May 30, 2023

The Honorable Rohit Chopra, Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Honorable April Tabor, Secretary
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)
Washington, D.C. 20580

> **RE:** **Public Comment from 15 State Attorneys General on the Adverse Impacts of Tenant Screening Reports and Algorithmic Determinations of Tenant "Worthiness"**

Dear Director Chopra and Secretary Tabor:

The Attorneys General of the States of Arizona, California, Colorado, District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New York, Pennsylvania, Rhode Island, Vermont, and Wisconsin ("State Attorneys General") submit this comment in response to the request made by the Consumer Financial Protection Bureau ("CFPB") and the Federal Trade Commission ("FTC") for public comment on the background screening issues affecting individuals who seek rental housing in the United States. In this comment letter, we seek reasonable regulatory reforms, within the existing powers of the CFPB and FTC, that will ensure that applicants for housing have access to all the data that is being used to make determinations of their tenant "worthiness". We seek enforcement mechanisms to ensure that Tenant Screening Companies ("TSCs") do not rely on algorithms, inaccurate or stale data that result in biased, unverifiable data being used to make recommendations that end up denying access to housing for some of our most vulnerable and underserved communities. We also encourage the CFPB to reiterate that the Fair Credit Reporting Act ("FCRA") and other applicable federal laws and regulations establish a baseline from which States can enact further legislation or regulation to fully address the many challenges

tenants face due to background screening services, as well as other consumer protection issues encountered by tenants.

I.   <u>Introduction</u>

The States have a strong interest in ensuring that all their residents can access safe, quality, and affordable housing. Nationally, it is estimated that there are more than 100 million people across the United States renting 45 million units.[1] Renters are more likely to be people of color and lower income.[2] Tenants face an increasingly competitive housing market, making the identification of safe, affordable housing extremely difficult.[3] Additionally, the high demand for housing translates into a market that is particularly favorable to landlords with no shortage of applicants for available units. In this environment, heightened landlord discretion increases the prevalence and importance of tenant screening services. The exclusion of tenants from housing opportunities based on inaccurate or inequitable tenant screening criteria, disproportionately impacts people of color (especially black women) and lower income households contributing to cycles of homelessness, mental and physical impacts, and interference with opportunities for building generational wealth.[4]

The FTC and CFPB share authority to enforce consumer protection laws with respect to non-bank financial institutions. The CFPB enforces federal consumer financial laws to ensure that all consumers have access to consumer financial services and products that are "fair, transparent, and competitive," including the federal Fair Credit Reporting Act ("FCRA").[5] Specifically, the CFPB investigates the accuracy of data reported by Consumer Reporting Agencies ("CRAs"), such as tenant screening companies ("TSCs") to determine if reasonable procedures are in place to ensure that information is not incomplete or misleading and that there are procedures for timely and reasonable investigations of consumer disputes. The CFPB works

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[1]*See* United States Census, 2019 American Housing Survey ("AHS"), https://www.census.gov/programs-surveys/ahs/data.html.

[2]*See* Joint Center for Housing Studies of Harvard University, "America's Rental Housing 2022," 2022, https://www.jchs.harvard.edu/americas-rental-housing-2022.

[3]*See e.g.*, The Elliman Report: March 2023 Manhattan, Brooklyn and Northwest Queens Rentals, https://www.elliman.com/resources/siteresources/commonresources/static%20pages/images/corporate-resources/q1_2023/rental-03_2023.pdf (citing average rents in New York City, for example, climbed 13-16% higher in one year between March 2022 and 2023, with a typical rent in Brooklyn at $3,493.00 per month and only slightly less in Queens at $3,300).

[4]Peter Hepburn, Renee Louis, Matthew Desmond, *Racial and Gender Disparities among Evicted Americans,* Sociological Science 10.15195/v7. a27, (Dec. 16, 2020), https://sociologicalscience.com/articles-v7-27-649/. *See also,* Valerie Schneider, *Locked Out by Big Data: How Big Data, Algorithms and Machine Learning May Undermine Housing Justice*, Columbia Human Rights L. Rev. Issue 52.1 at 251 (2020).

[5]Consumer Financial Protection Bureau ("CFPB"), Rules and Policy, https://www.consumerfinance.gov/rules-policy/#:~:text=The%20CFPB%20implements%20and%20enforces,fair%2C%20transparent%2C%20and%20competitive.

to ensure that CRAs and data aggregators comply with the FCRA and the agency's implementing regulations.

Additionally, the CFPB has clarified that States play an important role in the regulation of consumer reporting and that they retain "substantial flexibility to pass laws involving consumer reporting" to address problems arising in their local economies, without fear of federal FCRA preemption.[6] There is an urgent need for federal regulators and the States to coordinate their law enforcement and legislative efforts to address the growing impact that the outsourcing and anonymization of decision making by landlords to TSCs and other types of CRAs and the use of algorithmic based property management software have on access to safe and affordable housing for our most vulnerable residents. Federal regulators and the States must hold landlords, brokers, TSCs, and others accountable if they violate civil rights or consumer protection laws.

II.   Inflated and Hidden Application Fees and Fair Access to Housing

Landlords typically ask prospective tenants to fill out a written application to start the process of applying for available housing. In many jurisdictions, that application may require detailed information about, for example, why the tenant is leaving current housing, if the tenant has ever been evicted or has been convicted of a crime, how many people intend to live in the prospective unit, the name and phone number of prior landlords, and household income and assets.

Most landlords also require that a tenant screening report be run as an integral part of the tenant application.[7] They charge "application fees" or "administrative processing fees" that are meant to cover the cost of obtaining the reports, but which often far exceed the actual average cost of the report including fees for review, whether review occurs or not.[8]

Application fees that landlords charge prospective tenants are often non-refundable and purportedly cover the landlord's administrative costs of screening a tenant. They are paid with no guarantee that the application will be approved and are not refunded if the application is never reviewed because another applicant is selected first or if it is denied. The fees add up and become sizable to low-income renters, particularly when a prospective tenant's search requires applying to several landlords who might each charge fees for the

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[6]CFPB, The Fair Credit Reporting Act's Limited Preemption of State Laws, https://www.consumerfinance.gov/rules-policy/final-rules/the-fair-credit-reporting-acts-limited-preemption-of-state-laws/
[7]Nine out of ten landlords across the country are reported to work with tenant screening companies to obtain background check reports. See, Matthew Goldstein, The Stigma of a Scarlet E, N.Y. Times, August 9, 2021, https://www.nytimes.com/2021/08/09/business/eviction-stigma-scarlet-e.html.
[8] See e.g., Restaurant worker paid multiple application fees to rental property manager who never purchased a screening report or "processed" his rental application. https://winknews.com/2021/11/22/rental-runaround-what-you-need-to-know-about-application-fees-and-background-checks/

same screening service. The consumer's harm from application fees is exacerbated when an individual's experience of being denied housing – and submitting multiple applications and incurring cumulative fees – is based upon errors and inaccuracies in the screening reports used by the landlords.

There is also evidence of disparities based on race, sex (which includes sexual orientation and gender identity), and disability in the number of applications necessary for a successful housing search. This causes a disproportionate and inequitable increase in application costs for prospective renters in these protected classes.[9] Currently, landlords appear to be either hiding these fees or charging more in application or screening fees than their actual costs incurred, to the detriment of applicants for rental housing, particularly low-income and prospective tenants of color.[10] At a minimum, application and related fees should be clearly disclosed to prospective tenants and commensurate with the actual costs incurred by the landlord in connection with the application process.

Inflated application fees serve as just another barrier to safe and affordable housing. Despite these consequences, only a small number of states limit the amount of rental application fees that may be charged to a tenant.[11] Even fewer states have passed laws allowing tenants to use reusable, portable screening reports, to avoid the costs incurred with multiple applications for housing. However, these laws do not generally require landlords to accept such portable reports.[12] Accordingly, the problem persists

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[9]Manny Garcia and Edward Berchick, "Renters: Results from the Zillow Consumer Housing Trends Report 2022," Zillow, July 2022, https://www.zillow.com/research/renters-consumer-housing-trends-report-2022-31265/ (e.g., finding that 73% of Black, non-Hispanic prospective renters submitted two (2) or more applications where only 52% of White, non-Hispanic renters submitted two (2) or more applications). In addition, Black and Latinx renters were also almost twice as likely to report submitting 5 applications or more with 38% of Black and Latinx renters reporting submitting five (5) or more, compared to 21% of white renters submitting five (5) or more.)

[10]*Id.*, (finding that the typical white renter reported paying $35 in application fees on their rental, while the typical Black, Latinx, and Asian renters all reported spending $50 on application fees.)

[11]*See, e.g.*, NY CLS RPL§238-a(1)(b) (limiting the tenant application fee to the actual cost of a tenant credit or background check or $20.00 whichever is lower and allowing tenants to provide their own screening report to avoid a fee, as long as the report is less than 30 days old); Cal. Civ. Code § 1950.6 (limiting fee to actual cost but no greater than $30 plus annual CPI adjustment); M.G.L. c. 186, § 15B(1)(b) & 940 Mass. Regs. § 3.17(4) (prohibiting lessors from charging application fees entirely and limiting rental fees to only first and last month's rent, a security deposit, and the cost of a new lock and key); Colo. Rev. Stat. § 38-12-903(1) (limiting application fees to either the actual expense of processing the application or the average expense per tenant of processing multiple applications and prohibiting a fee if the tenant provides a portable screening report) and Wash. Rev. Code § 59.18.257(1)(b), Finding—2012 c 41 (2012) (limiting charges to actual costs or "customary costs charged by a screening service in the general area"—finding that TSRs may contain errors that cause applicants to be turned down, resulting in payments to multiple providers for the same screening fees). See generally RentPrep, "A Landlord's Guide Rental Application Fees (50 States)," https://rentprep.com/blog/tenant-screening-news/the-landlord-guide-to-charging-rental-application-fees/; Law District "Rental Application Fees by State", March 20, 2023. https://www.lawdistrict.com/articles/rental-application-fees-by-states.

[12]*See*, Cal. Civ. Code § 1950.1 and Washington, RCW 59.18.257. *But see* Colo. Rev. Stat.§ 38-12-904(1.5)(a) (requiring landlords to accept portable screening reports with limited exceptions).

nationwide almost unabated. [13] In order to promote fairness in the rental market, both federal and state governments must do more to hold landlords accountable for unfairly inflating application fees and tenants should be offered solutions to avoid incurring multiple fees for duplicative and unnecessary screening services.

To promote fairness and accessibility in the rental application process, the CFPB and FTC should consider adopting or promoting the following reforms:

- Require landlords and their agents to disclose all their rental criteria, including application fees and how they are used, on their public facing website, online apartment listings and any written tenant application forms before an application is made. [14]

- Require landlords and their agents who use TSC reports to disclose the name and address of the company they will use and what information will be used to produce the report, on their public facing website, online apartment listings and any written tenant application. Include the applicant's right to obtain a free copy of the report in the event of denial or other adverse action and to dispute accuracy with the TSC and the landlord.

- Where fees are not already capped or prohibited by law, encourage States to cap application fees at the actual cost of the screening report or a certain dollar amount, e.g., $20.00, whichever is lower. [15]

- In jurisdictions where application fees are not prohibited by law, encourage States to allow tenants to provide (at their option) and require landlords to accept an applicant's own TSC report if it is less than 30 days old, to avoid one or more application fees. [16]

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[13]This barrage of "junk fees" plaguing consumers is finally getting due attention.   Most notable is the Biden Administration's 2022 Initiative on Junk Fees and Related Pricing Practices. https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices. "Junk Fees" are often of little value to consumers and either confuse or deceive them or unfairly take advantage of a consumer's position in the marketplace. It is no surprise that "junk fees" have also flooded the rental housing market, where many states have witnessed a rise in hidden and unnecessarily inflated fees, including rental application fees.

[14] See e.g., Wash. Rev. Code § 59.18.257(1)(a) (2012).

[15]For example, as noted at FN 10, New York State caps application fees at a total of $20.00 or the actual cost of the tenant background screening report, whichever is less. NYS RPL §238-a (1) (a-b).

[16]See e.g., also in New York State, applicants for residential housing can avoid paying an application fee altogether if they present a reusable tenant screening report that is less than 30 days old. NYS RPL §238-a(1)(b).

III.   Ensuring Compliance with the FCRA

Tenant screening reports are "consumer reports," and companies that sell or provide "consumer reports" are "Consumer Reporting Agencies" under the FCRA.[17] Tenant screening companies are, therefore, subject to numerous regulatory requirements enforceable by both the CFPB and FTC. Paramount is the FCRA's requirement to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."[18]

Many aspects of the tenant screening industry remain unregulated. Tenant screening reports are compiled from literally *thousands* of data sources and are aggregated by third party data brokers. According to the CFPB, tenant screening companies obtain eviction and criminal record information from more than 13,000 federal, state, and local courts, and there is no single publicly available database that collects records from across all courts.[19] The National Center for State Courts ("NCSC") has warned background check companies that online court databases are not official records "and may be subject to error[s] or omission[s]" that require further verification for "accuracy, currency, and completeness."[20]

This complex ecosystem creates a high risk for reporting errors. Not all screening companies implement appropriate measures to validate the data and information that they market and sell. Systemic failures to validate data have resulted in inaccurate reports, incomplete records, and mismatched information.[21] First, screening companies may search for only partial name matches, even though doing so does not comply with the FCRA.[22] This can lead to rental

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[17]*See,* 15. U.S.C. § 1681a(d), definition of "consumer report" and 15. U.S.C. § 1681a(f), definition of "consumer reporting agency."

[18]*See* 15. U.S.C. § 1681e(b).

[19]CFPB, "Market Snapshot: Background Screening Reports," October 2019, p. 10 (noting 13,000 state courts of record, and 94 district level and 13 appellate federal courts), https://files.consumerfinance.gov/f/documents/201909_cfpb_market-snapshot-background-screening_report.pdf

[20]See National Center for State Courts ("NCSC"), "Why court records don't provide a person's criminal history," https://www.ncsc.org/consulting-and-research/areas-of-expertise/technology/online-records#:~:text=There%20are%20a%20variety%20of,the%20court's%20archive%2C%20not%20online.

[21]*See*, *e.g.*, Complaint, *U.S. v. AppFolio, Inc.,* 1:20-cv-03563 (D.D.C.), Filed Dec. 8, 2020 ("AppFolio failed to follow reasonable procedures to assess whether there were internal inconsistencies in the identifiers or results indicating that the company was including information about multiple people in one report; and AppFolio failed to follow reasonable procedures to prevent the inclusion of multiple entries for the same criminal or eviction case in one report"), available at https://www.ftc.gov/system/files/documents/cases/ecf_1_-_us_v_appfolio_complaint.pdf

[22]S*ee, e.g., FTC v. RealPage, Inc.*, 3:18-cv-02737-N (N.D. Tex.), Filed October 16, 2018; *see also* Consumer Financial Protection Bureau, Advisory Opinion, "Fair Credit Reporting: Name-Only Matching Procedures," 86 FR

applicants being wrongly associated with the court records of other people.[23] Second, the public records searched by the screening companies may not accurately capture the history of any court proceedings – the files may be incomplete or duplicative because often courts maintain these records for case management purposes, not for background check purposes.[24] In addition, screening companies can pull records that might later have been expunged, sealed, or otherwise prohibited from consideration.[25] In spite of these issues, many screening companies rely on automated record retrieval with manual verification in limited (or no) circumstances.[26]

Each of these problems can be seen in the context of both eviction and criminal records. Princeton's Eviction Lab examined more than 3.6 million eviction court records from 12 states and found that, on average, 22% of eviction records contain "ambiguous information on how the case was resolved or falsely reported a tenant's eviction history.[27] For example, a landlord may have filed a "no cause" eviction that is shown as a "for cause" eviction or the eviction filing may have been dismissed prior to any judgment.[28] Similarly, a study by the U.S. Census of persons not hired due to criminal history found that more than 30% of the participants' criminal records included at least one duplicate or dismissed entry, and that African Americans as well as younger participants were more likely to have inaccuracies in their records.[29] When these inaccuracies are

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62468, November 10, 2021 (inadequate matching procedures are not reasonable procedures that assure maximum possible accuracy under 15 U.S.C. 1681e(b)).

[23]*See*, *e.g.,* Laura Kirchner and Matthew Goldstein, *How Automated Background Checks Freeze Out Renters*, N.Y. Times, May 28, 2020, https://www.nytimes.com/2020/05/28/business/renters-background-checks.html (tenant screening company pulled records for women whose middle name and date of birth did not match the applicant, and searched databases in states where applicant had never lived).

[24]*See*, *e.g.,* Massachusetts Law Reform Institute (MLRI), "Evicted for Life: How eviction court records are creating a new barrier to housing" (June 2019), pp. 6-12, https://www.mlri.org/wp-content/uploads/2019/06/evicted_for_life_mlri.pdf.

[25]National Consumer Law Center (NCLC), *Salt in the Wound: How Eviction Records and Back Rent Haunt Tenant Screening Reports and Credit Score* (August 2020) https://www.nclc.org/wp-content/uploads/2022/09/IB_Salt_in_the_Wound.pdf; *see also,* Ariel Nelson, *Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing*, NCLC (Dec. 2019) https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf.

[26]*See,* Kirchner and Goldstein, supra note 21.

[27]Adam Porton, Ashley Gromis & Matthew Desmond (2021) *Inaccuracies in Eviction Records: Implications for Renters and Researchers*, Housing Policy Debate, 31:3-5, 377-394, DOI: 10.1080/10511482.2020.1748084.

[28] *See,* MLRI, supra note 22; *see also,* Housing Action Illinois and Lawyers' Committee for Better Housing, *Prejudged: The Stigma of Eviction Records* (March 2018) (analysis of Cook County eviction records from 2014 to 2017) https://housingactionil.org/downloads/EvictionReport2018.pdf.

[29]Wells et al., *Criminal Record Inaccuracies and the Impact of a Record Education Intervention on Employment-Related Outcomes* (Cornell University study, Jan. 2020), pp. 38-39 https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/LRE_WellsFinalProjectReport_December2020.pdf.

not identified by a background check company, or when the background check company pulls information on the wrong person, it can also lead to rental applicants being denied housing.

Under the FCRA, tenant screening companies are obligated to disclose to consumers all information in their file, so they have an opportunity to challenge information they believe is inaccurate and tenant screening companies have an obligation to investigate any errors.[30] However, the way in which the data is compiled for these reports, using proprietary scoring and algorithmic methods (as discussed in further detail *infra),* makes it very challenging for consumers to identify the source of any error or inaccuracy and, in turn, seek the necessary corrections. Tenants can face a variety of hurdles to challenge inaccurate information. Consumers may not be able to identify or may not even be provided with the full list of data sources in their reports to review for accuracy.[31] Also, consumers may have difficulty accessing the necessary information to disprove inaccuracies in their screening report.

Further, when errors are identified, the tenant screening companies may not provide reasonable means for a consumer to dispute information in their report. For example, the National Tenant Network only accepts reinvestigation requests by mail or fax.[32] Even when errors are identified by the tenant and corrected by the company, those same errors may reappear in *another* company's report. Finally, time is often of the essence and the consumer may simply lose out on the rental unit before the screening company finishes their investigation into the claimed inaccuracy of the records. Notably, the FCRA provides tenant screening companies thirty days to investigate a consumer dispute of their screening results; in competitive rental markets, in particular, most rental units are likely to become unavailable well before then.[33] Since the onset of the pandemic, and with many state housing assistance programs ending, access to (and the supply of) affordable housing has become even more scarce.[34]

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[30]*See,* 15 U.S.C. § 1681j(a)-(c) (setting out mandatory disclosure provisions of the FCRA); 15. U.S.C. § 1681i (setting out FCRA procedures in cases of disputed accuracy).

[31]*See*, e.g., *Kelly v. RealPage, Inc.*, 47 F.4th 202 (3rd Cir. 2022) (consumer class action alleging RealPage refused to disclose vendors used to gather information); *see also Leo v. AppFolio, Inc.,* No. 17-5771 RJB (W.D. Wash. Jan 30, 2019), at p. 4 (FCRA lawsuit filed against AppFolio for failing to provide the intermediary data source).

[32]National Tenant Network, "Reinvestigation Request Instructions" (stating that consumer disputes may only be processed via mail or fax), https://ntnonline.com/wp-content/uploads/2022/01/Consumer-Reinvestigation-Request-Packet-01-11-22.pdf

[33]*See,* 15 U.S.C. § 1681i(a)(1)(A); *see also,* Joint Center for Housing Studies of Harvard University, America's Rental Housing (2022), at 23 (discussing increased competition in rental markets nationwide where vacancy rates have reached their lowest since the mid-1980s), https://www.jchs.harvard.edu/americas-rental-housing-2022 https://www.jchs.harvard.edu/americas-rental-housing-2022.

[34] *See*, e.g., National Low Income Housing Coalition, "2022 Out of Reach: The High Cost of Housing," (2022), pp. 1-7 (showing, *inter alia*, spikes in rental prices in relation to average wages in the United States), https://nlihc.org/sites/default/files/2022_OOR.pdf.

To promote FCRA compliance and transparency in the tenant screening process, the CFPB and FTC should adopt or promote the following reforms:

- Impose a federal registration system for the consumer reporting industry, including TSCs, to address unknown market size/participation and maintain a publicly available database of this TSC registration information.

- Require TSCs to simultaneously email or mail a copy of any tenant screening report to the housing applicant when it is provided to the landlord or their agent, without additional charge.
- Require TSCs to disclose the underlying data that was used to make a recommendation and/or tenant screening score.

- Require the landlord or agent to provide a copy via email or regular mail, at the applicant's option, of the TSC report directly to the housing applicant upon receipt from the TSC.[35]

- Require any landlord or agent who uses a TSC report to deny or otherwise take an adverse action on an application for housing to specify in writing, within three business days of the Landlord's decision to deny or take an adverse action and provide a copy to the applicant, what part of the information in a screening report resulted in an adverse action, not just that information supplied in the report was used generally to deny an application.

- Require TSCs to investigate allegedly inaccurate, incomplete or unverifiable information contained in a screening report and remove or correct the information within 15 days as opposed to the current 30-day period.

- Require landlords and their agents to institute policies allowing for a reasonable opportunity for a prospective tenant to dispute or rebut criteria that served as the basis for an adverse decision on an application for housing and allow the prospective tenant to apply for reconsideration at no additional cost.

- Issue guidance providing that it is a deceptive practice for TSCs to sell or otherwise disseminate screening reports that use data prohibited by state or local law. Doing so harms prospective tenants and puts any landlords that rely on these reports at risk of prosecution.

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[35]*See e.g.*, NYS Real Property Law §238-a(1)(b). In New York State, tenants are entitled to a copy of both the screening report obtained on their behalf and a receipt from TSC that has conducted the report or the landlord or their agent cannot charge the tenant a fee.

IV. Algorithmic Models Used in Tenant Screening

In addition to commercial tenant screening products that provide compilations of traditional credit reports and other raw data about applicants, there is a rapidly growing market for products that generate aggregated screening results or recommendations based on algorithms that are used to assess an applicant's criminal conviction histories, credit reports, civil court records that reveal evictions, landlord-tenant disputes, and various forms of outstanding debt.[36] Research shows that landlords with the largest rental portfolios—the most professionalized and resourced landlords—rely the most on these screening algorithms.[37]

These algorithmic screening services generally purport to amalgamate all or some combination of the categories of data described above and present housing provider customers with a single score or result indicating how "safe" it would be to rent to an applicant.[38] The output of these services ranges from assigned numerical scores based on a sweep of the applicants' income, debt, payment history, housing records, and criminal records, to more targeted indicators—for example, screening models that rely on credit, income, and/or rental history to predict an applicant's ability and willingness to pay rent in the future, or those that rely mostly on an applicant's eviction court appearances as an indicator of future lease performance.[39] Other services eschew numerical scores altogether and simply provide an overall recommendation, occasionally through a binary "thumbs up" or "thumbs down."[40]

a. Lack of Transparency and Inaccuracies in the Data

These algorithms are purportedly built using sets of "training data" that represent the relationship between certain features (*i.e.,* credit score, rental history, criminal conviction

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[36]*See,* Anna Reosti, *We Go Totally Subjective": Discretion, Discrimination, and Tenant Screening in A Landlord's Market*, 45 L. & SOC. INQUIRY 618, 620 (2020); *see also* Cyrus Farivar, "Tenant Screening Software Faces National Reckoning," NBC News (Mar. 14, 2021) (noting that "[r]eal estate tech and tenancy screening firms have drawn the interest of Wall Street investors in recent years. Data from PitchBook, a financial data firm, shows that the number of private equity deals in this area has jumped in total value from $1.7 billion in 2018 to $6.9 billion in 2019 and $6.6 billion in 2020.")

[37]Rosen et al., *Racial Discrimination in Housing: How Landlords Use Algorithms and Home Visits to Screen Tenants*, American Sociological Review 86(5).

[38]*See,* Matthew Harold Leiwant, *Locked Out: How Algorithmic Tenant Screening Exacerbates the Eviction Crisis in the United States*, 6 GEO L. TECH. REV. 276, 282-83 (2022).

[39]*Id*; *see also* Lauren Kirchner, *Data Brokers May Report COVID-19-Related Evictions for Years*, The Markup (Aug. 4, 2020), https://themarkup.org/locked-out/2020/08/04/covid-evictions-renter-background-reports; Eric Dunn & Merf Ehman, *Rental Housing's Elephant in the Room: The Probable Disparate Impact of Unlawful Detainer Records,* 65 WASH. STATE BAR NEWS 35, 35 (2011).

[40]In addition to the use of algorithmic tenant screening products, there is a disturbing trend towards the use of pre-screening products that, may violate local and state fair housing laws by weeding out prospective tenants who plan to use housing subsidies to pay their rent, for example or who have been "justice-involved". *See e.g.*, https://www.mass.gov/news/ag-healey-targets-companies-selling-pre-qualification-software-that-discriminates-against-prospective-tenants

records) and a classification (i.*e.*, likelihood to default on rent).[41] "Training" refers to the process by which an algorithm or model is exposed to selected historical or example data in order to generate predictively useful correlations.[42] For example, a set of data may train an algorithm to show that people with certain levels of debt are likely to default on additional financial obligations, like loan payments. This training data is vulnerable to numerous risks, some of which are described above, such as biases in the data; incomplete, outdated, or irrelevant data; insufficiently large and diverse sample size; inappropriate data-collection techniques; or, as discussed further below, the potential of training the algorithm on data that tracks historical discriminatory practices. All these risks affect the extent to which an algorithmic model produces discriminatory results or how accurately it correlates the features and classifications. A model that has been trained to produce discriminatory results based on flaws or biases in the training data has the potential to create a problematic feedback loop, where biased decisions based on the model's results will then be applied in the real world, creating further biases in the data that the algorithm internalizes to make new decisions--and resulting in a system that becomes more and more unequal over time.[43] However, because the process and methodology by which these algorithms are developed are proprietary and unregulated, TSCs that rely on them do not disclose the data on which they are trained, the size of the data pools or exactly how the software scores applicants based on this data, making it difficult for regulators to assess the accuracy of their claims of unbiased and accurate assessments (short of initiating investigation and issuing specific data requests), and impossible for tenants to understand why they may have been denied housing.

Once trained, these algorithms rely on the following process to generate their reports: after obtaining an applicant's consent to run a background check, the housing provider first orders the service from a tenant screening company. Depending on the service, the housing provider may designate the categories and factors that are most salient to their evaluation of rental applications and instruct the screening company what weight to give those factors.[44] The screening company then mines records stored in a database, which are often provided through third-party vendors who have purchased the data in bulk from local courts or law enforcement agencies, and then search that database using proprietary matching algorithms.[45] As described herein, these databases can often be riddled with inaccuracies, given that there is no industry

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[41]*See generally,* David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. DAVIS L. REV. 653, 672 (2017) (explaining how algorithms make and apply rules based on training data that can predict, among other things, the likelihood of default).

[42]*Id*.

[43] *See, e.g.*, Mansoury, et al. "Feedback Loop and Bias Amplification in Recommender Systems," Proceedings of the 29th ACM International Conference on Information & Knowledge Management (2020), https://doi.org/10.1145/3340531.3412152.

[44]Tex Pasley, et al. "Screened Out: How Tenant Screening Reports Undermine Fair Housing Laws and Deprive Tenants of Equal Access to Housing in Illinois", Shriver Center on Poverty Law (January 2021) https://www.povertylaw.org/wp-content/uploads/2021/01/tenant-screening-final-report.pdf.

[45]Nelson, *Broken Records Redux*, at 11.

standard for how often these databases are updated, and how information from thousands of public records is merged into these databases.[46]

Once the screening company believes it has matched an applicant's information to results generated from the database, the company then compiles the information into a result or report for the housing provider. At this stage of the process, the TSC may employ models that ignore inaccuracies or inconsistencies in the data, as there is also no industry standard or requirements for verifying whether the data is accurate or even matches the applicant.[47] Furthermore, because these companies contract their services with the landlords rather than the applicants for housing, they have every incentive to avoid false-negatives that they have determined may adversely impact the landlord (i.e., a missed criminal conviction) in favor of false-positives that may adversely impact the applicant (i.e., falsely attributing a conviction to an applicant).[48] Thus, the contractual dynamic makes it more likely that the tenant screening company will create *overinclusive* reports that may misrepresent the applicant's profile in order to avoid complaints from landlord customers that they have missed information.[49] Examples of this practice include reporting dropped criminal cases as if they were convictions, expunged convictions, and records associated with individuals who are likely not the applicant themselves.[50] On the landlords' part, however, the algorithms' simplified outputs (*e.g., "*low, mid, or high-risk tenant" or "thumbs-up or thumbs-down") are often the end of the inquiry; at least one study has shown that landlords do not delve into the underlying details and assumptions of the screening report and rely almost entirely on the algorithm's categorical risk assessments and scores.[51]

While all tenant screening services generally adhere to these processes – algorithmic or not – the former create a new problem: a lack of transparency and visibility into the inaccuracies contained in this data. In the past, applicants who received a negative screening result using traditional tenant screening reports could request to review the underlying data themselves to find any inaccuracies and petition for corrections to be made. Today, the use of tenant screening algorithms removes this option entirely from applicants and adds a new layer of opacity to the

[46]Pasley, supra note 5, at 10; *see also id.* at 10, n. 16 ["The private credit reporting industry has adopted a standardized reporting format, known as Metro 2, but no equivalent exists for reporting of public record information.*"* (citing https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

[47]*Id*. at 11.

[48]*See, e.g.*, Natalie Campisi, *From Inherent Racial Bias to Incorrect Data—The Problems with Current Credit Scoring Models* (Feb. 26, 2021), https://www.forbes.com/advisor/credit-cards/from-inherent-racial-bias-to-incorrect-data-the-problems-with-current-credit-scoring-models/ (last accessed Apr. 17, 2023) ("The credit scoring system has every economic incentive to provide as much data volume as possible with as little cost to provide accuracy as the market will tolerate.")

[49]See, e.g., Lauren Kirchner, *When Zombie Data Costs You a Home*, The Markup (Oct. 6, 2020,), https://themarkup.org/locked-out/2020/10/06/zombie-criminal-records-housingbackground-checks [https://perma.cc/954U-23NN].

[50] Lauren Kirchner & Matthew Goldstein, *The Landlord's Algorithm Says Scram*, N.Y. Times, May 31, 2020, at BU1.

[51]Wonyoung So, *Which Information Matters? Measuring Landlord Assessment of Tenant Screening Reports*, HOUS. POLICY DEBATE, Aug. 30, 2022, at 16, https://doi.org/10.1080/10511482.2022.2113815.

screening process; the data that is used to generate the result now falls into a "black box" where neither the landlord nor the prospective tenant has a reasonable means to review or challenge the accuracy of underlying data baked into the "proprietary algorithm".[52]

b. Discriminatory Impact on Underserved Communities

To ensure fairness, it is not enough to simply remove consideration of protected class characteristics from the algorithm development process, as that does not account for the potential discriminatory impact the model may have.[53] A large body of research into these algorithms documents how and the extent to which these services, particularly those that generate a composite score or other binary recommendation, may perpetuate well-documented racial disparities in the criminal justice system and/or biases against low-income people with credit, income, and/or rental histories that are disadvantaged or discounted by these algorithms.[54] For example, the algorithms may give lower scores to applicants with addresses in neighborhoods with high eviction rates, perpetuating patterns of "redlining" and segregation, or algorithms may give undue weight to an inconsistent rental history, disadvantaging immigrants or those who have historically been forced to seek familial support for housing as opposed to traditional landlord-tenant relationships.[55]

Where algorithms rely on eviction court records to predict an applicant's future lease outcomes, they further have the potential to entrench the systemic disparities present in the eviction court system – in addition to the concerns raised above regarding the accuracy of these records. As documented by extensive research, communities of color—and in particular, Black women—disproportionately interact with the eviction court system; more recent data confirms this disparate impact, suggesting that communities of color faced disproportionately high rates of eviction actions during the COVID-19 pandemic.[56] Furthermore, the inclusion of eviction records has the potential to screen out applicants who faced eviction proceedings due to self-help actions, including refusal to pay rent in response to a landlord who is unwilling to fix sanitary

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[52]Leiwant, at 286.

[53]*See,* Michael Akinwumi et al., <u>An AI fair lending policy agenda for the federal financial regulators</u>, Economic Studies at Brookings at 8 (Dec. 2021), available at <u>https://www.brookings.edu/wp-content/uploads/2021/12/Akinwumi_Merrill_Rice_Saleh_Yap_12-01-2021-1.pdf</u>.

[54]*See, e.g.*, Pasley, at 16; Eva Rosen, <u>et al.</u>, *Racial Discrimination in Housing: How Landlords Use Algorithms and Home Visits to Screen Tenants*, 86(5) Am. Soc. Rev (2021).

[55] Schneider at 277-278.

[56]*See* Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIO. 88, 91, 98-99 (2012); *see also* Stefanos Chen, *New York Renters in Covid Hot Spots Are Four Times More Likely to Face Eviction*, N.Y. TIMES (Mar. 17, 2021), https://www.nytimes.com/2021/03/17/realestate/new-york-city-renters-evictions.html [<u>https://perma.cc/X5JN-5AM4</u>]; Emily Lemmerman et al., *Preliminary Analysis: Who is Being Filed Against During the Pandemic?* EVICTION LAB (Dec. 21, 2020), <u>https://evictionlab.org/pandemic-filing-demographics/</u>; Sophia Wedeen, *Black and Hispanic Renters Face Greatest Threat of Eviction in Pandemic*, JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV. (Jan. 11, 2021), <u>https://www.jchs.harvard.edu/blog/black-and-hispanic-renters-face-greatest-threat-eviction-pandemic</u>

code violations. Data suggests that Black people are more likely to live in rental housing with code violations, and therefore may be more likely to interact with eviction courts in this way.[57]

Similar systemic racial disparities are implicated in the use of credit scores and criminal record history in tenant screening. Extensive research shows that Black and Hispanic communities in particular have lower credit scores or minimal credit history due to systemic socioeconomic barriers and inequality.[58] As of August 2021, for example, Black consumers had a median credit score of 627, Hispanic consumers had a median credit score of 667, and white consumers had a median credit score of 727.[59] And 41.4% of Black consumers have "subprime" credit scores while only 16.5% of white consumers do.[60] Thus, to the extent tenant screening algorithms rely on credit score data, they both reflect historical inequities in the accumulation of wealth and perpetuate those racial wealth disparities into the future. Further, large racial disparities are relentlessly documented in nearly all aspects of the criminal legal system, including racial bias in the rate of traffic stops, arrests, prosecution and charging decisions, conviction rates, and sentencing outcomes.[61] The use of these metrics to determine an applicant's "rentworthiness" perpetuates these existing disparities.[62]

Aside from the likelihood of racial disparities and other biases affecting other protected classes of individuals on the basis of their sex (which includes sexual orientation and gender identity) or disability, in the underlying data, there are ample reasons to doubt whether certain of the factors relied upon by tenant screening algorithms will reliably predict "rentworthiness" at all. For example, a credit score likely will not capture a consumer's full history as a renter, does not consider how much income a consumer has available to pay rent, and therefore likely sheds

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[57] *See* Eliza Berkon, *When Tenants Take on Landlords Over Bad Conditions: A Rent-Strike Explainer*, WAMU (Feb. 27, 2020), https://wamu.org/story/20/02/27/when-tenants-take-on-landlords-over-bad-conditions-a-rent-strike-explainer/

[58] *Past Imperfect: How Credit Scores and Other Analytics "Bake in" and Perpetuate Past Discrimination, Issue Brief, Racial Justice and Economic Opportunity Project*, Nat'l Consumer Law Ctr. (May 2016), at 1, https://www.nclc.org/resources/past-imperfect-how-credit-scores-and-other-analyticsbake-in-and-perpetuate-past-discrimination/ ; see *id.* at 5−7 (collecting 11 studies finding racial disparities in credit scores).

[59]*See,* Kassandra Martinchek et al, "Credit Health During the COVID-19 Pandemic," feature funded by the Annie E. Casey Foundation and published by the Urban Institute available at https://apps.urban.org/features/credit-health-during-pandemic/

[60]*Id*.

[61]See Amanda Essex & Michael Hartman, Nat'l Conf. of State Legs., ("NCSL"), *Racial and Ethnic Disparities in the Justice System*, 1−11 (May 2022), https://www.ncsl.org/civil-and-criminal-justice/racial-and-ethnic-disparities-in-the-criminal-justice-system; *See also,* Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System is Racist. Here's the Proof,* Washington Post, June 10, 2020, https://perma.cc/8YLM-KWSY.

[62]*See e.g.,* Using criminal conviction histories as a "blanket-bans" to screen out "bad" tenants have been identified by the United States Department of Justice ("DOJ") as having a potentially illegal, discriminatory disparate impact on people of color. DOJ Statement of Interest filed in *Fortune Society Inc v. Sandcastle Towers HDFC et al* (EDNY) 14-cv-06410-VMS.

little light on the consumer's current ability to pay rent.[63] As to criminal history, it is impossible to know what impact a person's justice-involved record should have on "rentworthiness" -- presumably, whether they will endanger other tenants or engage in fraud -- until one conducts an individualized assessment of the facts of the case, nature of the charge(s), and the disposition.[64] But incorporating criminal history into a tenant's composite score or their binary rental recommendation would seem to require blanket, one-size-fits-all assumptions.[65] And records of eviction proceedings, as explained above, may be less indicative of tenant misbehavior or delinquency and more reflective of discriminatory or illegal actions taken by a prior landlord.[66] Thus, TSC algorithms may be relying on data inputs that will have a predictably disparate impact but dubious predictive power.[67]

By compiling and combining data inputs with well-documented racial disparities, algorithmic tenant screening and selection programs may reify and perpetuate systemic racism by disproportionately excluding or otherwise disadvantaging people with criminal records and/or low-income individuals. The federal Fair Housing Act ("FHA") prohibits discrimination in housing on the basis of "race [or] national origin" (among other protected groups). 42 U.S.C. § 3604. Under FHA standards, "where a policy or practice that restricts access to housing on the

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[63]*See,* CFPB, *Tenant Background Checks Market Report* at 39 (November 2022), https://files.consumerfinance.gov/f/documents/cfpb_tenant-background-checks-market_report_2022-11.pdf (documenting that rental payment history "is not well-populated" in credit files). Setting these predictive issues aside, a credit score also cannot account for how tenants are more likely to prioritize their rent or mortgage payments over other financial obligations (i.e., the notion that the "rent eats first"). *See, id*. *See also,* Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2019*, May 14, 2020, at 22 Table 9 (concluding that U.S. households are much more likely to defer credit card and utility bills than rental or mortgage payments).

[64]*See,* CFPB, *Tenant Background Checks Market Report* at 36 (November 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_tenant-background-checks-market_report_2022-11.pdf (concluding that "it appears that most types of offenses are not predictive and that their predictive value declines over time").

[65]*See,* U.S. Department of Housing & Urban Development, "Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions," June 2022, available at 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 (explaining how landlords may deny or evict tenants due to criminal backgrounds that "have no relationship to whether someone will be a good tenant").

[66] *See,* CFPB, *Tenant Background Checks Market Report* at 33 (November 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_tenant-background-checks-market_report_2022-11.pdf . In New York, tenant blacklisting, based on the inappropriate use of court records to deny housing, became such a pervasive problem that the State Legislature passed a complete prohibition on its the sale of filed court cases and their outcomes by the NYS Office of Court Administration. *See,* NYS Judiciary Law §212(1)(x).

[67]Given the many reasons to doubt the accuracy and efficacy of these TSC algorithms, the FTC and CFPB should reiterate that, especially in this context, companies should be careful about marketing claims that might potentially exaggerate what these algorithms can do. *See,* Michael Atleson, *Keep Your AI Claims in Check*, Federal Trade Commission (Feb. 27, 2023), available at https://www.ftc.gov/business-guidance/blog/2023/02/keep-your-ai-claims-check

basis of criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice is unlawful . . . if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect."[68] Courts have interpreted this to include categorical exclusion of applicants on the basis of criminal records.[69] Where state fair housing laws likewise prohibit discrimination on the basis of "race [or] national origin," the result or analysis would likely be the same as under federal law. Some state fair housing laws also prohibit discrimination against prospective tenants based on their receipt of lawful sources of unearned income such as government housing subsidies like the Section 8 Housing Choice Voucher or other forms of public assistance.[70]

Given this, algorithms that either negatively weigh or categorically exclude people with certain types of criminal histories may violate federal and state fair housing laws by disadvantaging people with these histories without regard to whether such an outcome is necessary to serve a substantial, legitimate, and nondiscriminatory interest. Likewise, the use of algorithms that disadvantage people with certain types of credit, income, asset, and/or rental histories may violate these laws by disproportionately screening out individuals who are reliant on public assistance because those individuals have credit, rental, or financial histories that cause the algorithm to treat them negatively as compared to those who are not reliant on public assistance.[71] Further, the combination of third-party TSCs and their use of these "black box" algorithmic screening methods that tend to disproportionately disadvantage tenants of color and other protected classes can introduce biases into the rental application process that landlords are expressly prohibited by anti-discrimination laws from contemplating. In this way, landlords may—intentionally or not—effectively outsource bias to TSCs and thereby attempt to shield themselves from their legal obligations under such laws.

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[68]See U.S. Dep't of Hous. & Urban Devel., 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 2016), available at: https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF (citing *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc*., 579 U.S. 519, 521 (2015)); see also *Green v. Missouri Pacific Railroad*, 523 F.2d 1290, 1293 (8th Cir. 1977) (holding that it is discriminatory under Title VII for an employer to "follow[] the policy of disqualifying for employment any applicant with a conviction for any crime other than a minor traffic offense"); *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232, 244-45 (3d Cir. 2007) (Title VII requires employers to justify criminal record exclusions by demonstrating that they "accurately distinguish between applicants [who] pose an unacceptable level of risk and those [who] do not.").

[69]*Id.*

[70]*See, e.g.*, NYS Human Rights Law, NY CLS Exec. Law §295(5)(a)(1); Mass. Gen. Laws Ch. 151B, § 4(6)-(7A) (Massachusetts); CA Gov't Code §12955(a).

[71]In 2022, a putative class action lawsuit was filed alleging that one such algorithmic screening company, SafeRent, has been violating the Fair Housing Act and related state laws for years because its tenant screening software algorithm disproportionately gives low scores to Black and Hispanic rental applicants who use federally funded housing vouchers, causing them to be denied housing. The complaint also alleges that SafeRent's use of credit history in producing SafeRent scores causes scores to be disproportionately lower for Black and Hispanic rental applicants. *See, Louis, et al. v. SafeRent Solutions, et al.,* Case No. 1:22-cv-10800 (D. Mass).

Suggestions for Regulatory Oversight to Mitigate Discriminatory, Inequitable, and/or Inaccurate Effects of Tenant Screening Algorithms

- Require TSCs that use algorithms in their tenant screening services to disclose their reliance upon an algorithm, screen models for bias against protected classes, and establish that the algorithm is necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider and that there is no less discriminatory alternative. [72]

- Require TSCs to maintain an inventory of all algorithms used in tenant screening and preserve all data relied upon to train the algorithm(s) used in their tenant screening products.

- Require landlords to allow prospective tenants opportunities to provide evidence of incorrect information or mitigating circumstances, including but not limited to proof of on-time rental payments, to the landlord following a denial of their application for housing. If the applicant provides information that would prove to a reasonable person that they can meet the requirements of tenancy, a landlord of a multiple-unit dwelling must offer the rejected applicant their next available unit of comparable size and rental price.[73]

- Require any TSC that generates an algorithmic tenant screening score to also provide to the landlord and to the consumer notice that reliably produces consistent and specific reasons that consumers can understand (and respond to as appropriate), including making clear which data points resulted in an adverse action (not just that the score generated by the algorithm was *generally* used to deny an application). The landlord (or the TSC if providing that service to the landlord) should also likewise generate and provide to the consumer an adverse action notice to explain all reasons for the denial of a tenancy, whether or not, they are related to the score generated by the TSC's algorithm.[74]

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[72]For example, the District of Columbia has pending legislation that would require tenant screening companies to provide notice about how personal information is used in algorithmic decisions and would prohibit algorithmic decision making based on protected traits or that have the effect of making decisions based on such traits. https://legiscan.com/DC/text/B25-0114/2023.

[73]*See e.g.* The Philadelphia Code, Sections 9-1008 (3) & (4), 9-810 EFFECTIVE DATE: October 13, 2021, 10.13.21 Renters' Access Act Tenant Screening Guidelines (phila.gov) which grants prospective tenants the right to submit mitigating and corrective evidence within 7 business days of an adverse decision and requires the landlord to offer a comparable next available unit if the information would prove to a reasonable person that the applicant could meet the requirements of the tenancy.

[74]*See,* Economic Studies at Brookings, *An AI fair lending policy agenda for the federal financial regulators* at 13 (Dec. 2021), available at https://www.brookings.edu/wp-content/uploads/2021/12/Akinwumi_Merrill_Rice_Saleh_Yap_12-01-2021-1.pdfhttps://www.brookings.edu/wp-content/uploads/2021/12/Akinwumi_Merrill_Rice_Saleh_Yap_12-01-2021-1.pdf.

- Make clear that TSCs using algorithms in their screening process must comply with the FCRA, FHA, and other federal and state civil rights and consumer protection laws and hold TSCs accountable for their violation of such laws when they provide biased, inaccurate and/or unverifiable information or when they participate in the provision or denial of housing to the public by providing a tenant score or recommendation to landlords.[75]

- Require TSCs to keep a record of the landlord's reported outcome on a housing application – or whether the landlord did not report an outcome – where a screening report was used and the basis for any denials of applications.

- Require TSCs to obtain certifications from their clients, prior to providing any screening report, that the client is in compliance with the FCRA, will not misuse any information in the report in violation of federal or state laws or regulations, and that the client has provided accurate identifying information for the housing applicant to the TSC.[76]

- Enforce prohibition against unfair and deceptive practices by auditing for race based or digital redlining resulting from biased underwriting in tenant screening products, including by requiring TSCs to provide to the CFPB the datasets mined by the tenant screening algorithms, the data brokers used, the source code, and programmers' notes describing the variables, correlations, and inferences embedded in the algorithms.[77]

- Prohibit use of arrest records that did not lead to conviction in screening reports or were "adjourned in contemplation of dismissal", are sealed conviction records, or expunged records or have juvenile or youthful offender adjudications and require TSCs to have procedures in place to assure the removal of records that are expunged, sealed, stale, or otherwise obsolete.[78]

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[75]*See,* CFPB, FTC, DOJ, & EEOC, Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems, available at https://files.consumerfinance.gov/f/documents/cfpb_joint-statement-enforcement-against-discrimination-bias-automated-systems_2023-04.pdf (making clear that "[e]xisting legal authorities apply to the use of automated systems and innovative new technologies just as they apply to other practices"); *Louis et al. v. SafeRent Solutions, LLC et al.*, No. 1:22-cv-10800 (D. Mass.), Statement of Interest of the United States (Doc. 37), available at https://www.justice.gov/opa/press-release/file/1561526/download (arguing that "the Fair Housing Act applies to residential screening companies").

[76]*See, e.g.*, 803 Code of Mass. Regs. § 5.15.

[77]*See, e.g.*, The Stop Discrimination by Algorithms Act of 2023, District of Columbia B114 s.7, available at https://trackbill.com/bill/district-of-columbia-bill-114-stop-discrimination-by-algorithms-act-of-2023/2356176/ (requiring annual auditing of algorithms used by covered entities to assess disparate-impact risks based on suspect classifications).

[78]*See, e.g.,* HUD Outlines Its Action Plan to Remove Unnecessary Barriers to Housing for People with Criminal Records, Press Release HUD No. 23-083 (April 24, 2023)

- Enforce the FCRA ban on the use of stale records and expand the ban on stale records to include criminal convictions that are more than 7 years old.[79]

- Prohibit TSCs from using landlord-tenant court records as a basis to deny housing where 1) the filing has been withdrawn or dismissed (e.g., where rent was withheld to obtain repairs) or 2) the landlord does not prevail against the tenant or 3) the court record is stale or has been sealed or 4) the judgment against the tenant arose during the COVID federally declared emergency period.[80]

V.   CONCLUSION

The State Attorneys General thank the CFPB and FTC for the opportunity to provide information about the impact of tenant screening on equitable access to housing. The State Attorneys General support any federal effort to solve the myriad problems with tenant screening services outlined herein – the inflated and hidden fees associated with these services,

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https://www.hud.gov/press/press_releases_media_advisories/HUD_No_23_083. *See also*, *e.g*., Cal. Penal Code section 1000 *et seq*.

[79] *See e.g.,* Pennsylvania Clean Slate Law, 18 Pa.C.S. § 9122.2 which uses an automated computer process to identify and shield from public view (1) offenses with dispositions that are not convictions, (2) summary convictions more than 10 years old and for which payment of all court-ordered financial obligations is complete, and (3) convictions graded as a misdemeanor of the 2nd or 3rd degree, or ungraded wherein the defendant has been free from any other felony or misdemeanor conviction for 10 years and completed the financial obligations of the sentence. Additionally, some localities, including Oakland and Berkeley, CA ban inquiries into criminal convictions in the housing context and NYC is considering "Ban the Box" legislation which would prohibit inquiries into arrest and conviction records in the housing application process. *See* Oakland Mun. Code Ch. 8.25 *and* Berkeley Mun. Code Ch. 13.106. New York State's legislature is considering a Clean Slate Act which would automatically sela convictions for crimes other than sexual offenses if the person had no subsequent arrests after the passage of seven years for felonies and three years for misdemeanors, from the imposition of sentence date. https://www.nysenate.gov/legislation/bills/2023/S211. And NYC is considering "Ban the Box" legislation which would prohibit inquiries into arrest and conviction records in the housing application process. *See* https://www.nytimes.com/2022/08/09/nyregion/criminal-background-checks-nyc-housing.html.

[80] Some states go further to prevent the use of eviction records in the tenant screening process. See e.g., California seals eviction records unless (1) a landlord files a complaint and prevails at trial within 60 days of filing, (2) a default is set aside against a tenant and the landlord then prevails at trial within 60 days of the judgment being set aside. CCP 1161.2. New York prohibits the total use of past or pending landlord and tenant court cases as a basis to deny housing to a prospective applicant. A rebuttable presumption exists if a landlord or their agent reviews landlord and tenant court records and then denies the applicant housing, that the law has been violated. NYS Real Property Law §227-f. And, in Massachusetts, a bill pending before the Legislature would protect tenants by establishing a mechanism for sealing eviction records for tenants facing no-fault eviction at any time, tenants facing a non-payment eviction after 4 years (without another non-payment eviction), and tenants facing fault eviction after 7 years (without another fault eviction). The bill also makes it unlawful for a TSC or landlord to use or report a sealed court record for purposes of screening a tenant and confers enforcement authority on the Attorney General. See *An Act Promoting Housing Opportunity and Mobility Through Eviction Sealing*, H.1690 (2023).

the need to ensure strict compliance with the FCRA, and the novel problems of opacity and disparity raised by using algorithms to screen potential tenants. But the State Attorneys General would propose that any federal rulemaking make clear that federal action is not preemptive and that state and local governments retain a vital regulatory role, as federal rights will set a floor of protections that other government actors can raise as necessary to protect their communities. For the foregoing reasons, the signatory State Attorneys General urge the CFPB and FTC to take swift action to set that strong floor of protection by adopting the regulatory recommendations laid out herein.

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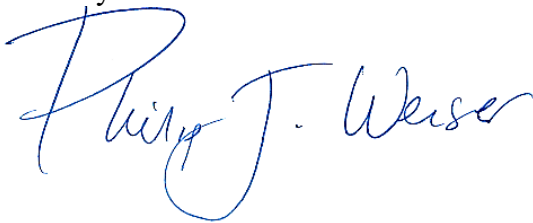Attorney General of California

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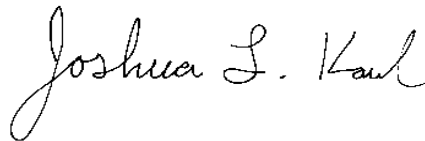
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