August 20, 2018

Anna Maria Farías
Assistant Secretary for Fair Housing and Equal Opportunity
Department of Housing and Urban Development
451 7th Street SW
Washington, DC 20410

Re: Response of The National Association of Professional Background Screeners ("NAPBS") to Request For Information Regarding HUD's Disparate Impact Rule – Docket No. FR-6111-A-01

Dear Ms. Farías:

The National Association of Professional Background Screeners ("NAPBS"), an international trade association of over 850 member companies, appreciates the opportunity to provide comment to the Department on the Disparate Impact Rule ("Rule") and would respectfully request that HUD reconsider the Rule's effect on businesses using legitimate, race-neutral information in order to provide safe, sustainable housing across the country. Its members provide employment and tenant background screening and related services to virtually every industry around the globe. The reports prepared by NAPBS's background screening members are used by employers and landlords every day to ensure that workplaces and residential communities are safe for all who work, reside or visit there. NAPBS members range from large background screening companies to individually-owned businesses, each of which must comply with applicable law, including how they obtain, handle, or use public record data. NAPBS members also include court- record retrieval services and companies that provide access to public record data to background screeners as well as employers who utilize background screening services in their onboarding process. The majority of NAPBS's members are consumer reporting agencies ("CRAs") who provide consumer reports for employment or tenant screening purposes to employers and landlords.

During the application process, NAPBS members provide objective information to enable landlords and property managers to ensure safe, healthy, and economically sustainable living spaces for individuals and families. This color blind, predictive information supports housing providers in determining whether an applicant will meet their economic obligations and whether the applicant may pose a risk of harm to others. Unfortunately, the Department of Housing and Urban Development's ("HUD") February 15, 2013 final rule, entitled "Implementation of the Fair Housing Act's Discriminatory Effects Standard", and the 2016 supplement (the "Rule"), creates a Hobson's choice for housing providers, forcing them to choose between ensuring safe,

harmonious communities or face extensive administrative and civil litigation under FHA over their neutral, non-discriminatory tenant screening policies.

Landlords and property managers are generally concerned with minimizing risk to their community for those who live there. Multifamily risk assessment in the leasing cycle usually includes verification of the identity of the applicant, followed by a review of the applicant's credit data as well as a criminal and eviction case history review. These reports, provided in many cases by multiple NAPBS members, give reliable and objective predictors about a tenant's ability to pay and his or her risk level to other tenants. Renters overwhelmingly choose where to live based on how safe they feel renting in a given community; thus landlords must make choices regarding acceptable risk levels of each applicant so as not to erode the trust their current tenants have placed in them to maintain a safe living environment. The consequence of violating that trust will be that existing renters choose to move to another community where the management is more vigilant in ensuring that all applicants meet the same qualifying criteria. This example creates a scenario where rental income erodes to the point that the landlord may be less financially able to provide safe and adequate housing to every qualified applicant. Thus, to protect their tenants, housing providers have a right to know if an applicant has a history of serious criminal offenses or other adverse characteristics such as routine failure to make timely rent payments. It is clear that such information is not "artificial, arbitrary, and unnecessary" – it serves a legitimate and important purpose in relation to the rights of existing tenants.

Should housing providers choose to continue tenant screening practices, they may be subject to administrative and civil litigation under the Disparate Impact Rule. Defending against government investigations or charges of disparate impact is notoriously expensive and complex. With the burden shifting framework of the Rule in mind, the mere existence of potential expensive and complex litigation will foster an environment of regulatory uncertainly for businesses merely working to provide safe, economically sustainable communities. It is particularly important to note that just because an applicant may have a criminal history or previous eviction, it does not automatically preclude them from living in communities of their choosing. Once a landlord has this information, they can take steps to mitigate risk such as requiring a co-signatory or placing the tenant in housing with limited access to vulnerable persons. While HUD's intent is certainly well-meaning, restricting the reasonable use of screening criteria will rob housing providers of the opportunity to utilize relevant, race-neutral information in their decisions. Indeed, some evidence exists that the use of background screening may actually reduce the incidence of racial discrimination by shattering subconscious stereotypes.[1]

Residential screening practices are an unquestionably legitimate use of non-discriminatory, neutral data. However, the Disparate Impact Rule's burden-shifting framework will open a

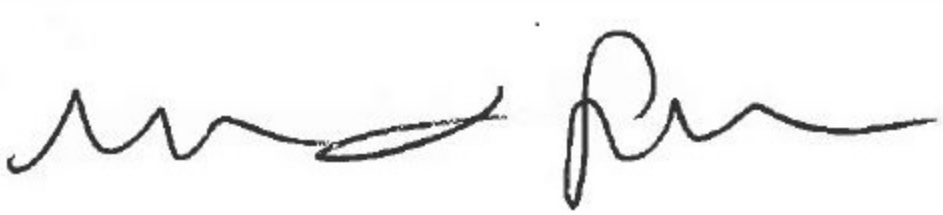
[1] See Harry J. Holzer et al., Perceived Criminality, Criminal Background Checks and the Racial Hiring Practices of Employers, 49 J. Law & Econ. 451, 452 (2006).

floodgate of potentially ruinous administrative and legal claims against landlords and property managers merely seeking to ensure the safety and economic viability of their housing communities. Accordingly, HUD should reconsider realigning the Rule's burden on defendant's to prove certain practices are "necessary to achieve one or more substantial, legitimate, nondiscriminatory" interests with Title VII's burden framework, which requires a defendant to offer a legitimate business justification "consistent with business necessity". The language of the Disparate Impact Rule effectively requires a defendant to prove tailoring twice – a burden of proof nonexistent under Title VII claims. This burden indubitably engenders legal and regulatory uncertainty over legitimate tenant screening practices.

The landscape of tenant screening in particular has changed over the last twenty years. At one time it was enough to know if the applicant being evaluated could simply pay the rent, but now it has evolved to necessitate validating that the applicant is who they say they are, i.e. that they haven't stolen an identity or created a new one; that they can pay; and that they don't pose a risk of harm to other tenants. Even though the business and public safety purpose of considering credit, criminal, conviction, and eviction history is legitimate, demonstrating that each of these criteria is completely "necessary" places an undue burden on businesses merely utilizing objective information.

The NAPBS respectfully requests that HUD reconsider the Disparate Impact Rule's effect on businesses' using legitimate, race-neutral information in order to provide safe, sustainable housing across the country. NAPBS thanks HUD for the opportunity to share its comments regarding the Disparate Impact Rule, and sincerely hopes its comments are beneficial to HUD's review process. NAPBS and its members are available and prepared to discuss any questions regarding our industry or the aforementioned concerns. Thank you for accepting our comments and we look forward to working with you further.

Sincerely,



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