

A Study on Homelessness among Veterans

Appendix P. Responses to Online Forum for Recommendations to End Veteran Homelessness



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Author	Comment
<p>Cate Tracz</p> <p>Moderator Registered: 04/01/13 Posts: 36</p>	<p>Posted 03/04 · Edited #1</p> <hr/> <p>The Texas Department of Housing and Community Affairs ("TDHCA"), with input from the Texas Interagency Council for the Homeless ("TICH") and the Texas Veterans Commission ("TVC"), is conducting a study on homelessness among Veterans to be submitted to the Texas Legislature on December 1, 2016.</p> <p>The Study on Homelessness among Veterans is required by Senate Bill 1580 (PDF), 84th (R) Texas Legislature. The study will be used to develop recommendations for the Texas Legislature for state programs and legislation to better serve Veterans who are experiencing homelessness.</p> <p>Per Senate Bill 1580, the study will include the following information:</p> <ul style="list-style-type: none"> • The definition of homeless Veteran used for the study • The status of homeless Veterans in Texas • The statewide and local entities providing services for Veterans • The funding sources of services for Veterans • Recommendations to the State's approach to address Veteran homelessness • Recommendations to State law to assist homeless Veterans <p>Through this Online Forum, TDHCA is seeking expertise and</p>

experience from Homeless Services Providers, Veterans Service Providers, and other interested stakeholders on how to end Veteran homelessness in Texas. Accordingly, TDHCA aims to answer the following questions:

1. What changes can be made to improve the effectiveness of Texas' approach to addressing homelessness among Veterans?
2. What recommendations to state law would to better address homelessness among Veterans?

****When providing comments in this Online Forum, please think about the homeless Veteran population in your area. Keep in mind any changes in homeless Veteran population you have noticed in the last few years Also, consider any factors that may have contributed to these changes in homeless Veteran population in your area.****

This forum will be open from Wednesday, March 9, 2016, through Wednesday April 6, 2016. Registered users of the Online Forum can subscribe to receive updates to forum topics or posts via e-mail by clicking the "Subscribe" link in the bottom left side of the forum. For additional information on TDHCA forums, please review the [Forums Overview and Usage Policy](#).

For additional information on the study development, please visit <http://www.tdhca.state.tx.us/tich/hvs.htm>.

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Author	Comment
<p>Cate Tracz</p> <p>Moderator Registered:04/01/13 Posts: 36</p>	<p>Posted 03/04 · Edited #1</p> <hr/> <p>TDHCA is aware of several local initiatives that have either effectively ended homelessness among Veterans or that are working towards this goal. For example, mayors in the following cities have taken the Mayors Challenge to End Veteran Homelessness:</p> <ul style="list-style-type: none"> • Austin • Crystal City • El Paso • Fort Worth • Houston • Plano • San Antonio • Waco <p>Are there important local initiatives in your area that are working to effectively end homelessness among Veterans? If so, please describe.</p>
<p>BringOpportunityHome</p> <p>Registered:03/10 Posts: 2</p>	<p>Posted 03/10 · Edited #2</p> <hr/> <p>Hello! I am the former Capacity Building Coordinator (VISTA) for Austin Mayor Steve Adler's office and now work as the HUD-VASH Housing Liaison for the Housing Authority of the City of Austin.</p>

Partnering with property companies to adopt an alternative screening criteria to house higher barrier clients, as well as fundraising private sector capital for a landlord risk mitigation pool and buy-down strategy to bring down price points on previously unaffordable fair market rent rates, has done us well. We began with forging relationships with the Real Estate community in Austin by using the power of the bully pulpit of the Mayor's Office to convene, for the first time, ringleaders and leading social service community organizations along with the Austin Apartment Association, Austin Board of Realtors, and many other partners at the same table. In collaboration, Austin Apartment Association, Austin Board of Realtors, Mayor Adler's office, ECHO (Ending Community Homelessness Coalition), Front Steps, Caritas, HACA (Housing Authority of the City of Austin), The VA, Senator Kirk Watson's office and Endeavor Real Estate group worked to coordinate and utilize many community resources and combine many different smaller and larger housing opportunities to make historic progress in 2015 to End Veteran Homelessness.

The Mayor's Task Force and the Austin Homeless Veterans Initiative (weekly collaborative working group) including ECHO (CoC leader) , HACA, Front Steps SSVF, ATCIC, Caritas SSVF, Goodwill, Salvation Army, A New Entry, the VA, and many others worked hard to ensure that on a community level, all operations and protocol were advancing and becoming more efficient. It was all about weekly communication and weakening silos that kept community resources from being streamlined.

It was evident to many leaders in the community that CA or Coordinated Assessment was the real game changer in disseminating and organizing client information so that all clinical and other case management providers could work together and stay on the same page on a client by client basis. The ROI (Release of Information) for the Continuum of Care allowed all organizations on the ROI to access to client information via the Homeless Management Information System.

Property companies were vetted from the meetings at the Mayor's Office and were brought in to partner with the CoC. A few of the larger partnering groups, ,all of which were able to adopt an alternative screening criteria for veterans and assist in new trials that hadn't been attempted in Austin before were Presidium Group, Roscoe Properties, Avesta , 512 Realty and

recently, Eureka Multifamily Group (Arnold Ground).

With these partnerships, most of the VASH (Veteran Affairs Supportive Housing) voucher holders were finally able to afford rent and qualify for housing opportunities brought to the table from the efforts of the Mayor's working group and other partnering organizations. The housing process lead by ECHO consisting of using Amrent background checks, property matching, data gathering, and then, on the front end, wrap-around services such as food vouchers, furniture, and then finally housing retention, is a the current system that is always developing, becoming more efficient each week with constant communication, collaboration, and community level problem solving to increase efficiency.

See more here: <http://housingheroesaustin.org/>

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Author	Comment
<p>Cate Tracz</p> <p>Moderator Registered:04/01/13 Posts: 36</p>	<p>Posted 03/04 #1</p> <hr/> <p>Identify existing barriers, gaps or needs in programs or services that are preventing the end of Veteran homelessness. How can these barriers, gaps or needs be filled?</p> <p>Are there specific gaps where Veterans keep falling out of programs and back into a homeless situation?</p>
<p>jessema</p> <p>Registered:03/10 Posts: 2</p>	<p>Posted 03/10 #2</p> <hr/> <p>Barriers:</p> <ul style="list-style-type: none"> • Tenant screening processes by property management companies: Incentives and laws to discourage property management from using high barrier background checks for veterans. Increase case management and housing counseling programs that can act as intermediary between housed veterans and property management. • Lack of access to VA housing screening and caseworker process: Decentralize and streamline the housing screening process by allowing agencies other than the VA to provide housing counseling and priority programs. • Agency and government silos in processes and services: Decrease and streamline the dispersed processes and documentation requirements from intake to housing voucher award.



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Author	Comment
<p>Cate Tracz</p> <p>Moderator Registered:04/01/13 Posts: 36</p>	<p>Posted 03/04 #1</p> <hr/> <p>Describe success stories for effectively ending Veteran homelessness in your communities. Can these best practices work statewide?</p>
<p>BringOpportunityHome</p> <p>Registered:03/10 Posts: 2</p>	<p>Posted 03/15 #2</p> <hr/> <p>Hello! I am the former Capacity Building Coordinator (VISTA) for Austin Mayor Steve Adler's office and now work as the HUD-VASH Housing Liaison for the Housing Authority of the City of Austin.</p> <p>Partnering with property companies to adopt an alternative screening criteria to house higher barrier clients, as well as fundraising private sector capital for a landlord risk mitigation pool and buy-down strategy to bring down price points on previously unaffordable fair market rent rates, has done us well. We began with forging relationships with the Real Estate community in Austin by using the power of the bully pulpit of the Mayor's Office to convene, for the first time, ringleaders and leading social service community organizations along with the Austin Apartment Association, Austin Board of Realtors, and many other partners at the same table. In collaboration, Austin Apartment Association, Austin Board of Realtors, Mayor Adler's office, ECHO (Ending Community Homelessness Coalition), Front</p>

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See more here: <http://housingheroesaustin.org/>

[gkeckert](#)

Posted 04/07

[#3](#)

Registered:04/07
Posts: 2

In line with the above comment, housing events are quite successful. By creating a community of housing seekers with peer-to-peer supports, many veterans (and others exiting homelessness through housing) find the task of identifying and securing housing much easier. Even when using housing navigators to support housing search and placement, these group forums allow people to share the difficulties of finding affordable housing, landlords accepting vouchers/subsidies, and the quality of housing being found. Rather than going it alone, veterans get to see that others are sharing their struggle but also finding and sustaining housing. These housing events can happen at properties leasing up, at sites where property managers represent multiple properties, emergency/transitional shelters, coordinated access sites, and 'stand down' events.

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- Lack of quality affordable housing options

Gap:

- Case management workers and services outside of urban areas: Increase outreach and presence of qualified housing counselors outside of central urban areas.

Needs:

- Financial resources for veterans with housing vouchers: Increase funding for rapid rehousing particularly for housing counseling, rental application fees, and deposits.
- Housing counseling and stability programs outside of central urban areas
- Incentives in existing affordable housing programs that target or set-aside units for veterans

Veterans fall out of programs and back into homeless due to the following:

- High barrier, siloed, and geographically dispersed program services
- Lack of housing first case management programs, services, and housing programs
- High barrier and stringent lease screening processes
- Lack of client financial resources for lease applications and deposits
- Lack of quality affordable housing options

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Author	Comment
<p>Cate Tracz</p> <p>Moderator Registered:04/01/13 Posts: 36</p>	<p>Posted 03/04 #1</p> <hr/> <p>What do you think an effective statewide approach to end homelessness among Veterans would look like? How would you change state law to better serve homeless Veterans?</p>
<p>gmcg</p> <p>Registered:08/29/13 Posts: 12</p>	<p>Posted 03/09 #2</p> <hr/> <p>Homelessness among Veterans will take a multi-pronged approach. And what a wonder opportunity for partnerships. You have to address medical issues including mental health, job training, absorption into the community, and THEN the housing. Without a safe place to live, all this is infinitely harder. It may be possible to borrow some successful experiences from microenterprise lending.</p>
<p>Marie Francis</p> <p>Registered:07/01/14 Posts: 1</p>	<p>Posted 03/09 #3</p> <hr/> <p>We need to approach homelessness (particularly veterans) with a one-stop shop. Currently we send homeless clients all through the county to access services. This causes clients to feel demoralized and tired before they have even sought one service. MHMR, Substance Abuse, Social service providers, medical services and other businesses/agencies that address</p>

homelessness (particularly veterans) should all be in one location. One Safe Place in Fort Worth (that addresses domestic violence) should be emulated. The VA should have a heavy presence there as well. Once barriers are identified and removed, housing can be the last option along with employment (if applicable).

[zappasodi](#)

Registered:03/09
Posts: 1

Posted 03/09

[#4](#)

Ending homelessness is a monumental challenge. Ending homelessness among veterans, while difficult, can be accomplished. The literature and practical experience shows good success with the "Housing First" model. This model recommends helping the person who is chronically homeless into stable housing first. When the housing is stabilized the individual has a better opportunity to make progress in addressing other needs. While housing is the cure for homelessness, we know that the homeless including homeless veterans have other challenges in addition to a lack of housing. Extensive support services with individualized case management and housing is in my opinion the appropriate solution to address most instances of homelessness. The best way to sequence the services (housing first or other) is the way that actually works best for the client. Typically, a homeless client needs individualized case managed care, a treatment plan, connection to needed support services and stable affordable housing. When the basic needs are in place and stability is established, the case manager can begin leading the client to accomplish other life goals.

If you are looking for recommendations pertaining to what role the state could play, the state could create an inventory of resources that are available to homeless veterans in each community as a means of helping to refer persons in need to available resources. Additionally, the state can continue to encourage local government to support and address the needs of homeless veterans.

[Rock1959](#)

Registered:03/10
Posts: 1

Posted 03/11

[#5](#)

-
- All cities / communities should designate a percentage of affordable and sustainable housing as there are homeless

Veterans identified in those cities and communities.

- Upon discharge from service, Veterans at risk should be provided intensive case management and after care in the communities in which they will be living.
- Advocate and lobby for the minimum wage to be raised to a livable wage.
- Designate and develop land for mini-housing and communal living with efficient transportation systems.
- Create a Veteran Peer to Peer network to include available housing / shelter options, and a way for veterans to ask for, (and receive), what they need in the communities in which they live, (similar to the Buy Nothing site currently on the web).
- Engage Veterans in leading groups that help to support and stabilize Veterans.

... to name just a few.

[ggloria](#)

Registered:03/10
Posts: 1

Posted 03/31

[#6](#)

I agree that the Housing First Philosophy is the way to go. We must get our Veterans stable housing and on-going support to get them stable. A majority of Homeless Veterans have a hard time finding housing due to their criminal background. Some may have felonies and they are denied because of it. After being denied housing two or three times, they simply regress, become discouraged and give up. There should be some exceptions to the rules as far as that goes to allow Veterans with felonies to be accepted into rental properties. Also, the state needs to find a way to get HUD-VASH vouchers into the rural areas. This would offer a great help to homeless Veterans in our rural counties.

[RRsims90](#)

Registered:08/01/11
Posts: 2

Posted 03/31

[#7](#)

How to end vet homelessness is simple just discontinue with the discriminatory practices in the implementation of your programs. I am a veterans,homeless,and i have been unsuccessful for the

past ten years with your programs, your first mistake is that we vets wrote this country a blank check to defend this country willing to give our life protecting life liberty and the pursuit of happiness we were trained to survive in the most extreme conditions so why should your programs promote us being inferior to people who did not serve this country as if me or other veterans cannot do the same for ourselves. Give preference to veterans is the answer cease the bigotry is our only choice in housing is to be a renter. This is Rick Sims speaking if i cannot do it for myself which i have tried for 10 years unsuccessfully trying to end my homeless situation it cannot be done because the department causes the problem because the department rewards the very same owners who causes the homelessness also the department places far too much weight on geography or location and far too little on promoting housing choice bec

[scottheiser](#)

Posted 03/31

[#8](#)

Registered:03/31
Posts: 1

You cannot mandate the public sector to provide rental set-asides and livable-wage employment. But what can be mandated is training for local VA and TVC staff to be trained in skills involving advocacy, collaboration, and negotiation. Then they can advocate and negotiate collaborative and innovative solutions defined at the local level.

We also need to rewrite policies and procedures VA and TVC (Texas Veterans Commission) staff must follow into guidelines with boundaries. Very few Veterans (round pegs) fit into the square holes which bind the hands of staff when needed (and available) resources cannot be reallocated at the local level. I cannot tell you how many times I have been told "The VA won't let us do this or the TVC won't allow us to do that." Someone really needs to listen to the boots on the ground in both the VA and the TVC. Funds and resources could be more effectively managed to help more Veterans and their families if control was given to the local offices. What works in Dallas or Houston does not work in Abilene or San Angelo.

[jessema](#)

Posted 04/04

[#9](#)

Registered:03/10
Posts: 2

	<p>Increase housing stability resources counseling throughout the state and extend the voucher expiration deadline for homeless veterans (from 60 or 90 days to find a unit to 120-150 days)</p>
<p>PaulaHCHVCTX Registered:03/11 Posts: 1</p>	<p>Posted 04/04 #10</p> <hr/> <p>I would like to see that non custodial parents are able to deduct child support from their income to qualify for affordable/subsidized housing options. Veterans paying child support often do not have sufficient income to pay for rent (and child support). This often results in individuals being homeless which negatively impacts his/her ability to maintain employment. Everyone would win if non custodial parents have access to subsidized housing (by deducting child support paid). The individual could afford housing, maintain employment, and hopefully have a place for the children to visit the non custodial parent. The laws need to be changed to permit a deduction for child support to qualify for subsidized housing.</p>
<p>DennisCTXVA Registered:04/06 Posts: 1</p>	<p>Posted 04/06 #11</p> <hr/> <p>These are many barriers our Homeless Veteran population faces as barriers to employment and housing in my area.</p> <p>Character Based Hiring Practices-</p> <p>I understand that companies desire the best talent and when unemployment rates are elevated the companies can pick and choose who they hire, if they hire anyone at all. Having been a manager I get it; however, Human Resource professionals and managers rely too heavily on negative aspects, such as a background check, lack of transportation, homelessness. We need character based practices because not everyone is a career criminal and many people facing these barriers can overcome them if they are given a chance to improve their situation. We need legislation to change what criminal background or length of time can actually be reported and used, we have some employers going back 10 or more years and this is a long time for someone that has been rehabilitated. We need to eliminate this barrier, at least for first time offenders, and make them contributing members of society or we give them no choice but to repeat crimes for survival.</p>

ADA and Reasonable Accommodations -

The enforcement of American Disabilities Act needs to hold companies accountable. Companies should be required to hold a percentage of ADA positions. Furthermore, they should be able to report specifically the reason a person was not considered for the position. Often reasonable accommodation can be utilized but again companies only want the best talent and not willing to give someone a chance. If I can identify these companies the investigators should be able too.

Underfunded Transportation -

Transportation in some areas is a significant barrier. In Central Texas the bus system is not a transit authority; therefore, funded by individual cities not taxes. The problem is many of the manufacturing businesses are not serviced by the transportation system and the reason is the buses start running too late or quick too early for people to use. The City leaders and State legislators need to understand this barrier and provide adequate funding to create an adequate transportation system; thereby, eliminating a barrier.

Legalized Discrimination -

Lastly we have companies that create their own discrimination tactics that are legal only because they don't fall within the EEO discrimination definition. A large hospital network in Central Texas publicizes a non-smoking hiring practice, where they will perform nicotine testing and will forbid employment or terminate employment if found. This is unnecessary discrimination of good talent and a slippery slope leading to potentially other classes of persons being discriminated that are outside the EEO definition.

[Cate Tracz](#)

Posted 04/06

[#12](#)

Moderator

Registered:04/01/13
Posts: 36

Note: This post was provided by SOLDBYABBA on 4/4/2016 under an incorrect category:

Mindset of Homeless:

I have had only one true success helping homeless adults. Jerry was a one leg veteran.....more on that later.

The mindset must be addressed first

Followed up by regular work and consistent pay.

[Esther Scott](#)

Registered:04/06

Posts: 1

Posted 04/06

[#13](#)

It is hard to identify a path out of homelessness without addressing the addiction and mental health issues that our Veterans are battling. We need to recognize that many veterans get complacent with the dysfunctional, but familiar, life of homelessness and at times resist housing opportunities. They may have developed a mindset that says "this is my permanent reality and I have no control." Changing this mindset is an essential key to ensuring that our veterans get out, and do not return to homelessness.

Additionally, trauma due to violence and victimization in the streets are a daily reality for most veterans experiencing homelessness; not to mention possible work-related trauma they may have experienced during their time in the military service. Research shows that trauma affected almost 90 percent of veterans studied.

A large number of veterans experiencing homelessness are also dependent on alcohol and other drugs to escape their reality. Changing the mindset that says, "This is my permanent reality and I have no control," for one that gives them a sense of control over their circumstances is crucial. This is accomplished by addressing their mental health needs and using a client-centered approach that covers all their basic needs for a longer period of time. The Housing First model is an excellent example of a successful plan. Veterans can't find jobs and reintegrate into the workforce or society until they have a place to organize their lives. In the same way, Veterans can't achieve a successful transition out of homelessness and stay focused until their mindset shifts to one that embraces the control that they do have over their situation. Therefore, increasing resources for mental health services beyond the 3,6 or 12 months period will produce best chances for success.

[gkeckert](#)

Registered:04/07

Posts: 2

Posted 04/07

[#14](#)

In line with the above comments (especially those supporting Housing First and peer to peer interventions pre and post discharge from the military if possible), I would also support the

ability of a veteran to keep his/her housing subsidy (in whatever form) while engaging in in-patient substance treatment / recovery. In our community, these recovery opportunities exist mostly within emergency or transitional homeless shelters and upon entry veterans lose their housing subsidy as they are deemed 'homeless'. I suggest they be allowed to maintain their subsidy for up to 90 days while undergoing recovery treatment.

[marcelabeth](#)

Registered:04/08
Posts: 1

Posted 04/08

[#15](#)

HUD-VASH needs to be extended to each county, specifically all 'balance of state' counties. There is almost no low-cost housing in our rural areas in Texas. Some 'land lords' are putting condemned trailers and boxcar containers on their land and renting these out as apartments or rooms for rent. Our Veterans deserve safe and sanitary housing, regardless of where they choose to live.

[Imontec](#)

Registered:04/08
Posts: 1

Posted 04/08 · Edited

[#16](#)

From a perspective of a Veteran Service Officer, we are seeing an overwhelming number of situations where Veterans are caught in an endless cycle due to their military discharge status as well as an inability for one reason or another to not be able to obtain a State ID card.

For those who may not be aware, any discharge that does not specify "honorable" automatically disqualifies the Veteran from VA benefits. However, by law, under the 38 Code of Federal Regulations there are exceptions based on a host of various conditions, however not for those with a dishonorable discharge. I am of the opinion that certain language/characters of discharge should not become a "life" sentence depending on circumstances. I believe that if a person has been discharged, served whatever punishment and/or sentence; there needs to be legislation which permits the Veteran to have his or her discharge upgraded with conditions after so many years. A probationary upgrade if you would.

As a Veteran, I know many others whom I served with whom have no idea the long term life impact of the language in the character of discharge.

I add that an overwhelming majority of those Veterans who are chronically homeless have spiraled into this state with issues e.g. stolen identity, jail time, felonies, warrants, etc; and are also not able to obtain a valid State ID card. A valid State ID card is necessary to obtain a bank account, verify residence etc.

[cbayer](#)

Registered:04/04
Posts: 1

Posted 04/12

[#17](#)

Texas Homeless Network (THN) is the CoC lead agency for the Texas Balance of State Continuum of Care (TX BoS CoC). In May 2015, THN began involved work with the TX BoS CoC Supportive Services for Veteran Families (SSVF) grantees to assertively pursue an end to Veteran homelessness. Through a collaborative process with these grantees and the CoC Board, THN has established a CoC-wide definition of an end to Veteran homelessness and has made significant steps forward in working with communities to establish an effective housing crisis response system for Veterans. In order to continue making gains toward this goal, THN has the following policy recommendations:

SSVF and System Sustainability

Two of the most powerful tools TX BoS CoC communities have to end Veteran homelessness are the homelessness prevention and rapid re-housing programs funded by SSVF. SSVF is, in many cases, the only rapid re-housing program in rural communities. Due to its program structure, SSVF's Priority 1 funded communities (located in the counties of Parmer, Castro, Swisher, Bailey, Lamb, Hale, Floyd, Motley, Cochran, Hockley, Lubbock, Crosby, Dickens, Yoakum, Terry, Lynn, Garza, Gaines, Dawson, Borden, Coryell, Bell, Williamson, Burnet, Bastrop, Gillespie, Blanco, Hays, Caldwell, Kendall, Kerr, Comal, Guadalupe, Gonzales, Val Verde, Edwards, Real, Kinney, Uvalde, Maverick, Zavala, Frio, Dimmit, La Salle, Webb, Duval, Zapata, Jim Hogg, Brooks, Kenedy, Starr, Hidalgo, Willacy, and Cameron) will be losing their funding in March 2018. It is imperative that the State of Texas step up to fill in the coverage gaps in these communities to sustain the housing crisis response system. In the absence of these programs, THN expects that the gains made

toward housing homeless Veterans in affected areas will be reversed. We recommend leveraging Texas Veterans Commission (TVC) and other State funds to cover the service gap left when these programs leave their communities.

Reasonable, evidence-driven look-back periods for criminal history

A major barrier many Veterans face when accessing market-rate housing is their criminal history. While landlords have a duty to keep their tenants safe from reasonably foreseeable hazards, THN asserts that the majority of housing screening criteria are unnecessarily restrictive. Furthermore, the Department of Housing and Urban Development has released guidance (see 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^[1]) asserting that such screening criteria may have a disparate impact on minority renters, in violation of Fair Housing. To rectify this issue, THN recommends that the State provide Texas landlords with guidance on reasonable look-back periods, based on evidence and which takes into consideration the nature of the applicant's offense, the age at which the offense was committed, and other factors shown by data to influence an applicant's chances of recidivating. THN also recommends that landlords be provided guidance on granting reasonable accommodations during the application process to Veterans whose offenses are related to a disability.

Increase affordable housing options

It should come as no surprise that affordable housing options in Texas are severely limited, particularly in the rural areas covered by the TX BoS CoC. While TDHCA has made Section 811 housing available to special populations such as Veterans, waitlists for Section 811 units can be years long, and are therefore an inappropriate option for a Veteran experiencing an acute housing crisis. Thus, THN advocates that TDHCA expedite the development of affordable housing, especially for LIHTC properties that agree to set aside units for homeless Veterans. In the short term, THN recommends that TDHCA incentivize existing affordable housing developers to set aside units for Veterans wherever possible, and to modify the QAP to allow less

prohibitive income and criminal history eligibility criteria.

Rural property rehabilitation

Beyond the lack of affordable housing, rural areas experience an additional challenge: finding housing that will pass a Housing Quality Standards (HQS) inspection. Substandard housing is prevalent in rural communities, making it difficult for Veterans enrolled in HUD-funded rent subsidy programs to enter housing. Because many Veterans are unwilling to leave their communities of origin to access housing, THN suggest that TDHCA make funds available to rehabilitate substandard housing in high-need rural areas so Veterans can remain in their home communities.

These recommendations are endorsed by SSVF providers representing the following counties: Knox, Stonewall, Haskell, Throckmorton, Scurry, Fisher, Jones, Shackelford, Stephens, Mitchell, Nolan, Taylor, Callahan, Eastland, Coke, Runnels, Coleman, Brown, Comanche, McCullough, San Saba, Mills, Denton, Tarrant, Montague, Cooke, Grayson, Jack, Wise, Collin, Palo Pinto, Parker, Collin, Dallas, Brath, Hood, Johnson, Ellis, Bosque, Hill, , Val Verde, Edwards, Real, Kinney, Uvalde, Maverick, Zavala, Frio, Dimmit, La Salle, Webb, Duval, Zapata, Jim Hogg, Brooks, Kenedy, Starr, Hidalgo, Willacy, Cameron, Kerr, Kendall, Bandera, Hays, Bexar, Gonzalez, Guadalupe, Wilson, Medina, Atascoa, Karnes, DeWitt, Lavaca, McMullen, Live Oak, Bee, Goliad, Victoria, Refugio, Jim Wells, San Patricio, Nueces, and Klebero.

Special thanks to West Central Texas Regional Foundation, Family Endeavors, and Catholic Charities of Diocese- Fort Worth.

[1] http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASStandCR.pdf

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TEXAS HOMELESS NETWORK

Response to TDHCA on Ending Veteran Homelessness

Response to the Texas Department of Housing and Community Affairs (TDHCA) Request for Recommendations on Ending Veteran Homelessness

Submitted April 13, 2016

Texas Homeless Network (THN) is the CoC lead agency for the Texas Balance of State Continuum of Care (TX BoS CoC). In May 2015, THN began involved work with the TX BoS CoC Supportive Services for Veteran Families (SSVF) grantees to assertively pursue an end to Veteran homelessness. Through a collaborative process with these grantees and the CoC Board, THN has established a CoC-wide definition of an end to Veteran homelessness and has made significant steps forward in working with communities to establish an effective housing crisis response system for Veterans. In order to continue making gains toward this goal, THN has the following policy recommendations:

SSVF and System Sustainability

Two of the most powerful tools TX BoS CoC communities have to end Veteran homelessness are the homelessness prevention and rapid re-housing programs funded by SSVF. SSVF is, in many cases, the only rapid re-housing program in rural communities. Due to its program structure, SSVF's Priority 1 funded communities (located in the counties of Parmer, Castro, Swisher, Bailey, Lamb, Hale, Floyd, Motley, Cochran, Hockley, Lubbock, Crosby, Dickens, Yoakum, Terry, Lynn, Garza, Gaines, Dawson, Borden, Coryell, Bell, Williamson, Burnet, Bastrop, Gillespie, Blanco, Hays, Caldwell, Kendall, Kerr, Comal, Guadalupe, Gonzales, Val Verde, Edwards, Real, Kinney, Uvalde, Maverick, Zavala, Frio, Dimmit, La Salle, Webb, Duval, Zapata, Jim Hogg, Brooks, Kenedy, Starr, Hidalgo, Willacy, and Cameron) will be losing their funding in March 2018. It is imperative that the State of Texas step up to fill in the coverage gaps in these communities to sustain the housing crisis response system. In the absence of these programs, THN expects that the gains made toward housing homeless Veterans in affected areas will be reversed. We recommend leveraging Texas Veterans Commission (TVC) and other State funds to cover the service gap left when these programs leave their communities.

Reasonable, evidence-driven look-back periods for criminal history

A major barrier many Veterans face when accessing market-rate housing is their criminal history. While landlords have a duty to keep their tenants safe from reasonably foreseeable hazards, THN asserts that the majority of housing screening criteria are unnecessarily restrictive. Furthermore, the Department of Housing and Urban Development has released guidance (see 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

Transactions¹) asserting that such screening criteria may have a disparate impact on minority renters, in violation of Fair Housing. To rectify this issue, THN recommends that the State provide Texas landlords with guidance on reasonable look-back periods, based on evidence and which takes into consideration the nature of the applicant's offense, the age at which the offense was committed, and other factors shown by data to influence an applicant's chances of recidivating. THN also recommends that landlords be provided guidance on granting reasonable accommodations during the application process to Veterans whose offenses are related to a disability.

Increase affordable housing options

It should come as no surprise that affordable housing options in Texas are severely limited, particularly in the rural areas covered by the TX BoS CoC. While TDHCA has made Section 811 housing available to special populations such as Veterans, waitlists for Section 811 units can be years long, and are therefore an inappropriate option for a Veteran experiencing an acute housing crisis. Thus, THN advocates that TDHCA expedite the development of affordable housing, especially for LIHTC properties that agree to set aside units for homeless Veterans. In the short term, THN recommends that TDHCA incentivize existing affordable housing developers to set aside units for Veterans wherever possible, and to modify the QAP to allow less prohibitive income and criminal history eligibility criteria.

Rural property rehabilitation

Beyond the lack of affordable housing, rural areas experience an additional challenge: finding housing that will pass a Housing Quality Standards (HQS) inspection. Substandard housing is prevalent in rural communities, making it difficult for Veterans enrolled in HUD-funded rent subsidy programs to enter housing. Because many Veterans are unwilling to leave their communities of origin to access housing, THN suggest that TDHCA make funds available to rehabilitate substandard housing in high-need rural areas so Veterans can remain in their home communities.

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¹ http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf

Special thanks to the West Central Texas Regional Foundation, Family Endeavors, and Catholic Charities of Diocese- Fort Worth.



April 4, 2016

**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**

I. Introduction

The Fair Housing Act (or Act) prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status or national origin.¹ HUD's Office of General Counsel issues this guidance concerning how the Fair Housing Act applies to the use of criminal history by providers or operators of housing and real-estate related transactions. Specifically, this guidance addresses how the discriminatory effects and disparate treatment methods of proof apply in Fair Housing Act cases in which a housing provider justifies an adverse housing action – such as a refusal to rent or renew a lease – based on an individual's criminal history.

II. Background

As many as 100 million U.S. adults – or nearly one-third of the population – have a criminal record of some sort.² The United States prison population of 2.2 million adults is by far the largest in the world.³ As of 2012, the United States accounted for only about five percent of the world's population, yet almost one quarter of the world's prisoners were held in American prisons.⁴ Since 2004, an average of over 650,000 individuals have been released annually from federal and state prisons,⁵ and over 95 percent of current inmates will be released at some point.⁶ When individuals are released from prisons and jails, their ability to access safe, secure and affordable housing is critical to their successful reentry to society.⁷ Yet many formerly incarcerated individuals, as well as individuals who were convicted but not incarcerated, encounter significant barriers to securing housing, including public and other federally-subsidized housing,

¹ 42 U.S.C. § 3601 *et seq.*

² Bureau of Justice Statistics, U.S. Dep't of Justice, *Survey of State Criminal History Information Systems, 2012*, 3 (Jan. 2014), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>.

³ Nat'l Acad. Sci., Nat'l Res. Couns., *The Growth of Incarceration in the United States: Exploring Causes and Consequences 2* (Jeremy Travis, et al. eds., 2014), available at: <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>.

⁴ *Id.*

⁵ E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at 29, appendix tbls. 1 and 2, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387>.

⁶ Bureau of Justice Statistics, U.S. Dep't of Justice, *Reentry Trends in the United States*, available at <http://www.bjs.gov/content/pub/pdf/reentry.pdf>.

⁷ See, e.g., S. Metraux, et al. "Incarceration and Homelessness," in *Toward Understanding Homelessness: The 2007 National Symposium on Homelessness Research, #9* (D. Dennis, et al. eds., 2007), available at: <https://www.huduser.gov/portal/publications/pdf/p9.pdf> (explaining "how the increasing numbers of people leaving carceral institutions face an increased risk for homelessness and, conversely, how persons experiencing homelessness are vulnerable to incarceration.").

because of their criminal history. In some cases, even individuals who were arrested but not convicted face difficulty in securing housing based on their prior arrest.

Across the United States, African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population.⁸ Consequently, criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers. While having a criminal record is not a protected characteristic under the Fair Housing Act, 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).⁹ 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).

III. Discriminatory Effects Liability and Use of Criminal History to Make Housing Decisions

A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate.¹⁰ Under this standard, a facially-neutral policy or practice that has a discriminatory effect violates the Act if it is not supported by a legally sufficient justification. Thus, where a policy or practice that restricts access to housing on the 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 under the Fair Housing Act 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.¹¹ Discriminatory effects liability is assessed under a three-step burden-shifting standard requiring a fact-specific analysis.¹²

The following sections discuss the three steps used to analyze claims that a housing provider's use of criminal history to deny housing opportunities results in a discriminatory effect in violation of the Act. As explained in Section IV, below, a different analytical framework is used to evaluate claims of intentional discrimination.

⁸ See *infra* nn. 16-20 and accompanying text.

⁹ The Fair Housing Act prohibits discrimination based on race, color, religion, sex, disability, familial status, and national origin. This memorandum focuses on race and national origin discrimination, although criminal history policies may result in discrimination against other protected classes.

¹⁰ 24 C.F.R. § 100.500; accord *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, ___ U.S. ___, 135 S. Ct. 2507 (2015).

¹¹ 24 C.F.R. § 100.500; see also *Inclusive Cmty. Project*, 135 S. Ct. at 2514-15 (summarizing HUD's Discriminatory Effects Standard in 24 C.F.R. § 100.500); *id.* at 2523 (explaining that housing providers may maintain a policy that causes a disparate impact "if they can prove [the policy] is necessary to achieve a valid interest.").

¹² See 24 C.F.R. § 100.500.

A. Evaluating Whether the Criminal History Policy or Practice Has a Discriminatory Effect

In the first step of the analysis, a plaintiff (or HUD in an administrative adjudication) must prove that the criminal history policy has a discriminatory effect, that is, that the policy results in a disparate impact on a group of persons because of their race or national origin.¹³ This burden is satisfied by presenting evidence proving that the challenged practice actually or predictably results in a disparate impact.

Whether national or local statistical evidence should be used to evaluate a discriminatory effects claim at the first step of the analysis depends on the nature of the claim alleged and the facts of that case. While state or local statistics should be presented where available and appropriate based on a housing provider's market area or other facts particular to a given case, national statistics on racial and ethnic disparities in the criminal justice system may be used where, for example, state or local statistics are not readily available and there is no reason to believe they would differ markedly from the national statistics.¹⁴

National statistics provide grounds for HUD to investigate complaints challenging criminal history policies.¹⁵ Nationally, racial and ethnic minorities face disproportionately high rates of arrest and incarceration. For example, in 2013, African Americans were arrested at a rate more than double their proportion of the general population.¹⁶ Moreover, in 2014, African Americans comprised approximately 36 percent of the total prison population in the United States, but only about 12 percent of the country's total population.¹⁷ In other words, African Americans were incarcerated at a rate nearly three times their proportion of the general population. Hispanics were similarly incarcerated at a rate disproportionate to their share of the

¹³ 24 C.F.R. § 100.500(c)(1); *accord Inclusive Cmty. Project*, 135 S. Ct. at 2522-23. A discriminatory effect can also be proven with evidence that the policy or practice creates, increases, reinforces, or perpetuates segregated housing patterns. See 24 C.F.R. § 100.500(a). This guidance addresses only the method for analyzing disparate impact claims, which in HUD's experience are more commonly asserted in this context.

¹⁴ *Compare Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (“[R]eliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population.”) with *Mountain Side Mobile Estates P’ship v. Sec’y of Hous. & Urban Dev.*, 56 F.3d 1243, 1253 (10th Cir. 1995) (“In some cases national statistics may be the appropriate comparable population. However, those cases are the rare exception and this case is not such an exception.”) (citation omitted).

¹⁵ *Cf. El v. SEPTA*, 418 F. Supp. 2d 659, 668-69 (E.D. Pa. 2005) (finding that plaintiff proved prima facie case of disparate impact under Title VII based on national data from the U.S. Bureau of Justice Statistics and the Statistical Abstract of the U.S., which showed that non-Whites were substantially more likely than Whites to have a conviction), *aff’d on other grounds*, 479 F.2d 232 (3d Cir. 2007).

¹⁶ See FBI Criminal Justice Information Services Division, *Crime in the United States, 2013*, tbl.43A, available at <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-43> (Fall 2014) (reporting that African Americans comprised 28.3% of all arrestees in 2013); U.S. Census Bureau, Monthly Postcensal Resident Population by Single Year of Age, Sex, Race and Hispanic Origin: July 1, 2013 to December 1, 2013, available at <http://www.census.gov/popest/data/national/asrh/2014/2014-nat-res.html> (reporting data showing that individuals identifying as African American or Black alone made up only 12.4% of the total U.S. population at 2013 year-end).

¹⁷ See E. Ann Carson, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Prisoners in 2014* (Sept. 2015) at tbl. 10, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387>; and U.S. Census Bureau, Monthly Postcensal Resident Population by Single Year of Age, Sex, Race and Hispanic Origin: July 1, 2014 to December 1, 2014, available at <http://www.census.gov/popest/data/national/asrh/2014/2014-nat-res.html>.

general population, with Hispanic individuals comprising approximately 22 percent of the prison population, but only about 17 percent of the total U.S. population.¹⁸ In contrast, non-Hispanic Whites comprised approximately 62 percent of the total U.S. population but only about 34 percent of the prison population in 2014.¹⁹ Across all age groups, the imprisonment rates for African American males is almost six times greater than for White males, and for Hispanic males, it is over twice that for non-Hispanic White males.²⁰

Additional evidence, such as applicant data, tenant files, census demographic data and localized criminal justice data, may be relevant in determining whether local statistics are consistent with national statistics and whether there is reasonable cause to believe that the challenged policy or practice causes a disparate impact. Whether in the context of an investigation or administrative enforcement action by HUD or private litigation, a housing provider may offer evidence to refute the claim that its policy or practice causes a disparate impact on one or more protected classes.

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.

B. Evaluating Whether the Challenged Policy or Practice is Necessary to Achieve a Substantial, Legitimate, Nondiscriminatory Interest

In the second step of the discriminatory effects analysis, the burden shifts to the housing provider to prove that the challenged policy or practice is justified – that is, that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider.²¹ The interest proffered by the housing provider may not be hypothetical or speculative, meaning the housing provider must be able to provide evidence proving both that the housing provider has a substantial, legitimate, nondiscriminatory interest supporting the challenged policy and that the challenged policy actually achieves that interest.²²

Although the specific interest(s) that underlie a criminal history policy or practice will no doubt vary from case to case, some landlords and property managers have asserted the protection of other residents and their property as the reason for such policies or practices.²³ Ensuring

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ E. Ann Carson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2014* (Sept. 2015) at table 10, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387>.

²¹ 24 C.F.R. § 100.500(c)(2); *see also Inclusive Cmty. Project*, 135 S. Ct. at 2523.

²² *See* 24 C.F.R. § 100.500(b)(2); *see also* 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013).

²³ *See, e.g.,* Answer to Amended Complaint at 58, *The Fortune Society, Inc. v. Sandcastle Towers Hsg. Dev. Fund Corp.*, No. 1:14-CV-6410 (E.D.N.Y. May 21, 2015), ECF No. 37 (“The use of criminal records searches as part of the overall tenant screening process used at Sand Castle serves valid business and security functions of protecting tenants and the property from former convicted criminals.”); *Evans v. UDR, Inc.*, 644 F.Supp.2d 675, 683 (E.D.N.C. 2009) (noting, based on affidavit of property owner, that “[t]he policy [against renting to individuals with criminal histories is] based primarily on the concern that individuals with criminal histories are more likely than others to commit crimes on the property than those without such backgrounds ... [and] is thus based [on] concerns for the safety of other residents of the apartment complex and their property.”); *see also* J. Helfgott, *Ex-Offender Needs Versus Community Opportunity in Seattle*, Washington, 61 Fed. Probation 12, 20 (1997) (finding in a survey of 196

resident safety and protecting property are often considered to be among the fundamental responsibilities of a housing provider, and courts may consider such interests to be both substantial and legitimate, assuming they are the actual reasons for the policy or practice.²⁴ A housing provider must, however, be able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property. Bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record are not sufficient to satisfy this burden.

1. Exclusions Because of Prior Arrest

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.²⁵ As the Supreme Court has recognized, “[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense.”²⁶ Because arrest records do not constitute proof of past unlawful conduct and are often incomplete (*e.g.*, by failing to indicate whether the individual was prosecuted, convicted, or acquitted),²⁷ the fact of an arrest is not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual. 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.

landlords in Seattle that of the 43% of landlords that said they were inclined to reject applicants with a criminal history, the primary reason for their inclination was protection and safety of community).

²⁴ As explained in HUD’s 2013 Discriminatory Effects Final Rule, a “substantial” interest is a core interest of the organization that has a direct relationship to the function of that organization. The requirement that an interest be “legitimate” means that a housing provider’s justification must be genuine and not false or fabricated. *See* 78 Fed. Reg. at 11470; *see also* *Charleston Hous. Auth. v. U.S. Dep’t of Agric.*, 419 F.3d 729, 742 (8th Cir. 2005) (recognizing that, “in the abstract, a reduction in the concentration of low income housing is a legitimate goal,” but concluding “that the Housing Authority had not shown a need for deconcentration in this instance, and in fact, had falsely represented the density [of low income housing] at the location in question in an attempt to do so”).

²⁵ HUD recently clarified that arrest records may not be the basis for denying admission, terminating assistance, or evicting tenants from public and other federally-assisted housing. *See* Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, HUD PIH Notice 2015-19, (November 2, 2015), available at: <http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf>.

²⁶ *Schwartz v. Bd of Bar Examiners*, 353 U.S. 232, 241 (1957); *see also* *United States v. Berry*, 553 F.3d 273, 282 (3d Cir. 2009) (“[A] bare arrest record – without more – does not justify an assumption that a defendant has committed other crimes and it therefore cannot support increasing his/her sentence in the absence of adequate proof of criminal activity.”); *United States v. Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006) (“[A] mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct.”).

²⁷ *See, e.g.*, U.S. Dep’t of Justice, *The Attorney General’s Report on Criminal History Background Checks* at 3, 17 (June 2006), available at http://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf (reporting that the FBI’s Interstate Identification Index system, which is the national system designed to provide automated criminal history record information and “the most comprehensive single source of criminal history information in the United States,” is “still missing final disposition information for approximately 50 percent of its records”).

Analogously, in the employment context, the Equal Employment Opportunity Commission has explained that barring applicants from employment on the basis of arrests not resulting in conviction is not consistent with business necessity under Title VII because the fact of an arrest does not establish that criminal conduct occurred.²⁸

2. Exclusions Because of Prior Conviction

In most instances, a record of conviction (as opposed to an arrest) will serve as sufficient evidence to prove that an individual engaged in criminal conduct.²⁹ But housing providers that apply a policy or practice that excludes persons with prior convictions must still be able to prove that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. A housing provider that imposes a blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – will be unable to meet this burden. One federal court of appeals held that such a blanket ban violated Title VII, stating that it “could not conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed.”³⁰ Although the defendant-employer in that case had proffered a number of theft and safety-related justifications for the policy, the court rejected such justifications as “not empirically validated.”³¹

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.³²

²⁸ See U.S. Equal Employment Opportunity Commission, *EEOC Enforcement Guidance, Number 915.002*, 12 (Apr. 25, 2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm; see also *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding that defendant employer’s policy of excluding from employment persons with arrests without convictions unlawfully discriminated against African American applicants in violation of Title VII because there “was no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees,” such that “information concerning a . . . record of arrests without conviction, is irrelevant to [an applicant’s] suitability or qualification for employment”), *aff’d*, 472 F.2d 631 (9th Cir. 1972).

²⁹ There may, however, be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction. For example, a database may continue to report a conviction that was later expunged, or may continue to report as a felony an offense that was subsequently downgraded to a misdemeanor. See generally SEARCH, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (2005), available at <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>.

³⁰ *Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975).

³¹ *Id.*

³² *Cf. El*, 479 F.3d at 245-46 (stating that “Title VII . . . require[s] that the [criminal conviction] policy under review accurately distinguish[es] between applicants that pose an unacceptable level or risk and those that do not”).

A policy or practice that fails to take into account the nature and severity of an individual's conviction is unlikely to satisfy this standard.³³ Similarly, a policy or practice that does not consider the amount of time that has passed since the criminal conduct occurred is unlikely to satisfy this standard, especially in light of criminological research showing that, over time, the likelihood that a person with a prior criminal record will engage in additional criminal conduct decreases until it approximates the likelihood that a person with no criminal history will commit an offense.³⁴

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.³⁵

C. Evaluating Whether There Is a Less Discriminatory Alternative

The third step of the discriminatory effects analysis is applicable only if a housing provider successfully proves that its criminal history policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest. In the third step, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another practice that has a less discriminatory effect.³⁶

Although the identification of a less discriminatory alternative will depend on the particulars of the criminal history policy or practice under challenge, individualized assessment of relevant mitigating information beyond that contained in an individual's criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account. Relevant individualized evidence might include: the facts or circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts. By delaying consideration of criminal history until after an individual's financial and other qualifications are verified, a housing provider may be able to minimize any additional costs that such individualized assessment might add to the applicant screening process.

³³ Cf. *Green*, 523 F.2d at 1298 (holding that racially disproportionate denial of employment opportunities based on criminal conduct that "does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden" and violated Title VII).

³⁴ Cf. *El*, 479 F.3d at 247 (noting that plaintiff's Title VII disparate impact claim might have survived summary judgment had plaintiff presented evidence that "there is a time at which a former criminal is no longer any more likely to recidivate than the average person..."); see also *Green*, 523 F.2d at 1298 (permanent exclusion from employment based on any and all offenses violated Title VII); see Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *Criminology and Pub. Pol'y* 483 (2006) (reporting that after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record).

³⁵ The liability standards and principles discussed throughout this guidance would apply to HUD-assisted housing providers just as they would to any other housing provider covered by the Fair Housing Act. See HUD PIH Notice 2015-19 *supra* n. 25. Section 6 of that Notice addresses civil rights requirements.

³⁶ 24 C.F.R. § 100.500(c)(3); accord *Inclusive Cmty. Project*, 135 S. Ct. 2507.

D. Statutory Exemption from Fair Housing Act Liability for Exclusion Because of Illegal Manufacture or Distribution of a Controlled Substance

Section 807(b)(4) of the Fair Housing Act provides that the Act does not prohibit “conduct against a person because such person has been convicted ... of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).”³⁷ Accordingly, a housing provider will not be liable under the Act for excluding individuals because they have been convicted of one or more of the specified drug crimes, regardless of any discriminatory effect that may result from such a policy.

Limitation. Section 807(b)(4) only applies to disparate impact claims based on the denial of housing due to the person’s *conviction* for drug manufacturing or distribution; it does not provide a defense to disparate impact claims alleging that a policy or practice denies housing because of the person’s *arrest* for such offenses. Similarly, the exemption is limited to disparate impact claims based on drug *manufacturing or distribution* convictions, and does not provide a defense to disparate impact claims based on other drug-related convictions, such as the denial of housing due to a person’s conviction for drug *possession*.

IV. Intentional Discrimination and Use of Criminal History

A housing provider may also violate the Fair Housing Act if the housing provider intentionally discriminates in using criminal history information. This occurs when the provider treats an applicant or renter differently because of race, national origin or another protected characteristic. In these cases, the housing provider’s use of criminal records or other criminal history information as a pretext for unequal treatment of individuals because of race, national origin or other protected characteristics is no different from the discriminatory application of any other rental or purchase criteria.

For example, intentional discrimination in violation of the Act may be proven based on evidence that a housing provider rejected an Hispanic applicant based on his criminal record, but admitted a non-Hispanic White applicant with a comparable criminal record. Similarly, if a housing provider has a policy of not renting to persons with certain convictions, but makes exceptions to it for Whites but not African Americans, intentional discrimination exists.³⁸ A disparate treatment violation may also be proven based on evidence that a leasing agent assisted a White applicant seeking to secure approval of his rental application despite his potentially disqualifying criminal record under the housing provider’s screening policy, but did not provide such assistance to an African American applicant.³⁹

³⁷ 42 U.S.C. § 3607(b)(4).

³⁸ *Cf. Sherman Ave. Tenants’ Assn. v. District of Columbia*, 444 F.3d 673, 683-84 (D.C. Cir. 2006) (upholding plaintiff’s disparate treatment claim based on evidence that defendant had not enforced its housing code as aggressively against comparable non-Hispanic neighborhoods as it did in plaintiff’s disproportionately Hispanic neighborhood).

³⁹ *See, e.g., Muriello*, 217 F. 3d at 522 (holding that Plaintiff’s allegations that his application for federal housing assistance and the alleged existence of a potentially disqualifying prior criminal record was handled differently than those of two similarly situated white applicants presented a prima facie case that he was discriminated against because of race, in violation of the Fair Housing Act).

Discrimination may also occur before an individual applies for housing. For example, intentional discrimination may be proven based on evidence that, when responding to inquiries from prospective applicants, a property manager told an African American individual that her criminal record would disqualify her from renting an apartment, but did not similarly discourage a White individual with a comparable criminal record from applying.

If overt, direct evidence of discrimination does not exist, the traditional burden-shifting method of establishing intentional discrimination applies to complaints alleging discriminatory intent in the use of criminal history information.⁴⁰ First, the evidence must establish a prima facie case of disparate treatment. This may be shown in a refusal to rent case, for example, by evidence that: (1) the plaintiff (or complainant in an administrative enforcement action) is a member of a protected class; (2) the plaintiff or complainant applied for a dwelling from the housing provider; (3) the housing provider rejected the plaintiff or complainant because of his or her criminal history; and (4) the housing provider offered housing to a similarly-situated applicant not of the plaintiff or complainant's protected class, but with a comparable criminal record. It is then the housing provider's burden to offer "evidence of a legitimate, nondiscriminatory reason for the adverse housing decision."⁴¹ A housing provider's nondiscriminatory reason for the challenged decision must be clear, reasonably specific, and supported by admissible evidence.⁴² Purely subjective or arbitrary reasons will not be sufficient to demonstrate a legitimate, nondiscriminatory basis for differential treatment.⁴³

While a criminal record can constitute a legitimate, nondiscriminatory reason for a refusal to rent or other adverse action by a housing provider, a plaintiff or HUD may still prevail by showing that the criminal record was not the true reason for the adverse housing decision, and was instead a mere pretext for unlawful discrimination. For example, the fact that a housing provider acted upon comparable criminal history information differently for one or more individuals of a different protected class than the plaintiff or complainant is strong evidence that a housing provider was not considering criminal history information uniformly or did not in fact have a criminal history policy. Or pretext may be shown where a housing provider did not actually know of an applicant's criminal record at the time of the alleged discrimination. Additionally, shifting or inconsistent explanations offered by a housing provider for the denial of an application may also provide evidence of pretext. Ultimately, the evidence that may be offered to show that the plaintiff or complainant's criminal history was merely a pretextual

⁴⁰ See, generally, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (articulating the concept of a "prima facie case" of intentional discrimination under Title VII); see, e.g., *Allen v. Muriello*, 217 F.3d 517, 520-22 (7th Cir. 2000) (applying prima facie case analysis to claim under the Fair Housing Act alleging disparate treatment because of race in housing provider's use of criminal records to deny housing).

⁴¹ *Lindsay v. Yates*, 578 F.3d 407, 415 (6th Cir. 2009) (quotations and citations omitted).

⁴² See, e.g., *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1039-40 (2d Cir. 1979) ("A prima facie case having been established, a Fair Housing Act claim cannot be defeated by a defendant which relies on merely hypothetical reasons for the plaintiff's rejection.").

⁴³ See, e.g., *Muriello*, 217 F.3d at 522 (noting that housing provider's "rather dubious explanation for the differing treatment" of African American and White applicants' criminal records "puts the issue of pretext in the lap of a trier of fact"); *Soules v. U.S. Dep't of Hous. and Urban Dev.*, 967 F.2d 817, 822 (2d Cir. 1992) ("In examining the defendant's reason, we view skeptically subjective rationales concerning why he denied housing to members or protected groups [because] 'clever men may easily conceal their [discriminatory] motivations.'" (quoting *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1185 (8th Cir. 1974))).

justification for intentional discrimination by the housing provider will depend on the facts of a particular case.

The section 807(b)(4) exemption discussed in Section III.D., above, does not apply to claims of intentional discrimination because by definition, the challenged conduct in intentional discrimination cases is taken because of race, national origin, or another protected characteristic, and not because of the drug conviction. For example, the section 807(b)(4) exemption would not provide a defense to a claim of intentional discrimination where the evidence shows that a housing provider rejects only African American applicants with convictions for distribution of a controlled substance, while admitting White applicants with such convictions.

V. Conclusion

The Fair Housing Act prohibits both intentional housing discrimination and housing practices that have an unjustified discriminatory effect because of race, national origin or other protected characteristics. Because of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden African Americans and Hispanics. While the Act does not prohibit housing providers from appropriately considering criminal history information when making housing decisions, arbitrary and overbroad criminal history-related bans are likely to lack a legally sufficient justification. Thus, a discriminatory effect resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act.

Policies that exclude persons based on criminal history must be tailored to serve the housing provider's substantial, legitimate, nondiscriminatory interest and take into consideration such factors as the type of the crime and the length of the time since conviction. 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.

Selective use of criminal history as a pretext for unequal treatment of individuals based on race, national origin, or other protected characteristics violates the Act.

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