



NATIONAL
MULTIFAMILY
HOUSING
COUNCIL



FAIR HOUSING: RESIDENT CRIMINAL SCREENING

NMHC/NAA Viewpoint

The apartment industry is committed to equal housing opportunity for all without regard to race, religion, color, sex, national origin, handicap or familial status. However, more clarity is needed on the applicability of disparate impact liability, as it could be used to undermine apartment providers' otherwise valid policies to ensure safe and decent housing for residents.

In April 2016, HUD issued guidance on the "Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions," which focuses on expanding fair housing protections for individuals with criminal convictions and arrest histories. Safe and secure housing is a critical need for all Americans and the federal government has long recognized the role criminal background screening plays in making informed residency decisions. Despite the fact that criminal screening helps achieve property safety and security goals, the guidance challenges a variety of prevailing criminal screening policies and raises numerous legal and operational questions for housing providers.

Broadly, the guidance seeks to end blanket exclusions of prospective residents based on criminal history in favor of a more individualized approach. The guidance prohibits the use of arrest records alone to deny residency and denials based on convictions must consider the nature and severity of the incident.

Recognizing that those with criminal histories are not a protected class under the Fair Housing Act (FHA), HUD relied on disparate impact theory to support their guidance. Disparate impact theory allows fair housing complaints to proceed where actions have a discriminatory result even if there was no intent to discriminate. In 2013, HUD issued a final rule formalizing the agency's position on disparate impact liability and establishing uniform standards for determining when a real estate practice or policy violates the FHA. Subsequently, the U.S. Supreme Court issued a milestone decision on disparate impact liability in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc. (Inclusive Communities)*, establishing a separate standard for disparate impact liability.

HUD largely structured its criminal screening guidance around the 2013 Final Rule on disparate impact and cites to the 2015 *Inclusive Communities* decision without resolving or addressing the inconsistencies between the two disparate impact standards. The guidance therefore leaves unanswered questions about both the underlying legal theories involved and acceptable compliance strategies. NMHC/NAA continue to raise concerns about the uncertainty created for housing providers and urge HUD to reevaluate its interpretation of disparate impact liability to ensure compatibility with the Supreme Court's analysis.

Courts have used disparate impact theory in discrimination cases for over 40 years.