



Public Housing Authorities Directors Association

511 Capitol Court, NE, Washington, DC 20002-4937
phone: 202-546-5445 fax: 202-546-2280 www.phada.org

The Honorable Helen R. Kanovsky, Esq.
General Counsel
Office of the General Counsel
United States Department of Housing and
Urban Development
451 Seventh Street, SW
Washington, DC 20410

June 17, 2016

Re: 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

Dear Ms. Kanovsky:

The Public Housing Authorities Directors Association (PHADA) is a professional membership association of over 1,900 chief executives of public housing authorities (HAs). PHADA wishes to raise its concerns regarding recent Office of General Counsel (OGC) guidance. On April 4, 2016, HUD's OGC published the document referenced above. The OGC did not address any particular audience but emailed the guidance broadly to housers and made it available on the department's web site under, "In Focus." The document is not available on HUD's web page entitled, "OGC Opinions and Guidance." PHADA has become concerned with the publication and HUD's method of issuance on a number of dimensions detailed in this letter.

As with its assessment of Notice PIH 2015-19, PHADA appreciates and supports those elements of the OGC's guidance which provide HAs and other housers with legitimate and useful advice concerning reasonable and unreasonable uses of arrest records and other records of criminal charges and convictions. It is important for HAs to understand as clearly as possible both the importance of and limitations on their uses of this information in deciding whom to admit to assisted housing apartment complexes and to the Section 8 Housing Choice Vouchers that they manage, and in deciding on actions to terminate that assistance.

Nevertheless, among other things, PHADA believes that:

- HUD has taken the unusual step of issuing important guidance outside of its normal channels through its operating divisions,

- The department appears to have established new requirements and review standards without the public notice and comment process required by the Administrative Procedures Act (APA), or processes required by guidance issued by the Office of Management and Budget (OMB) to federal agencies and departments concerning guidance issuances (OMB Bulletin 07-02),
- The guidance is inconsistent with or contradicts the tone and content of some of HUD's existing regulations,
- The guidance may not comport with standards regarding implementation of a disparate impact described recently by the Supreme Court of the United States in *Texas Dept. of Housing and Community Development v. Inclusive Communities Project, Inc.*,
- The OGC seems to contradict guidance issued by HUD's Office of Public and Indian Housing (PIH) in Notice PIH 2015-19 concerning the use of arrest records for screening applicants for the public housing and Section 8 programs,
- In combination with HUD's Affirmatively Furthering Fair Housing (AFFH) regulatory changes and its Assessment of Fair Housing (AFH) procedures, the OGC's guidance could raise the risk of litigation for HAs, housers and HUD significantly, and
- The guidance fails to offer housers specific guidance concerning what constitute acceptable and unacceptable screening practices or to describe any safe harbor for housers concerning uses of criminal histories.

Issuance of this Guidance

Ordinarily, the department has issued guidance to HAs and other partners through its operating offices and divisions and that guidance has been subject to an extensive internal vetting and review process. Guidance has usually taken the form of Notices, but HUD has used other forms of guidance irregularly. The OGC has always been in the position of offering advice and guidance to HUD's operating divisions and offices but has rarely issued guidance to independent entities operating as HUD's agents in specific programs. In this particular instance, HUD has taken the unusual step of issuing important guidance through the OGC rather than through its operating divisions (e.g. PIH, the Office of Housing, or the Office of Fair Housing and Equal Opportunity (FHOO)), and the guidance fails to identify its audience. The source and form of the OGC's guidance concerning this very important topic may serve to confuse HUD's program sponsors and agents rather than clarify options available to them in connection with use of criminal backgrounds in screening for admission and for lease enforcement.

“Guidance” that Creates Requirements and Confusion

Departmental guidance cannot create requirements binding on entities outside of the department. In order to create new requirements or amend existing ones, HUD must abide by the APA’s notice and comment process. In its guidance concerning the use of criminal records, the OGC often makes use of language that seems to require compliance by HUD’s program sponsors and agents.

For example, the OGC appears to create a requirement and to establish standards of evidence related to the use of criminal histories:

A housing provider must, however, be able to prove through reliable evidence that its policy or practice of making housing decisions based on history actually assists in protecting resident safety and/or property. (page 5)

The guidance also appears to prejudge possible fair housing issues, implying a requirement not currently in regulations:

For that reason, a housing provider who denies housing to persons on the basis of arrests not resulting in conviction cannot prove that the exclusion actually assists in protecting resident safety and/or property. (page 5).

The guidance seems to establish a similar requirement and prejudices fair housing issues using novel standards:

A housing provider with a more tailored policy or practice that excludes individuals with only certain types of convictions must still prove that its policy is necessary to serve a “substantial, legitimate, nondiscriminatory interest.” To do this, a housing provider must show that its policy accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not. (page 6)

If the department wishes to establish new requirements concerning uses of criminal histories, it may do so using the notice and comment process required by the APA.

In this regard, the OGC’s guidance includes a number of statements that implying new standards that may not actually be standards at all:

Regardless of the data used, determining whether a policy or practice results in a disparate impact is ultimately a fact-specific and case-specific inquiry. (page 4),

and

The determination of whether any particular criminal history-based restriction on housing satisfies step two of the discriminatory effects standard must be made on a case-by-case basis. (page 7),

and

Ultimately, the evidence that may be offered to show that the plaintiff or complainant's criminal history was merely a pretextual justification for intentional discrimination by the housing provider will depend on the facts of a particular case. (page 10)

This approach (describing new standards as though they are requirements and then indicating that all matters will be determined case by case) is problematic on 2 fronts. First, since the large majority of HAs and landlords are small and lack significant slack resources, they may err on the side of conservative caution and take these policies and standards which are not really requirements as requirements. The guidance's implicit threats may act to coerce some HAs and other providers to implement policies that are not in their interests, that don't conform to other existing regulations, or that don't conform to their communities' legitimate policy preferences. Second, a number of public comments the department has received in response to its new AFFH regulation and to various AFH tools have pointed out this confusing language. Many commenters expressed concern that HUD has not provided specific advice on what screening practices are acceptable and what practices are not, nor has HUD described any safe harbors providers of housing and real estate-related transactions could rely on as they endeavor to comply with new requirements and existing regulations. Making a similar point in the *Advocate* of May 25, 2016, Mr. Raymond James, Esq. wrote:

It is clear that the HUD OGC, and therefore the Secretary of HUD, want to **impose** a nationwide policy on the admission of tenants with criminal records. [emphasis added]

This guidance continues HUD's confusing and sometimes contradictory approach to implementing the new AFFH regulations.

Inconsistency with OMB's "Final Bulletin for Agency Good Guidance Practices"

The OGC's guidance affects all, "Providers of Housing and Real Estate-Related Transactions," and as a result:

... may reasonably be anticipated to: (i) Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the

economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. (OMB Bulletin 07-02, p. 19)

As the OGC's guidance affects a sector of the economy (all providers of housing and real estate transactions), it is a "significant guidance document," and is subject to the bulletin's procedures. Among other things, OMB's bulletin indicates that:

II. Basic Agency Standards for Significant Guidance Documents ...

2. Standard Elements: Each significant guidance document shall:

...

h. Not include mandatory language such as "shall," "must," "required" or "requirement," unless the agency is using these words to describe a statutory or regulatory requirement, or the language is addressed to agency staff and will not foreclose agency consideration of positions advanced by affected private parties. (OMB Bulletin 07-02, p. 20)

Section III. 2. of the bulletin requires federal agencies to offer the public an opportunity to comment on all significant guidance documents and identify an office where the public may submit comments or complaints concerning an agency's failure to comply with the good guidance bulletin.

In addition, Section IV of the bulletin requires federal agencies to notify the public of the content of draft economically significant guidance documents, offer the public an opportunity to comment on that guidance, and respond publicly to comments the agency receives concerning proposed economically significant guidance documents. Given the economic sector affected by OGC's guidance, PHADA believes that the OGC's guidance represents an economically significant guidance document.

On May 10, 2016, staff of OMB confirmed to PHADA that OMB Bulletin 07-02 remains in effect. HUD's guidance on the use of criminal records does not appear to comply with that bulletin and that HUD's issuance would require the notice and comment process described by OMB.

Inconsistency with Existing Program Regulations

Regulations treat assisted housing sponsors' access and use of criminal records in denying admission to assisted housing and in terminating that assistance at 24 CFR Part 5 Subpart L and at 24 CFR Part 960 Subpart B. Those sections include authority to obtain and use criminal records to deny admission or terminate assistance based on a wide set of criminal activities in public housing (Part 960) and other HUD supported assisted housing (Part 5).

HUD's new guidance on the use of criminal records seems to contradict requirements and authorities established in regulation.

24 CFR Part 5 says, in part:

- You *must* prohibit admission to your federally assisted housing of an applicant for three years from the date of eviction if any household member has been evicted from federally assisted housing for drug-related criminal activity. (24 CFR 5.854(a))
- You **must** establish standards that **prohibit admission of a household** to federally assisted housing if: (1) You determine that any household member is currently engaging in illegal use of a drug; or (2) You determine that you have reasonable cause to believe that a household member's illegal use or a pattern of illegal use of a drug may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents. [emphasis added] (24 CFR 5.854(b))
- You may prohibit admission of a household to federally assisted housing under your standards if you determine that any household member is currently engaging in, or has engaged in during a reasonable time before the admission decision: (1) Drug-related criminal activity; (2) Violent criminal activity; (3) Other criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents; or (4) Other criminal activity that would threaten the health or safety of the PHA or owner or any employee, contractor, subcontractor or agent of the PHA or owner who is involved in the housing operations. (24 CFR 5.855)

24 CFR Part 960, applicable to operators of public housing, says, in part:

- These policies shall provide for and include the following: ... (iii) Precluding admission of applicants whose habits and practices reasonably may be expected to have a detrimental effect on the residents or the project environment; (24 CFR 960.202(a)(2))
- In selection of families for admission to its public housing program, or to occupy a public housing development or unit, the PHA is responsible for screening family behavior and suitability for tenancy. The PHA may consider all relevant information, which may include, but is not limited to: ... (2) A record of disturbance of neighbors, destruction of property, or living or housekeeping habits at prior residences which may adversely affect the health, safety or welfare of other tenants; and (3) A history of criminal activity involving crimes of physical violence to persons or

property and other criminal acts which would adversely affect the health, safety or welfare of other tenants (See §960.204.). (24 CFR 960.203(c))

With respect to criminal activity described in §960.204:

- Required denial of admission (1) Persons evicted for drug-related criminal activity. The PHA standards **must** prohibit admission of an applicant to the PHA's public housing program for three years from the date of the eviction if any household member has been evicted from federally assisted housing for drug-related criminal activity. However, the PHA may admit the household if the PHA determines: ... [The rule proceeds to describe factors HAs **may** use to counterbalance these evictions.] (2) Persons engaging in illegal use of a drug. The PHA must establish standards that prohibit admission of a household to the PHA's public housing program if: ... [The rule describes details for these determinations] (3) Persons convicted of methamphetamine production. The PHA must establish standards that **permanently prohibit** admission to the PHA's public housing program if any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing. [emphasis added] (4) Persons subject to sex offender registration requirement. ... In the screening of applicants, the PHA must perform necessary criminal history background checks in the State where the housing is located and in other States where household members are known to have resided. (See part 5, subpart J of this title for provisions concerning access to sex offender registration records.) [emphasis added] (24 CFR 960.204(a))
- Persons that abuse or show a pattern of abuse of alcohol. The PHA **must establish standards that prohibit admission** to the PHA's public housing program if the PHA determines that it has reasonable cause to believe that a household member's abuse or pattern of abuse of alcohol may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents. [emphasis added] (24 CFR 960.204(b))

HUD's new guidance appears to contradict or undercut the authority of these rules. At best, HUD has injected an unreasonable level of uncertainty concerning compliance with HUD's new AFFH regulations and with HUD's existing regulatory requirements and authorities concerning admission to assisted housing programs and termination of that assistance. HUD may resolve these issues by clarifying its new guidance and its relationship with existing regulations.

Elements of the Supreme Court of the United States' Opinion in Texas Dept. of Housing Community Development v. Inclusive Communities Project, Inc. Raise Questions about HUD's Guidance

The June 25, 2015 opinion affirming use of disparate impact in fair housing enforcement included a number of important limitations on that standard. Among points raised by the court's opinion are:

Causation

In the case syllabus, the court wrote:

In a similar vein, a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. (p. 3)

Later, in Justice Kennedy's majority opinion he wrote:

A robust causality requirement ensures that "[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create. (p. 20)

The racial disparities of concern involve disparities in rates of criminal convictions and of arrests. Although those disparities are real, they are not caused or created by HAs or other housing providers. In this instance, it does not appear that causality is robust if it is present at all. A fair housing claim that an HA's use of criminal records in screening for admission represents a prohibited disparate impact without robust causality, "must fail," and there would be no prima facie case of illegitimate discrimination. The court's opinion protects HAs and other housing providers from liability for disparities they did not create. This point was highlighted in a published commentary prepared by Harry J. Kelly, Esq. of Nixon Peabody, LLP, and by Mr. James in the *Advocate*. PHADA questions whether HUD's guidance is consistent with the court's standard.

Double Binds

The majority opinion also endeavored to avoid placing defendants in a fair housing compliance or liability catch 22. Justice Kennedy wrote:

The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities. (p. 19)

PHADA wonders if HUD's guidance creates such a double bind in connection with the use of criminal records. On the one hand:

... criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (i.e., discriminatory effects liability). (p. 2)

But:

Accordingly, a policy or practice that fails to consider the nature, severity, and recency of criminal conduct is unlikely to be proven necessary to serve a "substantial, legitimate, nondiscriminatory interest" of the provider. The determination of whether any particular criminal history-based restriction on housing satisfies step two of the discriminatory effects standard must be made on a case-by-case basis. (p. 7)

A blanket policy that disparately impacts members of a protected class violates the FHA, but policies that use rational standards to differentiate between applicants' circumstances also may violate the act.

The guidance also advises that:

Additionally, intentional discrimination in violation of the Act occurs if a housing provider treats individuals with comparable criminal history differently because of their race, national origin or other protected characteristic (i.e., disparate treatment liability). [Later this is exactly what OGC recommends]. (p. 2)

But:

Where a policy or practice excludes individuals with only certain types of convictions, a housing provider will still bear the burden of proving that any discriminatory effect caused by such policy or practice is justified. Such a determination must be made on a case-by-case basis. (p. 10)

These examples may place HAs, other providers of housing and real estate transactions in catch 22s the court was trying to avoid. Mr. Kelly's commentary discusses the court's concern with double binds as well.

Justifications for Practices that Have Disparate Impacts

The court's decision describes the standards to use to find that defendants' facially nondiscriminatory policies produce disparate impacts in violation of the FHA.

Policies, whether governmental or private, are not contrary to the disparate-impact requirement unless they are “**artificial, arbitrary, and unnecessary barriers.**” (p. 4) [emphasis added]

Justice Kennedy cites this standard later in the majority opinion:

Disparate-impact liability mandates the “removal of artificial, arbitrary, and unnecessary barriers,” not the displacement of valid governmental policies. (p.18)

Kennedy described positive standards to test policies with disparate impacts as well:

... so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is **necessary** to achieve a **valid interest.** (p. 19)

The court majority expressed support for policies that produced disparate impacts on protected classes if a defendant can prove that the policies are **necessary** to achieve a **valid interest**, and that a policy may only be considered a violation of the FHA if it creates an **artificial, arbitrary, and unnecessary barrier.**

HUD’s guidance on this matter may have established very different standards to determine compliance with or violation of the disparate impact standard. In one instance, the OGC advises that a policy must be, “proven necessary to serve a “substantial, legitimate, nondiscriminatory interest” of the provider.” This standard seems more onerous than the court’s (necessary to achieve a valid interest). The OGC’s standard may disqualify criminal background screening practices that don’t create artificial, arbitrary and unnecessary barriers. Mr. Kelly’s commentary also raises this concern with HUD’s new guidance.

Finally, HUD has indicated that an acceptable criminal background screening policy must **accurately** distinguish between criminal conduct that **indicates a demonstrable risk** to resident safety and/or property. These standards seem much more stringent than creating artificial, arbitrary and unnecessary barriers.

OGC’s and HUD’s Other Guidance Are Inconsistent

On November 2, 2015, PIH issued Notice PIH 2015-19 concerning, “Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions.” PHADA understands that such Notices undergo a thorough internal review before

publication that permits every HUD division to provide feedback to the issuing office and suggest improvements to the guidance.

OGC's guidance on the use of arrest records differs significantly from that offered by PIH in its November 2015 Notice. PIH advised that HAs and other housing providers should not rely **solely** on arrest records in determining eligibility for admission. Use of such records should be accompanied by other evidence supporting the claim that an applicant's behavior represents a risk to the public housing property or to public housing residents. The PIH Notice offered a number of helpful suggestions concerning what that supporting evidence might be.

In contrast, the OGC wrote, "A housing provider with a policy or practice of excluding individuals because of one or more prior arrests (without any conviction) **cannot** satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest," [emphasis added] (p. 5) and, "For that reason, a housing provider who denies housing to persons on the basis of arrests not resulting in conviction **cannot** prove that the exclusion actually assists in protecting resident safety and/or property." [emphasis added] (p. 5) HUD has now issued two guidance documents that suggest the use of very different standards for uses of arrest records by providers of housing and real estate-related transactions.

HUD's Guidance Contributes to Increasing Risks of Litigation

PHADA and others have submitted comments concerning HUD's final AFFH regulation that expressed concerns that the rule lacked standards or safe harbors for compliance with HUD's new AFFH rules and procedures. PHADA has submitted similar comments concerning HUD's AFH information collection that also lacks standards or safe harbors for compliance with these new procedures. HUD's guidance seems to continue HUD's practice of not offering reasonable standards or safe harbors for the use of criminal histories in making decisions concerning admission to assisted housing programs or termination of that assistance. This raises the risks of expensive litigation concerning fair housing compliance for HAs, other providers of housing and real estate-related transactions, and HUD. Given the ongoing status of HUD's budgets and appropriations, it seems particularly important that guidance reduces risks of litigation and its very high associated costs.

OGC's Guidance Offers Little Guidance

Unlike existing regulations concerning the use of criminal records in admissions and termination decisions, the opinion of the Supreme Court, and HUD's Notice PIH 2015-19, HUD's recently issued guidance offers housing providers little help in navigating new liability and compliance standards related to disparate impact and HUD's implementation of the AFFH rule.

Rather than clarifying standards for compliance and liability, the new guidance has placed into question other requirements and procedures the department has used in prior years.

In comments submitted in recent years concerning fair housing regulations and information collections, PHADA and others have expressed concern that HAs lack examples, guidelines or standards the department will use in evaluating fair housing complaints, in assessing AFH submissions, and in determining regulatory compliance and noncompliance. In comments, many others requested concrete, understandable guidance on these matters and safe harbor policies that might be acceptable to HUD.

The OGC guidance does not seem to clarify these complicated, confusing issues for HUD grantees and partners, and it seems to contradict some existing published standards in regulations and in guidance. The guidance exacerbates uncertainty in this particular policy area.

Conclusion

To summarize, PHADA believes that the OGC's April 25, 2016 guidance is problematic on a number of counts:

- Its form and method of issuance is confusing.
- It effectively creates new requirements and standards for using criminal records without the use of public notice and comment procedures.
- The guidance does not seem consistent with procedures established by OMB Bulletin 07-02 that OMB staff confirmed remains in effect on May 10, 2016.
- It seems to contradict existing regulations at 24 CFR Part 5 and Part 960 governing the use of criminal records in making decisions concerning admissions and continued occupancy.
- It may not comport with standards recently established by the United States Supreme Court.
- It seems to contradict elements of HUD guidance issued through Notice PIH 2015-19.
- It does not appear to provide HUD's agents and program sponsors much help as they endeavor to comply with new AFFH and disparate impact requirements.

PHADA urges the department to reconsider its approach. HUD should:

1. Provide specific guidance to PHAs and owners of HUD-assisted housing projects concerning what screening practices HUD considers acceptable or unacceptable.

2. Adopt a moratorium on its enforcement activities for a reasonable period of time to allow HAs, and providers of housing and other real estate-related transactions to revise screening policies in relation to the department's specific guidance.
3. Revise existing regulations to conform to HUD's new guidance or create new requirements consistent with the APA and with OMB's Bulletin.
4. Assist HUD's operating divisions (e.g. PIH and OFHEO), in developing fair housing guidance appropriate to their areas of authority.

PHADA would be pleased to collaborate with the department and with OGC in developing guidance documents PHADA members are likely to find helpful. Please contact me if you believe we may be of any assistance to the department in offering our members helpful guidance and advice.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy G. Kaiser". The signature is fluid and cursive, with a large initial "T" and "K".

Timothy G. Kaiser
Executive Director

cc: The Honorable Julian Castro, Secretary
The Honorable Gustavo F. Velazquez, Assistant Secretary for Fair
Housing and Equal Opportunity
Ms. Lourdes Castro Ramirez, Principal Deputy Assistant Secretary, Office
of Public & Indian Housing
Mr. Edward L. Golding, Principal Deputy Assistant Secretary for Housing