

CFPB Highlights Purported “Problems With Tenant Background Checks”

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On November 15, the Consumer Financial Protection Bureau (CFPB) issued two reports, highlighting what the CFPB perceives to be forms of errors that frequently occur in tenant background checks and the impacts the CFPB believes that those errors can have on potential renters.

The “[Tenant Background Check Markets Report](#)” (Market Report) provides a description of the rental housing landscape and an overview of the tenant screening industry, largely drawn from market participants’ own marketing materials, filed lawsuits, and other regulatory enforcement actions. The “[Consumer Snapshot: Tenant Background Checks](#)” highlights common consumer complaints, identifying that renters submitted approximately 26,700 complaints related to tenant screening from January 2019 through September 2022, and complaint volumes increased year-over-year. In January 2019, the CFPB received approximately 300 complaints per month and by September 2022, the CFPB received almost 700 complaints per month related to tenant screening. The vast majority of complaints were related to allegedly incorrect information appearing on a prospective renter’s report. This was followed by complaints regarding obstacles faced trying to get companies to fix their alleged errors.

In its [press release](#), the CFPB described its positions on the impact screening reports can have on tenants. “The reports describe how errors in these background checks contribute to higher costs and barriers to quality rental housing. Too often, these background checks — which purport to contain valuable tenant background information — are filled with largely unvalidated information of uncertain accuracy or predictive value. While renters bear the costs of errors and false information in these reports, they have few avenues to make tenant screening companies fix their sloppy procedures.”

As a result, the CFPB pledged, among other priorities, to continue to work closely with the Federal Trade Commission (FTC) to take action on those issues.

Consumer Reports

The Markets Report details how the creation and use of tenant screening reports are regulated by a patchwork of federal, state, and local government laws. While tenant screening companies sometimes access information directly from an original source, such as eviction filings or criminal records, the CFPB notes that such companies often purchase information from third-party vendors. The CFPB noted its view that applicants often have little to no

visibility into the information contained in the reports, and applicants may not be provided the full list of data sources used for their report, further limiting their ability to fix errors or inaccuracies. The CFPB also identified what it viewed to be issues with the processing of consumer disputes and the reappearance of disputed information, whether in another company's screening report or even by the same company.

Probity of Eviction Proceedings, Criminal History, and Credit Information Questioned

The CFPB found that eviction records are one of the most commonly marketed, yet widely criticized, elements of tenant screening reports. The legal basis for an eviction and whether that basis must be stated in the initial court records varies by jurisdiction. The CFPB also noted that many cases may be dismissed or ultimately decided in the tenant's favor. According to one study cited by the CFPB of 3.6 million eviction court records from an industry advocacy group, 22% of state eviction cases "are ambiguous or false" records.

Based on the context, the CFPB stated that landlords may place too much weight on eviction history, despite the nuances and complexities of eviction proceedings. These practices may also exacerbate concerns about the discriminatory impact of tenant screening reports on certain demographic groups. Some jurisdictions have recently considered or passed laws to seal or limit access to eviction filings in certain instances, such as situations in which the landlord does not follow through with an eviction or the matter is not decided in the landlord's favor. California, Oregon, Florida, Massachusetts, Connecticut, and Ohio, for instance, all have passed or considered legislation to seal or expunge eviction records. The CFPB also reported many examples of tenant screening reports appearing to include statutorily prohibited obsolete information, such as eviction records that are more than seven years old.

The CFPB also concluded that there is limited evidence that individuals with criminal records, including arrests, are categorically more problematic tenants. In response to these concerns, the CFPB noted that a handful of jurisdictions have recently passed "ban-the-box" laws that either prohibit the collection and use of criminal history information in rental decisions, or only permit collection and use for individualized assessments after the landlord has determined the tenant otherwise qualifies. A growing number of jurisdictions around the country, such as New Jersey, San Francisco, and Cook County, IL (which includes Chicago), have limited the ability of landlords to screen prospective tenants based on their criminal records. New York City continues to consider legislation in this area too. The CFPB endorsed those processes.

The CFPB also identified that tenant screening reports often include a third-party credit score or portions of a person's credit report. The CFPB report concluded that credit history is a limited predictor of one's likelihood to pay rent, given that the majority of tradelines furnished to the national credit reporting agencies are from financial services providers and related to bank loans, credit cards, and insurance.

The CFPB further stated the opinion that the one credit reporting variable it considers to be most relevant for rental housing — rent payment history — is not well-populated since the CFPB estimated that only 1.7% to 2.3% of adults who live in rental housing have rent tradelines in their credit files. That statement also could be seen as an endorsement of the greater population and use of that data and similar data (e.g., utility payment data).

Risks of Relying on Computer Generated Tenant Risk Scores Highlighted

The CFPB also focused on algorithmic processes that are used during the tenant screening process. The CFPB

noted that some tenant screening companies generate overall tenant risk scores based on their own proprietary models that purport to estimate the likelihood of an eviction, missed payment, or lease renewal. The CFPB found that while rental risk scores and decision recommendations can simplify the landlord's decision-making process, they can also conceal inaccuracies in the underlying data. The CFPB also stated the concern that automated scoring and algorithmic screening can obfuscate the underlying reasons for adverse rental application decisions and create risks for landlords. As a result, landlords may reject qualified applicants and may not be able to provide enough information to allow applicants to challenge the results, correct inaccurate information, or provide relevant mitigating information. The CFPB believes that these algorithmic processes can result in further legal risk to landlords, including through violations of the Fair Housing Act.

The CFPB's Focus on Consumer Reporting and Its Pledged Action Going Forward

The CFPB concluded its report by pledging to continue to monitor and conduct research to understand the tenant screening market and its impacts on prospective renters, including to: (1) identify guidance or rules that that CFPB can issue to ensure that the background screening industry adheres to the law; (2) determine how to require the background screening industry to develop and maintain appropriate and accurate consumer reporting practices in accordance with applicable law; (3) coordinate law enforcement efforts with the FTC to hold tenant screening companies accountable for having reasonable procedures to "assure accurate information in the consumer reporting system"; and (4) coordinate with federal and local government agencies to ensure tenants receive information about potential inaccuracies in their reports in a timely fashion and that adequate adverse action notices are provided.

The FTC also weighed in on the issue in the press release regarding the CFPB's publications: "FTC enforcement investigations have identified serious problems with tenant background check reports. We will continue to work with the CFPB to ensure that firms compiling these reports are following the law," said FTC Bureau of Consumer Protection Director Samuel Levine.

These latest CFPB publications represent a continued emphasis by the FTC and CFPB on issues relating to credit reporting and tenant screening. Under the Biden administration, the FTC and CFPB have issued multiple advisory statements, reports, and opinions critical of certain aspects of the consumer reporting process, often without giving any weight to the interests of users of consumer reports, without providing any specific direction to consumer reporting agencies, and without any formal opportunity for notice and comment by industry actors. The CFPB's publications in this regard will also be of specific interest to housing providers and property managers as they consider the use of tenant screening tools.

Troutman Pepper will continue to monitor these regulatory development and publications as they are made.

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