

July 27, 2023

Federal Housing Finance Agency
Office of Multifamily Analytics and Policy
400 7th Street SW, 9th Floor
Washington, D.C. 20219

RE: Tenant Protections for Enterprise-Backed Multifamily Properties Request for Information

Dear Office of Multifamily Analytics and Policy:

On behalf of our low-income clients, we appreciate the opportunity to respond to Federal Housing Finance Agency's (FHFA's) Request for Information (RFI) on the issues that tenants face in multifamily properties backed by Fannie Mae and Freddie Mac ("Enterprises") and protections needed to address those issues. Our comments focus on specific consumer issues that multifamily tenants face and do not cover additional protections that tenants may need.

As outlined below and in our reports linked to this comment, multifamily tenants face a rental market where excessive fees are common, tenant screening mechanisms are biased and improperly restrictive, and rental debts are unfairly collected and reported. These issues impose unnecessary costs and burdens on tenants that threaten their ability to obtain stable and secure rental housing. As FHFA recognizes in the RFI, the Enterprises serve important public purposes and should take steps to rid the rental market of these practices.¹

Specifically, we urge FHFA to require tenant-enforceable provisions in loans purchased by the Enterprises that:

- Ban excessive and unreasonable rental housing junk fees;
- Prohibit landlords from rejecting applicants on the basis of
 - arrest records; convictions which have been set aside, pardoned, sealed or expunged; convictions older than seven years (or shorter if research indicates); or juvenile records
 - convictions without making an individualized assessment, such as about the severity of the offense;
 - evictions unless a judgment was issued against the tenant on the basis of nonpayment or other cause on the merits;
 - credit score or credit history information, based on the lack of empirical support, the disparate impact on Black and Latino renters, and the proliferation of errors in credit reports;
 - tenant screening scores or recommendations alone, without reviewing and considering all relevant and predictive underlying information; and

¹ Federal Housing Finance Agency, Tenant Protections for Enterprise-Backed Multifamily Properties Request for Information at 2 (May 2023), <https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Multifamily-Tenant-Protections-RFI.pdf>.

- Require borrowers that hire debt collectors to mandate that such debt collectors must obtain and review appropriate documentation of alleged rental debts before engaging in any collection activity or reporting such information to credit reporting agencies.

We also strongly encourage FHFA and the Enterprises to collaborate with the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB) in their efforts to evaluate and regulate tenant screening more broadly. Finally, FHFA should require that any reporting of rents in Enterprise-supported multifamily housing be limited to positive information regarding tenants who have opted in to the reporting.

FHFA should ban junk fees in multifamily apartments financed through

Enterprise-backed loans. To secure and maintain rental housing, renters today typically face a dizzying array of unavoidable fees. These junk fees render safe and decent rental housing even more out of reach because renters must pay fees on top of sky-high rents. Junk fees also jeopardize access to future housing and financial stability because they can become an alleged rental debt that leads to dunning by debt collectors and negative marks on credit reports. The Biden Administration has recently highlighted the harm that rental junk fees cause and the need to limit them.²

To learn more about the junk fees charged to renters and rental housing applicants, NCLC conducted a survey of legal services and nonprofit attorneys between November and December of 2022.³ The survey asked respondents to indicate whether they had seen specific fees as part of rental housing (respondents also had the option of selecting “no fees,” but no respondents did). The survey also asked respondents to provide details about the types of fees that they have seen and any other relevant information. We received 95 responses.

Almost all survey respondents (89%) reported that landlords impose rental application fees. Nearly as many (87%) stated that landlords charge excessive late fees. Well over half of respondents observed utility-related fees (73%), processing or administrative fees (68%), convenience fees (60%), insurance fees (59%), and notice fees (56%). A little less than half of respondents reported fees charged by new corporate landlords (41%). A quarter of respondents stated that landlords impose high risk fees (25%) and slightly less than a quarter observed charges in lieu of a security deposit (24%). 21% of respondents observed check cashing fees and 7% observed fees to report payment information to credit bureaus. 61% of respondents also reported that landlords charge “other” types of fees, including pet fees, valet trash fees, and “January fees.” The full report is linked in the footnote and incorporated into these comments.⁴

²The White House, Fact Sheet: Biden-Harris Administration Takes on Junk Fees in Rental Housing to Lower Costs for Renters (July 19, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/19/fact-sheet-biden-harris-administration-takes-on-junk-fees-in-rental-housing-to-lower-costs-for-renters/>.

³Ariel Nelson et al, Nat’l Consumer Law Ctr., Too Damn High: How Junk Fees Add to Skyrocketing Rents at 3 (March 2023), <https://www.nclc.org/wp-content/uploads/2023/03/JunkFees-Rpt.pdf>. These comments borrow directly from this report.

⁴ *Id.* at 8.

These junk fees add to the already heavy burden that exorbitant rents place on renters, with over 40% of renter households—19 million households—in the United States being “cost burdened,” i.e., paying over 30% of their income on housing costs.⁵ Various advocates who responded to NCLC’s survey emphasized the ubiquity of junk fees, with a Colorado advocate stating that very few landlords in their state do not charge these fees.⁶ While a renter may be able to manage and plan for high rents if they know about them in advance, they may not be expecting an array of junk fees, which could push them over their budgets. As an advocate from South Carolina explained, landlords will advertise rentals for \$1100, but after pet fees, deposits, utility deposits, third-party company deposits, pest control fees, valet trash fees (for a service that people rarely would opt to use and that often does not actually exist in practice), the rent will be up to \$1800 per month.⁷

Consistent with the recent Biden Administration announcement on rental housing junk fees, FHFA should impose a ban on unreasonable or excessive fees in multifamily housing supported by Enterprise-backed loans. To make the ban effective, the Enterprises should give tenants the ability to enforce the ban. The Low Income Housing Tax Credit (LIHTC) program may serve as a model for how to accomplish this. State housing finance agencies that administer LIHTC generally require developers to include in the recorded Land Use Restriction Agreement 1) a “good cause” eviction protection and other protections and 2) a statement that tenants and applicants may enforce those protections.⁸ FHFA can require something similar. By making junk fee bans legally enforceable, FHFA will make housing more affordable and its costs more transparent.

FHFA should address comprehensive and wide-spread abuses in tenant screening.

Landlords in the United States almost always engage in some form of screening for rental applicants. This screening often involves reports or scores purchased from specialized tenant screening consumer reporting agencies (CRAs). The reports typically combine information about eviction filings, criminal records, and credit history. Often the reports include a score or recommendation based on these records, and in some cases, the score or recommendation is the only information conveyed to the landlord.

Each of the components of tenant screening reports is highly problematic and also creates a disparate impact on Black and Latino renters. Tenant screening is significantly flawed in two major respects: (1) a lack of empirical evidence that the information and criteria included in reports and upon which scores/recommendations are based have any predictive value for determining whether a renter will be a good tenant; and (2) significant systemic errors and flaws,

⁵ Press Release, U.S. Census Bureau, More Than 19 Million Renters Burdened by Housing Costs (Dec. 8, 2022) (data from 2017-2021 period).

⁶ Ariel Nelson et al, Nat’l Consumer Law Ctr., Too Damn High: How Junk Fees Add to Skyrocketing Rents at 6 (March 2023), <https://www.nclc.org/wp-content/uploads/2023/03/JunkFees-Rpt.pdf>.

⁷ *Id.*

⁸ See 26 U.S.C. § 42(h)(6)(B)(ii); IRS Revenue Ruling 2004-82 (July 29, 2004).

such as tagging the wrong person with a criminal or eviction record, reporting of incomplete or misleading records, and reporting of sealed or expunged records.⁹

In connection with our recent comments to the CFPB and FTC, NCLC surveyed housing advocates on their clients' experiences with tenant screening. The results showed that landlords frequently failed to consider mitigating information or context, tenant disputes of information are ineffective, reports included inaccurate and misleading criminal and eviction records, and adverse action notices are rarely given. In addition, the NCLC survey respondents observed that little language assistance is offered for the 8.2% of the U.S. population who are limited English proficient. Our comment letter, which includes the survey results, is linked in the footnote and incorporated into these comments.¹⁰

FHFA can take specific steps to reduce improper tenant screening. FHFA should:

- ban the use of particular sources of information that are fundamentally problematic, including arrest records; convictions that have been set aside, pardoned, sealed or expunged; convictions older than seven years (or shorter if research indicates); or juvenile records.
- ban the use of conviction records without making an individualized assessment, such as about the severity of the offense.
- ban the use of evictions unless a judgment was issued against the tenant on the basis of nonpayment or other cause on the merits.
- ban the use of credit score or credit history information, based on the lack of empirical support and the disparate impact on Black and Latino renters.
- collaborate with the FTC and the CFPB in their efforts to evaluate and regulate tenant screening more broadly.

FHFA should require debt collectors to obtain and review appropriate documentation of alleged rental debts before engaging in any collection activity related to Enterprise-supported multifamily housing. Rental debt is money allegedly owed due to a current or prior tenancy. In addition to past due rent such as back rent from the pandemic, rental debt may also include claims for fees associated with breaking a lease and alleged damages to the rental property. Rental debt can appear on a credit report as a debt collection item for up to seven years. When rental debt appears on a tenant's credit report, the tenant may be forced to turn to landlords who charge above-market rates for low-quality housing or may even become homeless.

⁹ For a detailed discussion, see Comment, Nat'l Consumer Law Ctr., CFPB and FTC Request for Information on Tenant Screening (May 30, 2023), <https://www.nclc.org/wp-content/uploads/2023/05/NCLC-Comments-to-FTC-CFPB-screening-RFI-no-appendices-Chi-Chi-Wu.pdf>.

¹⁰Comment, Nat'l Consumer Law Ctr., CFPB and FTC Request for Information on Tenant Screening (May 30, 2023), <https://www.nclc.org/wp-content/uploads/2023/05/NCLC-Comments-to-FTC-CFPB-screening-RFI-no-appendices-Chi-Chi-Wu.pdf>.

In October of 2022, NCLC completed a report discussing common problems faced by consumers experiencing debt collection for alleged rental debts as reported to the CFPB via consumer complaints.¹¹ These include problems with the amount of debt owed, the collection of old debts, verification of the debts, credit reporting, and communication. NCLC's report is linked in the footnote and incorporated into these comments.¹²

FHFA can reduce rental debt collection abuses by putting a clause in the standard financing documents for multifamily apartments that requires borrowers to require any debt collectors that the borrower subsequently hires to obtain and review appropriate documentation of alleged rental debts before engaging in any collection activity, including whether the housing provider is entitled to such amounts under state law and complied with the procedural requirements of such laws. FHFA should specify in the financing documents that the borrower must also require that any sale of alleged rental debts to debt buyers must include the transfer or appropriate documentation and that any debt collectors collecting on the debt buyer's behalf must review such documentation.

Such action from FHFA will directly address problems renters have identified. Consumers reported asking debt collectors for specific information about the alleged rental debt, such as an itemized list of charges or proof that they should be liable for those charges, especially for cleaning and damage-related fees that were assessed with no explanation or proof. Many consumers complained that they never received a response to requests for verification of the alleged debt. Moreover, many consumers reported that the debt collector continued its efforts to collect without responding to the dispute. Some collection agencies refused to investigate or verify a debt, or simply ignored requests.¹³

FHFA should require that any reporting of rents in Enterprise-supported multifamily housing be limited to positive information regarding tenants who have opted in. Rent payment data has been aggressively promoted as a form of alternative data that will help consumers who are either credit invisible or have poor credit histories. Rent reporting has been touted by industry as a way to help Black and Latino consumers, given the stark racial disparities in credit scores and credit invisibility.

However, rent reporting actually carries huge risks for renters, especially the most vulnerable families who struggle with housing costs. These at-risk households are also disproportionately Black and Latino. Rent reporting risks helping some better-off credit invisible consumers at the

¹¹ April Kuehnhoff et al, Nat'l Consumer Law Ctr. Unfair Debts With No Way Out: Consumers Share Their Experiences With Rental Debt Collectors (Oct. 2022), <https://www.nclc.org/wp-content/uploads/2022/10/UnfairDebts-Rpt.pdf>.

¹² April Kuehnhoff et al, Nat'l Consumer Law Ctr. Unfair Debts With No Way Out: Consumers Share Their Experiences With Rental Debt Collectors (Oct. 2022), <https://www.nclc.org/wp-content/uploads/2022/10/UnfairDebts-Rpt.pdf>.

¹³ *Id.* at 5.1

cost of literally making other renters homeless. We have linked a policy brief outlining these issues in the footnote and incorporated it into these comment.¹⁴

The most important consideration is that rent reporting should be limited to positive payment information only. Programs that report negative or “full file” information will most certainly harm vulnerable, struggling families. This is because landlords use credit reports and scores, either independently or bundled with criminal history and eviction records as part of tenant screening reports. Many landlords will not rent to a consumer with any record of a late rent payment, or will charge them a prohibitively high security deposit.

Even reporting only positive payment history would carry some risks. If there are months in which a rental payment is not recorded, or that show a lower amount than the “scheduled payment,” a landlord might make a negative assumption that the tenant failed to pay the rent that month. This is one reason why using bank account cash flow information is preferable to including the data in credit bureau files – the fact that rent is missing from bank account transactions could be because the tenant paid rent through different means, such as cash raised via a side job or when someone paid rent for the tenant, potentially blunting negative inferences.

Rent payment reporting to the credit bureaus should always be with the consumer’s active permission – it should be opt-in only, not opt-out or mandatory. As a basic principle, consumers should always have control over whether their data is shared. Not only is it the right thing to do with respect to privacy and consumer rights, but requiring the consumers’ active permission also avoids inclusion of harmful negative information that will hurt their rental housing prospects. This is a second reason why using bank account transaction information is preferable to including the data in credit bureau files – currently, consumers must give active permission to allow access to their bank account data. Moreover, as discussed above, some landlords charge tenants to report payment information to the credit bureaus, making housing less affordable and frequently making the total rent less transparent.

We appreciate the opportunity to comment on these important issues. If you have any questions about this letter or would like to discuss it in more detail, please contact Ariel Nelson, Staff Attorney at the National Consumer Law Center, at anelson@nclc.org, and Steve Sharpe, Senior Attorney at the National Consumer Law Center, at ssharpe@nclc.org.

Sincerely,

National Consumer Law Center (on behalf of its low-income clients)

¹⁴ Chi Chi Wu, Nat’l Consumer Law Ctr. Even the Catch-22s Come with Catch-22s: Potential Harms and Drawbacks of Rent Reporting (Oct. 2022), https://www.nclc.org/wp-content/uploads/2022/10/IB_Catch_22_Rent.pdf. These comments borrow directly from this issue brief.