HUD's OGC 2016 Guidance on Criminal Screening: What Has It Meant?

by Wes Daniel, senior vice president of affordable housing for ConAm Management Corporation

On April 4, 2016, the U.S. Department of Housing and Urban Development (HUD) issued the 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 Transactions (hereinafter referred to as "the HUD Guidance"). The contents of the HUD Guidance seemed to send shockwaves through the multifamily property management industry. For those not familiar with the HUD Guidance, it laid out a case for defining many prevailing industry practices on criminal background screening as discriminatory under disparate impact* theory. And, on top of that, the HUD Guidance required something new — "individualized assessments" — which was contrary to what we all thought we should be doing.

The HUD Guidance noted that, "African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population," and, therefore, prohibitions against renting to "criminals" were likely to have a disparate impact on minority applicants. For decades, the mantra in fair housing had been to focus on treating everybody equally, and now a new protocol was being introduced: one of offering individuals who otherwise would have been declined the opportunity to request an "individualized assessment" in order to determine the circumstances surrounding their situation and then make an individual determination after considering any mitigating factors.

Upon first review of the guidance, many multifamily professionals were scratching their collective heads and wondering what to do. The need to perform due diligence in screening applicants for our apartment communities remained. However, the HUD Guidance seemed to seriously hamper our ability to do that. We feared a cumbersome web of decisions and an inability to adequately screen applicants. But, after digesting the HUD Guidance and having conversations with each other and with fair housing attorneys, most of us found our way to positions in which we were comfortable (or at least moderately less uncomfortable).

Within the company where I work, we first consulted with our screening provider and reviewed the very long list of offenses for which they offered screening options. We started by ensuring that we weren't screening for any arrests without convictions (a specific reference in the HUD Guidance), as well as by verifying that nearly all misdemeanor convictions were no longer on the list of offenses for which we would decline an application (or, now, offer an individualized assessment). We continued by working to identify the specific offenses for which we believed there were legitimate, business-related, non-discriminatory justification for offering individualized assessments and focused on those.

Once we had our narrow list defined, we had to internally learn to change our language. Rather than “denying” or “declining” applications when an individual’s background fell within the narrow parameters we had set, we instead offered individualized assessments. We established an internal protocol for who would review the requests for assessments. (In our firm, it is someone who does not work in operations.) We gave applicants the opportunity to provide any mitigating documents and to advocate for themselves.

Finally, we trained our on-site associates. Several times. This was an enlightening experience. We discovered that many associates believed that we rejected applications for all felonies in the past (which was not the case), and we discovered that some associates had strong feelings about the changes we were making. It makes sense — we train our associates to treat the communities as if they are their own. And, based on that, they become very protective of them. For many associates, we had to provide training two or three or more times from different perspectives until they understood the rationale behind the changes and internalized the importance of them.

I recently addressed a conference of affordable housing professionals on fair housing, and during the presentation, I was able to survey the audience of approximately 120 people on their responses to the HUD Guidance, their changes in policy and any fallout experienced. What I found is that the vast majority of them went through the same processes my firm did. Although there were some differences in thresholds for offering individualized assessments, for most in attendance, the policies were very similar.

All of that gives us insight into history, but it doesn’t say much about where we are now and any potential fallout from the HUD Guidance. So, the big question: What has changed? The truth is that, really, not much has changed. Historically (before the HUD Guidance), the firm for which I work had only declined approximately 1% or less of our total applicants for criminal background issues. Our practice is to process a credit screening first and, if the applicant passes the credit screening, proceed to criminal background screening. So, we don’t know if any of those who are removed from consideration due to credit would also have criminal backgrounds.

We still see less than 1% of our total applications that require offers of individualized assessments and, for whatever reason, only a small fraction of those who are offered assessments request them. A large percentage of the requests are approved, and we’ve not had any issues related to those that have been approved. So much of the handwringing and concern following the HUD Guidance related to fears of drastic increases of crime on our properties and, fortunately, we just haven’t seen that result.

One additional challenge is that occasionally, cities and municipalities pass “crime-free” ordinances with (oftentimes) draconian requirements that are in direct opposition to the HUD Guidance. Some cities have gone so far as to require that owners allow the city to conduct background checks and reject applicants. Some have prescribed prohibitions based on arrest records within city limits, and others have called for eviction of existing residents in the event of arrest (even off property).

Further, in addition to the HUD Guidance, many areas (such as Seattle and New York) have implemented complementary ordinances and laws relative to criminal background screening, and some requirements of these ordinances have more stringent restrictions on using (or even running) criminal background screenings than the HUD Guidance. Property owners and managers must always be aware of local legislation, be prepared to comply when reasonable, and be prepared to fight when the ordinances are unreasonable.

**Disparate impact: When a policy or procedure that appears to be neutral on its face actually has a different, negative impact on one or more protected classes*

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