington Agencies, Crosscut, Nov. 3, 2022, <https://crosscut.com/news/2022/11/housing-vouchers-sit-unused-some-rural-washington-agencies> (“Housing officials. . . said they lack the staffing to shepherd clients with high rental barriers through a tight market . . .”); Jacqueline Rabe Thomas, Why Half of Affordable Housing Vouchers in CT Go Unused: ‘A Slamming Door in My Face,’ CT Insider, <https://www.ctinsider.com/news/article/Half-of-CT-affordable-housing-lottery-winners-17597460.php>.

the scores they received from the tenant screening company SafeRent.³⁶ SafeRent scores punish applicants for negative credit history but do not account for housing subsidies as positive financial information.³⁷ As a result, vouchers can go unused, and people remain unhoused, especially Black and Latine voucher holders.³⁸ FHFA and the Enterprises should prohibit housing providers from screening out voucher holders based on prior rental and credit histories.

III. Rental application fees limit housing opportunity and incentivize exclusionary tenant screening practices.

Many landlords charge rental application fees, but they seldom disclose exactly what these fees are used for, or the relationship between the fees and the actual cost of tenant screening.³⁹ Tenant screening companies encourage landlords to pass on the cost of tenant screening services to applicants,⁴⁰ and many applicants end up paying multiple non-refundable fees before finding housing.⁴¹ For example, a study by Zillow found that Black, Latine, and Asian American and Pacific Islander renters pay an average of \$50 per application fee compared to \$35 for white renters, and that renters of color are almost twice as likely to submit more than five applications before finding a place to live.⁴² Application fees pose an immediate and discriminatory barrier to multifamily tenants' access to housing, and FHFA should seek to eliminate them.

IV. Recommendations

Tenant screening practices impact the majority of people looking for rental housing, yet there are many gaps in existing protections for renters at the state and federal levels. In the past, FHFA has required the Enterprises to incorporate tenant protections into existing

³⁶ Complaint at 2, *Louis v. SafeRent*, 1:22-cv-10800 (D. Mass. 2022), <https://www.cohenmilstein.com/sites/default/files/Complaint%20-%20Louis%20v%20SafeRent%2005252022.pdf>.

³⁷ Complaint, *Louis v. SafeRent*, 1:22-cv-10800.

³⁸ Complaint at 11–17, *Louis v. SafeRent*, 1:22-cv-10800.

³⁹ See, e.g., Dunn, *supra* note 2, at 30–31.

⁴⁰ See, e.g., TransUnion SmartMove, <https://www.mysmartmove.com/> (“ . . . SmartMove enables landlords the choice to pay themselves or pass the cost of background screening onto tenants.”).

⁴¹ See Dunn, *supra* note 2, at 30.

⁴² Zillow, Renters of Color Pay Higher Upfront Costs, Apr. 6, 2023, <https://zillow.mediaroom.com/2023-04-06-Renters-of-color-pay-higher-upfront-costs>.

loan agreements.⁴³ FHFA is uniquely positioned to implement tenant protections in Enterprise-backed multifamily housing and should consider taking the following actions:

- **Prohibit the use of credit, criminal, and eviction histories in housing decisions for borrowers of Enterprise-backed, multifamily mortgages.** These tenant screening criteria disproportionately harm people of color, people with disabilities, low-income people, and other members of vulnerable communities, and provide little to no reliable information about tenant behavior or outcomes. Consequently, the Enterprises' loan agreements should include a prohibition on using this kind of information to screen tenants. FHFA and the Enterprises can look to existing local laws when considering how to limit the information that can be considered in tenant screening. For example, DC⁴⁴ and Philadelphia⁴⁵ prohibit landlords from considering eviction records other than judgments in favor of the landlord. DC also prohibits landlords from screening voucher holders based on rental or credit history from before they received their vouchers.⁴⁶ Oakland and Seattle both generally prohibit landlords from screening applicants' criminal history.⁴⁷
- **Eliminate rental application fees collected by borrowers.** People of color and low-income people can pay hundreds of dollars in application fees before finding housing, which creates a significant barrier to housing access. At the very least, applicants should be refunded the fee if their application is rejected. FHFA can require that borrowers of Enterprise-backed mortgages absorb the costs of screening tenants as part of Enterprise loan agreements.
- **Require the acceptance of housing subsidies in Enterprise-backed multifamily properties.** Housing subsidies such as housing choice vouchers guarantee rental payments and should not be a reason to deny a rental applicant. Denying voucher holders has a disproportionate impact on Black and Latine people and people with disabilities. Enterprise-backed loan agreements should prohibit multifamily housing providers from rejecting applicants with housing subsidies or screening them out based on credit or rental history. FHFA and the Enterprises should explore ways to expand protections against source-of-income discrimination, including by

⁴³ Federal Housing Finance Agency, Tenant Protections For Enterprise-Backed Rental Properties In Response To Covid-19, https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/COVID_19_Tenant-Fact-Sheet_72821.pdf; Freddie Mac, Freddie Mac Multifamily Requires Tenant Protections on All Future Manufactured Housing Community Transactions, Sep. 13, 2021, <https://freddiemac.gcs-web.com/news-releases/news-release-details/freddie-mac-multifamily-requires-tenant-protections-all-future>.

⁴⁴ D.C. Code § 42-3505.10(d).

⁴⁵ Philadelphia Code § 9-810.

⁴⁶ DC Code § 2-1402.21(g)(1)-(2).

⁴⁷ Oakland Ordinance No. 13581 C.M.S.; Seattle Ordinance No. 125393.

extending Fannie Mae's Expanded Housing Choice Initiative to cover all states without source of income protections and to Freddie Mac mortgages.⁴⁸

The above tenant protections would help address the barriers that tenants face at multifamily properties and fulfill FHFA's goal to "foster housing finance markets that promote equitable access to affordable and sustainable housing."⁴⁹ In order for any tenant protections to be meaningful, however, FHFA and the Enterprises need to be more proactive in enforcing the terms in loan agreements. FHFA should regularly monitor compliance with loan agreements either through primary mortgage servicers or direct investigations. Additionally, the Enterprises should require borrowers to notify tenants of their protections in writing and certify that tenants have read the notification. This would better allow tenants to flag instances of noncompliance for further investigation by FHFA and Enterprises.

We welcome further conversations on these important issues. If you have any questions, please contact Natasha Duarte (Project Director, natasha@upturn.org) and Mariah de Leon (Research Associate, mariah@upturn.org).

⁴⁸ Fannie Mae, Expanded Housing Choice Initiative, <https://multifamily.fanniemae.com/financing-options/specialty-financing/expanded-housing-choice-initiative>.

⁴⁹ See Fed. Housing Finance Agency, Strategic Plan Fiscal Year 2022-2026 at 4, https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FHFA_StrategicPlan_2022-2026_Final.pdf.