CENTER FOR
DEMOCRACY
& TECHNOLOGY

May 30, 2023

To: Federal Trade Commission
   Office of the Secretary
   600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B)
   Washington, DC 20580

   Consumer Financial Protection Bureau
   1700 G Street NW
   Washington, DC 20552

Re: Request for Comments on Tenant Screening, P235400

The Center for Democracy & Technology (CDT) respectfully submits these comments in response to the Federal Trade Commission (FTC) and Consumer Financial Protection Bureau's (CFPB) request for information regarding background screening issues affecting people who seek rental housing in the United States. CDT is a nonprofit 501(c)(3) organization fighting to advance civil rights and civil liberties in the digital age. CDT's focus includes the impact of data- and algorithm-driven discrimination on people's access to economic opportunities, including safe and adequate housing.

Landlords turn to tenant screening companies to try to predict whether applicants will pay rent on time,[1] and whether applicants will pose any threat to landlords' property or other tenants.[2] As the request for information recognizes, the types of data used to predict these outcomes generally fall into three categories: credit data, criminal records, and eviction records. Our comments explain that

- Credit data, criminal records, and eviction records are unreliable as tenant screening criteria;

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[1] Will Douglas Heaven, *Bias Isn't The Only Problem With Credit Scores—and No, AI Can't Help*, MIT Tech. Rev. (June 17, 2021), https://www.technologyreview.com/2021/06/17/1026519/racial-bias-noisy-data-credit-scores-mortgage-loans-fairness-machine-learning/.

[2] Matthew Harold Leiwant, *Locked Out: How Algorithmic Tenant Screening Exacerbates the Eviction Crisis in the United States*, 6 Geo. L. Tech. Rev. 276, 279 (2022), https://georgetownlawtechreview.org/wp-content/uploads/2022/08/Leiwant_Locked-Out.pdf.

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- The use of this data disproportionately denies housing and negatively impacts other opportunities for marginalized communities; and
- Rental applicants have few available avenues for recourse when they are a victim of discriminatory tenant screening.

The comments then offer recommendations for potential regulatory action to address these issues.

I.   **Certain tenant screening criteria are not reliable predictors of tenant behavior.[3]**

Tenant screening criteria involves several data points that are poor predictors of a prospective tenant's behavior. Nevertheless, the vast majority of landlords – and the screening companies they work with – rely on these often unreliable tenant screening criteria.

In a 2022 survey of more than 1100 landlords who manage their own tenant screening, the Urban Institute found that nearly ninety percent of landlords use income, job history, and eviction records to screen applicants.[4] Other commonly used tenant screening criteria include credit scores and history, rental history, identity verification information, court records regarding civil judgments, and criminal records.[5] Tenant screening also incorporates foreclosures, non-tenancy related debt such as medical and student loan debt, banking and purchase activity, education history, and social media and online activity.[6]

Much of this data can be unreliable for tenant screening because it reflects an applicant's past circumstances rather than their current ability or tendency to make timely payments or otherwise abide by the terms of a lease. People can remain trapped in a cycle of poor access to credit and housing stability because they are evaluated based on past records despite changes

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[3] This section addresses Questions 1, 8, 17, 22, 33, 36, 39, and 40 of the request for comments.
[4] Jung Hyun Choi, Laurie Goodman, and Daniel Pang, *The Real Rental Housing Crisis is on the Horizon*, Urban Institute (Mar. 11, 2022), https://www.urban.org/urban-wire/real-rental-housing-crisis-horizon.
[5] Aditi Shrikant, *This Common Problem With Tenant Background Checks is Costing Renters*, CNBC (Nov. 17, 2022), https://www.cnbc.com/2022/11/17/background-checks-are-often-inaccurate-make-renting-more- expensive.html.
[6] Erin Smith and Heather Vogell, *How Your Shadow Credit Score Could Decide Whether You Get an Apartment*, ProPublica (Mar. 29, 2022), https://www.propublica.org/article/how-your-shadow-credit-score-could-decide-whether-you-get-an-apartment; Karen Hao, *The Coming War on The Hidden Algorithms That Trap People in Poverty*, MIT Tech. Rev. (Dec. 4, 2020), https://www.technologyreview.com/2020/12/04/1013068/algorithms-create-a-poverty-trap-lawyers-fight-back/.

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to their circumstances or qualifications.[7] For example, employment history can be affected by barriers such as hiring discrimination or medical treatments that create a period of unemployment, in which case that history will be less accurate in predicting a person's current ability to make timely payments than their current employment will be. Further, while adverse credit data may be a product of circumstances that no longer apply, an applicant's recent on-time rental and utility payments are more likely to reflect their current ability to pay but are not traditionally considered when screening applicants.[8]

Arrest records and eviction records are presumed to indicate culpability, but they can also fail to tell the whole story. Arrest records do not demonstrate actual criminal conduct or conviction – this data simply reflects a person's prior encounters with law enforcement without considering the factors unrelated to culpability (such as over-policed neighborhoods) that can contribute to such encounters.[9] An eviction record, which tenant screening companies scrape from free court indexes that only state the parties and address of the relevant property, indicates only that an eviction case was filed and thus on its own is not proof of a successful eviction, let alone any wrongdoing by the applicant.[10] Such records can be a result of landlords' reliance on nuisance laws or retaliation against tenants for exercising their rights to withhold rent over poor rental conditions.[11] Eviction records can also be a result of other circumstances that applicants cannot avoid. For example, the COVID-19 pandemic cost numerous people their jobs and expanded the need for unemployment benefits, which were increasingly being administered by flawed algorithmic systems that exacerbated delays and denials of benefits.[12] As a result, people could not make their rent and utility payments, which hurt their credit scores, and their inability to make payments also prompted landlords to initiate eviction proceedings that became public record.[13]

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[7] Eric Sirota, *Smokescreen: Unfair Tenant Screening Practices Perpetuate Housing Discrimination* (May 10, 2023), https://www.povertylaw.org/article/unfair-tenant-screening-practices/.

[8] Sasha Fernandez, *The Use of Alternative Data – Like On-Time Rental Payments – Could Help Borrowers Boost Credit Scores*, Marketplace (Jul. 7, 2022), https://www.marketplace.org/shows/marketplace-tech/the-use-of-alternative-data-like-on-time-rental-payments-could-help-borrowers-boost-credit-scores/.

[9] Bill Block, *How Biased Algorithms Create Barriers to Housing*, ACLU Washington (Feb. 16, 2022), https://www.aclu-wa.org/story/how-biased-algorithms-create-barriers-housing.

[10] 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.

[11] Rasheedah Phillips, *Eviction Records Follow People Around for Years. This Isn't Fair.*, (June 4, 2021), https://nextcity.org/urbanist-news/eviction-records-follow-people-around-for-years-this-isnt-fair.

[12] Hao, *supra* note 6.

[13] *Id*.

To make matters worse, tenant screening companies compile data from numerous sources, including credit bureaus, housing courts, and other public records, which can include data that is outdated, mismatched, or simply recorded incorrectly.[14] While rental applicants have the right to dispute inaccurate data, resolution can take over a month, which may be well beyond the timeline for the person to find a place to live, and by which point rental units at the desired property may no longer be available.[15]

II. Tenant screening practices disproportionately harm marginalized communities.[16]

Much of the data described above can disproportionately lead to negative tenant screening outcomes for certain communities, particularly Black, Indigenous, and immigrant communities and disabled people. Credit data such as level and source of income, employment history, history of missed payments, length of credit history, and debt balances and assets tend to disadvantage marginalized communities who experience systemic discrimination in employment and access to credit.[17] Adverse credit decisions make it harder for members of marginalized communities to build credit and improve their credit scores that are included in the tenant screening process.[18]

As noted above, affirmatively using certain positive alternative credit data such as an applicant's cash flow and on-time rental and utility payment data from their current residence can help mitigate the discriminatory impact of traditional credit scoring, because this data better reflects the person's current ability and reliability to make timely rental payments.[19] However, even alternative credit data can produce discriminatory outcomes if it is not selected carefully. For example, a study by the Student Borrower Protection Center examined a fintech company that trained its algorithmic system to consider certain educational data such as average exam scores,

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[14] Nisha Shetty & Jay Young, *The Problem With Tenant Screening Reports*, The Real Deal (Sept. 12, 2022), https://therealdeal.com/new-york/2022/09/12/the-problem-with-tenant-screening-reports/.
[15] *Id*.
[16] This section addresses Questions 3, 5, 14, 18, 19, 20, 23, 27, 28, 31, 32, and 39 of the request for comments.
[17] Chi Chi Wu, *Reparations, Race, and Reputation in Credit: Rethinking the Relationship Between Credit Scores and Reports with Black Communities*, Medium (Aug. 7, 2020), https://medium.com/@cwu_84767/reparations-race-and-reputation-in-credit-rethinking-the-relationship-between-credit-scores-and-852f70149877.
[18] Thea Garon, *Young Adults' Credit Trajectories Vary Widely by Race and Ethnicity*, Urban Institute (Aug. 22, 2022), https://www.urban.org/urban-wire/young-adults-credit-trajectories-vary-widely-race-and-ethnicity.
[19] Daniel Pang, *Incorporating Two Alternative Types of Data into Mortgage Underwriting Could Make the Process More Equitable*, Urban Institute (Jan. 4, 2023), https://www.urban.org/urban-wire/incorporating-two-alternative-types-data-mortgage-underwriting-could-make-process-more.

college or university attended, and post-graduate income levels, that was thought to more accurately predict a student loan borrower's estimated earning potential and thus their ability to repay.[20] The study compared how the system treated borrowers with the same income levels but different alma maters. It found that the system subjected graduates of minority-serving institutions to higher interest rates on their student loans. As a result, companies have to examine whether specific points of alternative data, such as college or university attended, could actually contribute to disparities instead of mitigating them.

Communities that face higher rates of socioeconomic marginalization are more heavily policed, and young people in these communities may have arrest records before they are even old enough to begin trying to build credit.[21] The Department of Housing and Urban Development (HUD) has cautioned that rejecting applicants based on arrest records can lead to discrimination on the basis of race or national origin prohibited under the Fair Housing Act (FHA).[22] Arrest rates are higher in overpoliced neighborhoods, which tend to comprise predominantly Black, Indigenous, and immigrant communities, so people who have lived in these neighborhoods are more likely to have criminal record data.[23] Arrest records can also be a result of law enforcement responses to deaf people, people with intellectual or developmental disabilities, or people experiencing a mental health crisis.[24]

Even the technology that landlords themselves use to surveil their properties can contribute to arrest records. Landlords contribute to overpolicing when they use video surveillance, facial recognition, and biometric entry systems to monitor and prevent unpermitted activity or unauthorized presence.[25] These technologies can also trigger arrests and evictions for people who are already disproportionately surveilled, and who are less likely to be accurately identified

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[20] Student Borrower Protection Center, Educational Redlining (2020), https://protectborrowers.org/wp-content/uploads/2020/02/Education-Redlining-Report.pdf.
[21] Dispelling Myths About Poverty, https://equaljusticeunderlaw.org/poverty-myths; NAACP Legal Defense Fund, *School to Prison Pipeline* (Feb. 16, 2018), https://www.naacpldf.org/case-issue/school-prison-pipeline/.
[22] Office of General Counsel, Department of Housing and Urban Development, *Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.
[23] TechEquity Collaborative, *Tech, Bias, and Housing Initiative: Tenant Screening* (Feb. 23, 2022), https://techequitycollaborative.org/2022/02/23/tech-bias-and-housing-initiative-tenant-screening/.
[24] Jamelia N. Morgan, *Policing Under Disability Law*, 73 Stanford L. Rev. 1401 (2021), https://review.law.stanford.edu/wp-content/uploads/sites/3/2021/06/Morgan-73-Stan.-L.-Rev.-1401.pdf.
[25] Avi-Asher Schapiro, *Good Business or Digital Bias? The Divisive Rise of 'Proptech',* Thomson Reuters (July 15, 2020, 5:14 PM), https://news.trust.org/item/20200715162819-bngcy; Anti-Eviction Mapping Project, Landlord Tech Watch, https://antievictionmappingproject.github.io/landlordtech/.

through facial analysis, increasing the likelihood that they could be penalized for behavior that is not even theirs.[26]

In addition to its guidance on the use of arrest records, HUD has cautioned that using nuisance laws to evict domestic violence survivors may violate the FHA because of the practice's disparate impact on the basis of gender and disability.[27] Nuisance laws subject tenants to potential fines and suspension of their rental licenses if law enforcement is frequently called to a rental property, and landlords cite these ordinances to evict tenants.[28] However, many of these law enforcement calls stem from interactions with child protective services and domestic abuse incidents. Eviction records generated from these cases thereby punish people for being victims of past domestic violence, which disabled people and people of color are more likely to experience and have greater difficulty leaving.[29] The ease with which eviction records are sealed or expunged varies by jurisdiction, as do the legal protections against the use of such records for tenant screening.[30]

III. The lack of transparency in discriminatory tenant screening is a barrier to accountability.[31]

The FHA prohibits discrimination in advertisements, offers, and sale or rental of housing on the basis of race, color, religion, sex, disability, familial status, or national origin.[32] As described above, HUD has advised that the use of criminal and eviction record data can violate the FHA.

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[26] *See generally* Sophia Maalsen, Peta Wolifson, Dallas Rogers, Jacqueline Nelson, and Caitlin Buckle, AHURI, *Understanding Discrimination Effects in Private Rental Housing* (2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3916655. *See also* Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 Proceedings Of Machine Learning Research 2 (2018), http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf.

[27] Office of General Counsel, Department of Housing and Urban Development, *Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services* (2016) https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF.

[28] Jerusalem Demsas, *Why People Are Getting Evicted for Calling 911*, Vox (Mar. 15, 2021), https://www.vox.com/22307509/crime-free-evictions-for-calling-911.

[29] Lydia X.Z. Brown, *Tenant Screening Algorithms Enable Racial and Disability Discrimination at Scale, and Contribute to Broader Patterns of Injustice*, Center for Democracy & Technology (Jul. 7, 2021), https://cdt.org/insights/tenant-screening-algorithms-enable-racial-and-disability-discrimination-at-scale-and-contribute-to-broader-patterns-of-injustice/; Alisha Jarwala and Sejal Singh, *When Your Emergency is a "Nuisance"*, Slate (Jul. 9, 2019), https://slate.com/news-and-politics/2019/07/nuisance-ordinances-study-disabilities-domestic-violence-eviction.html.

[30] Kirchner, *supra* note 10.

[31] This section addresses Questions 2, 4, 8, 9, 15, 31, 34, 35, 37, 41, and 42 of the request for comments.

[32] 42 U.S.C. §3604 *et seq*.

The Fair Credit Reporting Act (FCRA) also requires consumer reporting agencies to maintain reasonable procedures to ensure maximum accuracy in consumer reports and to allow consumers to correct inaccuracies.[33] However, as the CFPB has recognized, renters have difficulty disputing adverse outcomes arising from tenant screening tools, making it difficult to successfully vindicate their rights under civil rights and consumer protection laws.[34] Adverse action notices, to the extent they are even provided to rental applicants, generally lack enough detail to allow errors to be found and corrected before applicants are rejected.[35]

An ongoing case against tenant screening company CoreLogic illustrates this challenge: when a landlord rejected Carmen Arroyo's application to move into a new unit in her building with her son who had recently become disabled, Arroyo was simply told that her son had "disqualifying" criminal records.[36] There was no further information in the documentation the landlord received from CoreLogic. Arroyo, who had consented to her son's tenant screening as his conservator, continued to work a full-time job, support her son as he lived at a nursing home, and look for more accessible housing while seeking an explanation. As far as Arroyo's lawyers could find, her son's only criminal record was a shoplifting charge that had occurred before he became disabled and had been dismissed, so she was not aware of criminal conduct that would be disqualifying. She eventually sued CoreLogic under the FCRA and FHA, alleging that CoreLogic refused multiple written requests to provide her with her son's consumer file or an explanation of the disqualifying criminal record, delaying her ability to dispute it.[37]

In an unsuccessful motion to dismiss, CoreLogic argued that the landlord, not the tenant screening company, is responsible for eligibility criteria and rental decisions.[38] In the meantime, CoreLogic's practices may affect people screened by other companies – the FTC has alleged that

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[33] 15 U.S.C. §1681b.

[34] *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/.

[35] Smith, *supra* note 6.

[36] Cyrus Farivar, *Tenant Screening Software Faces National Reckoning*, NBC News (Mar. 14, 2021), https://www.nbcnews.com/tech/tech-news/tenant-screening-software-faces-national-reckoning-n1260975.

[37] Complaint, Connecticut Fair Housing Center et al., v. CoreLogic, Apr. 24, 2018, https://www.ctfairhousing.com/PDFs/CoreLogicComplaint.pdf. While CoreLogic argued that Arroyo failed to submit sufficient proof that she was authorized to request this information as her son's conservator, there was a genuine issue of material fact as to whether CoreLogic provided adequate directions to Arroyo on additional information required to complete her request and on how to submit this information, as the FCRA requires. Memorandum on Decision on Motions for Summary Judgment, Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., 478 F. Supp. 3d 259 (D. Conn. 2020).

[38] Farivar, *supra* note 36.

another tenant screening company, AppFolio, used incorrect data from CoreLogic.[39] Therefore, other tenant screening companies are using data from CoreLogic even if it is unreliable or incomplete.

While tenant screening companies and landlords each deflect responsibility to the other, and tenant screening companies feed inaccurate data to each other, rental applicants are left having to track down the errors in this widespread data exchange that have barred their access to housing. And like Arroyo, rejected applicants face this burden while trying to maintain income and survive without supportive housing in the interim, and the support of legal aid and investigation and enforcement actions by regulators are their main recourse.

IV.   Recommendations for potential regulatory efforts[40]

Regulators have affirmed that discriminatory algorithmic tenant screening practices can violate the FHA, and that tenant screening that punishes domestic violence survivors for their abusers' actions is at least counter to the spirit of the FHA.[41] Regulators should explore new regulations to impose the following obligations:

- Tenant screening companies:
    - Must proactively provide landlords with detailed explanations regarding disqualifying records;
    - Must not disqualify rental applicants on the basis of criminal or eviction record data that does not demonstrate culpability, such as an arrest record where the applicant was not convicted, or an eviction filing that did not actually result in the applicant's eviction; and
    - Must assess their products and provide landlords with documentation explaining their tenant screening methodologies and outputs, and any limitations to the detail or accuracy of their methodologies and outputs.
- Landlords must:

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[39] Complaint, U.S. v. AppFolio, Dec. 8, 2020, https://www.ftc.gov/system/files/documents/cases/ecf_1_-_us_v_appfolio_complaint.pdf.
[40] This section addresses Questions 9, 21, 30, 34, and 43 of the request for comments.
[41] Department of Justice, Statement of Interest, Louis et al. v. SafeRent et al. (Jan. 9, 2023), https://www.justice.gov/opa/press-release/file/1561526/download; The White House Blueprint for a Renters Bill of Rights (2023), https://www.whitehouse.gov/wp-content/uploads/2023/01/White-House-Blueprint-for-a-Renters-Bill-of-Rights.pdf.

- Bear responsibility for understanding and explaining to rental applicants the basis for adverse tenant screening decisions;
- Articulate the reasons for every adverse decision in adverse action notices that are proactively provided to rental applicants; and
- Refrain from relying on tenant screening companies' assessments of their own products alone to establish compliance with housing laws.

In addition, agencies should explore guidance advising that:

- Tenant screening companies should identify alternative data that would reliably reflect a person's current ability to pay – without producing discriminatory outcomes similar to the traditional data they are supposed to substitute – and consider this data when their initial criteria would result in a denial.
- Landlords should not rely on tenant screening companies' reports to reject applicants, because these reports compile data scraped from numerous sources that may be incorrect or outdated.
- Landlords should impose contractual terms that obligate the tenant screening companies they use to provide sufficient information for landlords to understand the basis for a recommended rejection.

Conclusion

The FTC and CFPB's current authorities under civil rights and consumer protection laws apply to the harms of tenant screening practices, though the lack of transparency in these practices creates challenges for enforcement. While the agencies exercise their existing enforcement authorities against tenant screening and explore issuing new regulations and guidance such as those recommended above, the agencies should push Congress to supplement their regulatory efforts by passing legislation that explicitly restricts the use of criminal and eviction record data for purposes like tenant screening,[42] and that holds both landlords and tenant screening companies responsible for ensuring that rental applicants are affirmatively provided a detailed explanation regarding the data responsible for a "disqualifying" record.

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[42] For example, advocates have recommended sealing eviction records at the point of filing to prevent the use of eviction data that does not take the nature or disposition of an eviction filing into account. Tinuola Dada and Natasha Duarte, *How to Seal Eviction Records*, Upturn (2022), https://www.upturn.org/work/how-to-seal-eviction-records/.