

COMMUNITY AFFAIRS

NEW JERSEY HOUSING AND MORTGAGE FINANCE AGENCY

New Jersey Housing and Mortgage Finance Agency Tenant Selection Standards Rules

Adopted Amendments: N.J.A.C. 5:80-7

Proposed: July 19, 2021, at 53 N.J.R. 1187(a).

Adopted: January 4, 2022, by New Jersey Housing and Mortgage Finance Agency, Melanie R. Walter, Executive Director.

Filed: January 27, 2022, as R. 2022 d.031, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-3.6).

Authority: N.J.S.A. 55:14K-5.g.

Effective Date: February 22, 2022.

Expiration Date: September 14, 2024.

The New Jersey Housing and Mortgage Finance Agency (Agency) is adopting amendments to the Tenant Selection Standards rules at N.J.A.C. 5:80-7 (Rules), which instruct housing sponsors, owners, and managing agents in the selection of tenants at Agency-financed housing projects. The Rules and these amendments are intended primarily to foster compliance with Federal, State, and local fair housing laws and to eliminate discriminatory practices in the tenant selection process, while also contributing to the economic and physical health of Agency-financed projects.

Summary of Public Comments and Agency Responses:

The Agency received comments from the following persons:

1. Bruce S. Shapiro, Director of RPAC & Regulatory Affairs, New Jersey Realtors (NJR); and

2. Adam Gordon, Executive Director, Fair Share Housing Center (FSHC).

The Agency expresses its appreciation for the thoughtful comments from both NJR and FSHC.

A summary of the comments received, and the Agency's responses follows. The commenters are identified in parentheses following the comment summaries by the numbers appearing before their names above.

1. COMMENT: Clarification is sought as to the amended definition of "minority" at N.J.A.C. 5:80-7.1. It is unclear which group or groups "have historically been subjected to discrimination or disparate treatment." Such groups should be more clearly delineated in the definition to provide greater certainty for landlords and other housing providers. (1)

RESPONSE: The existing definition of "minority" is archaic and, in some respects, offensive. The amended definition is far more inclusive and is self-defined as to persons who have been subjected to discrimination or disparate treatment based upon identifiers set forth in the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10-5.1 et seq. Since those identifiers have been established by statute, the Agency does not believe that a discrete listing in the rule is necessary or warranted.

Further, the amended definition incorporates the definitions used by Federal and State agencies charged with the enforcement of civil rights laws in connection with housing, thereby ensuring consistency in its application. The Agency, therefore, respectfully declines to further pinpoint such groups, as they may vary from time to time and case to case.

2. COMMENT: The definition of "minority" should contain a cross-reference with the Division on Civil Right (DCR) as to how a "minority group" is defined. (1)

RESPONSE: The definition does contain a cross-reference to DCR. However, as of this time, DCR has not defined either "minority" or "minority group."

3. COMMENT: Under the amendment at N.J.A.C. 5:80-7.3(b)4i concerning prior or current tenant involvement in civil actions, a prospective tenant cannot be rejected because she or he has been sued by a prior landlord. The commenter asks if, under the amendment, a landlord can consider whether a prospective tenant was sued by a previous landlord for nonpayment of rent or other wrongful conduct, especially if the tenant lost the case and was evicted, expressing concern that if a landlord inquires into the circumstances of civil actions involving a prospective tenant – as is permitted under the amendment - - and subsequently rejects the tenant, the landlord will be in violation of the rule. (1)

RESPONSE: The amendment is intended to strike a balance between the right of a prospective tenant to fair consideration of his or her application and the right and obligation of a landlord to undertake diligent tenant selection. Subparagraph (b)4i provides that landlords may properly consider litigation between a prospective tenant and former landlord where the former landlord has prevailed, but it does preclude the denial of a tenant’s application solely because a lawsuit has been filed by a former landlord against him or her. For purposes of clarification, the Agency is inserting the word “solely” into the second sentence of subparagraph (b)i upon adoption, so that it states: “A tenant may not be rejected solely because he or she has sued or been sued by a prior landlord or has participated in a class action lawsuit against a landlord.”

4. COMMENT: Regarding the proposed amendment at N.J.A.C. 5:80-7.3(b)4ii concerning involvement with the criminal justice system, clarification and specific definitions are sought as to the following terms applied with respect to “serious crimes and felonies”; “serious crimes”; “remote in time”; “lesser offenses”; “tenant’s youth”; and “decades past.” (1)

RESPONSE: The term “serious crimes” is further described in the rule as including “crimes of violence, domestic abuse, or the manufacture or distribution of illicit substances.” The Agency does not believe an exhaustive listing of offenses that may be considered by a landlord is necessary or warranted, particularly considering that Federal and various State and foreign jurisdictions – under which crimes may have been

committed by prospective tenants -- likely use different terminology and may assign different degrees of criminality than New Jersey. Additionally, the Agency notes the provisions of the recently enacted Fair Chance in Housing Act (FCHA), N.J.S.A. 46:8-52 et seq., particularly N.J.S.A. 46:8-56, which lists the types of records that may and may not be considered by prospective landlords.

With respect to the terms “remote in time,” “lesser offenses,” and “tenant’s youth,” the Agency believes that a reasonable reading of each, rather than a strict definition or categorization, is appropriate. It is neither desirable nor practical to exhaustively define each of those terms. Additionally, the Agency again refers to N.J.S.A. 46:8-56, which clarifies those terms, and the way landlords may properly consider them in evaluating prospective tenants.

The Agency agrees with the commenter that the term “in decades past” is not clear and notes that it may be subject to an ambiguity. Therefore, the Agency is changing the term to “more than 10 years ago” upon adoption.

5. COMMENT: Regarding the proposed amendment at N.J.A.C. 5:80-7.3(b)4ii with respect to “minor offenses,” clarification and specific delineations are sought for the phrases “[c]onvictions for minor offenses” and “in the prospective tenant’s youth or in decades past.” (1)

RESPONSE: For the reasons expressed in the Response to Comment 4, the Agency does not believe it is necessary or practical to further define or spell out those acts constituting “minor offenses” or the specific age at which a “prospective tenant’s youth” ends. However, as noted in that response, the Agency agrees that the term “in decades past” is not clear and may be subject to an ambiguity. Therefore, the Agency is changing the term to “more than 10 years ago” upon adoption.

6. COMMENT: The commenter “generally support[s]” the proposed amendments. (2)

RESPONSE: The Agency appreciates the expression of support from groups with a stake in furthering the goals of advancing housing opportunities for low-income and minority residents.

7. COMMENT: N.J.A.C. 5:80-7.3(b)4 should prohibit landlords from considering prospective tenants' involvement in prior civil actions, including eviction actions, altogether. If that is not possible, consideration should be limited to successful eviction actions only and, even in that instance, an individualized assessment should be required before denying tenancy. The commenter asserts that "[p]ast eviction actions are not a good indicator of a prospective tenant's ability to fulfill [her or his] lease obligations[,]" citing a hypothetical example in which a prospective tenant may have been previously evicted from a market-rate unit for which the rent was too much for the tenant to afford. (2)

RESPONSE: The Agency takes its responsibility to promote tenants' interests and to eliminate unlawful discrimination seriously and, in that respect, is in lockstep with the commenting entity. The Agency, however, must also consider the financial health and security of the housing projects that it finances, and the comfort and safety of all personnel involved with those projects. It is, therefore, reasonable to allow landlords to inquire into and consider the circumstances of prospective tenants' prior civil-action involvement, including cases other than successful eviction actions. The Agency's experience is that some tenants are overly litigious; Agency-financed housing providers, tenants, and other project personnel should not be subjected to unwarranted litigation from such tenants where it can be prevented by a reasonable inquiry prior to tenancy. Similarly, where a prospective tenant has a history of tortious conduct that is reflected in civil actions in which he or she is a defendant, that, too, impacts upon the prospective tenant's desirability as a tenant and should not be shielded from consideration by a prospective landlord based on an overly restrictive rule.

In the foregoing and other similar circumstances, the Agency agrees with the commenter that an individualized assessment must be undertaken before an applicant is denied admission to a housing project. In the Agency's judgment, however, such an assessment may consider, among other things, the prospective tenant's prior civil litigation history. It is not unreasonable for a prospective landlord to

consider evictions or other litigation in which a prospective tenant has been involved, provided that a court of competent jurisdiction has found against, or there has otherwise been an outcome adverse to, the tenant.

The Agency respectfully disagrees with the commenter's assertion that "[p]ast eviction actions are not a good indicator of a prospective tenant's ability to fulfill [his or her] lease obligations[.]" for which the commenter cites as an example a prospective tenant who may have been previously evicted from a market-rate unit at which the rent was too much for the tenant to afford. The Agency believes that prior eviction actions do have value in determining suitability for current tenancy, noting that the required individualized assessment would likely disclose factors that would either support or rebut the commenter's position with respect to the example presented.

For these reasons, the Agency will adopt its amendment at N.J.A.C. 5:80-7.3(b)4i as proposed, with the addition of the word "solely" (as explained in the Response to Comment 3). In so doing, the Agency emphasizes that an individualized assessment must be undertaken in any consideration of a prospective tenant's prior litigation history.

8. COMMENT: N.J.A.C. 5:80-7.3(b)4ii should comport with the FCHA. The practice of rejecting all applicants with prior criminal histories is overbroad and, upon passage of the FCHA, illegal. The FCHA helps ensure nondiscrimination in housing practices by setting forth those conditions under which a prospective tenant's criminal history may be considered in the application process. The commenter urges the Agency to make sure N.J.A.C. 5:80-7.3(b)4ii, Involvement with the criminal justice system, comports with the FCHA and rules implementing the FCHA that have been proposed by DCR.

(2)

RESPONSE: The Agency acknowledges that N.J.A.C. 5:80-7.3(b)4ii is worded in a manner that differs somewhat from, but does not materially conflict with, the FCHA and DCR's proposed rules. The Agency notes that to the extent any provision at N.J.A.C. 5:80-7.3(b)4ii might be deemed inconsistent with the FCHA, the latter will govern.

9. COMMENT: In addition to complying with the FCRA, the Agency must ensure that its rules do not have a disparate impact. Rejection of an applicant for tenancy based on the applicant's past criminal history may have such an impact. In some instances, it may bar applicants whose criminal histories are irrelevant to their qualifications for tenancy, a practice that harms society, as well as the individual applicants, since research has shown that recidivism is higher among formerly incarcerated persons who do not have stable housing situations. Also, it may further racial integration in housing because persons of color are incarcerated at disproportionately higher rates in New Jersey. Finally, screening services used by some landlords do not have lookback restrictions on criminal background checks. (2)

RESPONSE: The Agency agrees that its rules must not have a disparate impact and points out that N.J.A.C. 5:80-7.3(b)4ii – to which rule the comment was directed – has been drafted specifically to avoid such a result; the Agency anticipates that the rule will be interpreted to that end. The Agency also notes that the rule contains provisions to prevent reliance on unlimited lookbacks, other than where deemed necessary and/or to comply with Federal policy.

10. COMMENT: N.J.A.C. 5:80-7.3(b)3 should be strengthened to permit and encourage nontraditional credit checks that focus on a prospective tenant's ability to pay his or her share of the rent, rather than on prior credit history: "Employment and ability to pay rent should be the most important consideration[s] in the tenant selection process." Non-traditional credit reports – which may focus on payment history for services such as rental housing, utilities, cell phone service, renter's insurance, and childcare services – are more indicative of a prospective tenant's ability to pay rent than a traditional credit score. (2) (The Agency notes that N.J.A.C. 5:80-7.3(b)3, to which this and the succeeding three comments apply, precedes N.J.A.C. 5:80-7.3(b)4, to which the previous three comments apply, in the numerical

regulatory scheme. However, the Agency has chosen – here as well as elsewhere in this notice – to respond to the comments in the order presented by the commenter rather than in strict numerical order.)

RESPONSE: The Agency believes that the amendments at N.J.A.C. 5:80-7.3(b)3 strike an appropriate balance between the demonstrated ability of a prospective tenant to pay rent going forward and the history of that tenant having paid his or her rental and other obligations in the past. The reality is that the monetary wherewithal to pay one’s obligations does not always result in the actual payment of those obligations. The Agency deems it unwise to totally preclude a prospective landlord from considering the facts and circumstances of a prospective tenant’s timely, late, or non-payment of rent and other past financial obligations. The comment itself acknowledges that payments for rental housing, among other historical payment records, are “much more instructive as to . . . ability to pay rent than a credit score.”

N.J.A.C. 5:80-7.3(b)3, as amended, neither prohibits nor discourages reliance on the non-traditional indicia of credit advocated by the commenter. The Agency notes that reliance on information, such as rental and utility payment history, in the assessment of prospective tenant creditworthiness may be becoming an industry standard; the Federal National Mortgage Association (FNMA) recently announced that on-time rental payments will be considered in applications for FNMA mortgages. *See Georgia Kromrei, On-time rent now counts in Fannie Mae underwriting*, Aug. 11, 2021, available at <https://www.housingwire.com/articles/on-time-rent-now-counts-in-fannie-mae-underwriting>. The Agency supports this initiative, but believes it is best applied in conjunction with – not to the exclusion of – traditional credit scores.

11. COMMENT: Reliance on traditional credit scores in the tenant selection process tends to disadvantage minority applicants, whose credit scores are consistently lower than those of their non-minority counterparts. Some groups are particularly disadvantaged in credit reports because they do not use, or have easy access to, the financial products upon which credit scores are based. Additionally, the

COVID-19 pandemic has disproportionately impacted minority communities, especially with respect to evictions and credit. (2)

RESPONSE: N.J.A.C. 5:80-7.3(b)3 prioritizes rental payment history over – but not to the exclusion of – traditional credit scores. The rule makes clear that lack of a rent-paying or credit history may not automatically disqualify an applicant.

12. COMMENT: Low credit scores may not be good indicators of the ability to pay future rent inasmuch as tenants “often prioritize paying rent over other bills because housing is so critical to their well-being.” Thus, tenants may devote a disproportionate share of their resources to rent at the expense of medical and consumer debt, resulting in low credit scores because only one percent of credit scores take account of rental payment history. (2)

RESPONSE: The Agency reiterates that N.J.A.C. 5:80-7.3(b)3 deemphasizes, but does not eliminate, the reliance that landlords may place on traditional credit scores. The Agency encourages positive consideration being given to applicants who have shown they can properly allocate their resources in order to pay all their obligations, as well as to those who have a positive payment history only or primarily with respect to rent.

13. COMMENT: Negative credit histories that reflect the nonpayment of unsubsidized rent by prospective tenants do not correlate with the ability to pay subsidized rent and, in fact, may point to applicants who are most in need of subsidized housing. Additionally, prospective tenants may be deemed creditworthy where there was a “bona fide reason for a late payment[.]” Where affordable housing is concerned, “a landlord should only be able to consider a tenant’s credit history where that tenant has repeatedly failed to pay [his or her] share of a subsidized rent.” (2)

RESPONSE: The Agency respectfully disagrees with the commenter’s asserted position that tenants’ credit histories should only be considered where there has been a “repeated[] fail[ure] to pay their share

of a subsidized rent.” While N.J.A.C. 5:80-7.3(b)3 sets forth the Agency’s position that lack of a rent-paying or credit history may not automatically disqualify an applicant for tenancy, the Agency does not support completely ignoring such histories – other than in the limited context presented in the comment – where they do exist. In responding to this comment, the Agency emphasizes that its rules must give due consideration to the financial integrity of the projects it finances and that N.J.A.C. 5:80-7.3(b)3 exists within the context of the Agency’s tenant selection standards rules. It is neither financially responsible nor equitable to equate a prospective tenant who has a stellar credit history with one whose credit history is less so, but which does not reach the level of “repeated[] fail[ures]” to pay subsidized rent. The Agency firmly believes that credit histories – properly construed and giving appropriate consideration to individual circumstances, such as bona fide reasons for late payments – should be given consideration in the selection of tenants who will reside in Agency-financed projects.

14. COMMENT: The Agency should require landlords who make use of credit screening services to make “individualized determinations” of prospective tenants’ ability to pay rent based on current information about their income and the rent to be charged. (2)

RESPONSE: The comment regarding the use of credit screening services does not relate to a proposed amendment. Therefore, no response is made.

15. COMMENT: The commenter expresses support for the amendments at N.J.A.C. 5:80-7.4(c), which mandate the referral of complaints alleging violations of civil rights or fair housing laws, rules, or regulations in the tenant selection process to DCR, as well as to the Department of Housing and Urban Development’s (HUD) Regional Offices of Fair Housing and Equal Opportunity. (2)

RESPONSE: The Agency appreciates the expression of support.

16. COMMENT: At N.J.A.C. 5:80-7.5, the Agency should significantly limit residency preferences. “It is well-documented that New Jersey municipalities are among the most segregated in the nation[,]” with a substantial percentage of municipalities having large percentages of white, non-Hispanic residents. If residency preferences are permitted, non-white residents will be virtually shut out from the tenant selection process for Agency-financed projects in these municipalities. (2)

RESPONSE: The Agency acknowledges that local residency preferences have, in some instances, been applied in a manner so as not to affirmatively further fair housing. The Agency notes that it is tasked with multiple, sometimes competing, obligations, among which, in addition to eliminating unlawful discrimination, are furthering the supply of affordable housing in the State, financing economically viable and sustainable housing projects, and revitalizing the State’s urban areas. Local residency preferences play a legitimate role in attainment of those goals, particularly with respect to the development of successful housing projects. Both the Agency and the Department of Housing and Urban Development (HUD), therefore, permit local residency preferences, subject to specific conditions and limitations. Additionally, N.J.A.C. 5:80-7.5 mandates that any local preferences comply with, among other things, all State and Federal fair housing and civil rights laws and rules.

17. COMMENT: If residency preferences are not completely banned, N.J.A.C. 5:80-7.5 should provide that owners “may give priority” for local residency, but “shall give priority” to applicants who are disabled (that is, the mandatory “shall” language should apply to subsection (b) of the rule, while the permissive “may” language should apply to subsection (c)). (2)

RESPONSE: The Agency agrees in principle with the comment, which generally reflects the intention of the Agency as expressed in the proposed amendments at N.J.A.C. 5:80-7.5. The language at N.J.A.C. 5:80-7.5(b), which applies to applicants who are persons with a disability, is mandatory (must), as advocated by the commenter. On the other hand, the text at N.J.A.C. 5:80-7.5(c), which deals with local residency preferences, is permissive and conditional, rather than mandatory. (Priorities or preferences of

any kind, where required by a governing law or regulation, are mandated by N.J.A.C. 5:80-7.5(e). This subsection is deemed to be noncontroversial as it merely codifies that which is legally required.)

In order to clarify any possible ambiguity, the Agency is making the following changes to N.J.A.C. 5:80-7.5 upon adoption:

(1) Subsection (a) is being changed to the following:

Priorities or preferences for admission to otherwise eligible applicants are governed by (b) and (c) below, so long as such priorities and preferences are consistent with State and Federal fair housing and civil rights laws and rules, the owner's Affirmative Fair Housing Marketing Plan, and with all the formation and financing documents and regulatory agreements governing the project to the extent they do not conflict with any applicable fair housing or civil rights laws.

(2) The introductory language at subsection (c) is being changed to the following: “The following applies to local residency preferences:”.

The Agency believes these changes will avoid any confusion that might arise from the multiple uses of the word “shall” in the proposal.

18. COMMENT: N.J.A.C. 5:80-7.5(c) should state that residency preferences are “heavily disfavored in most circumstances.” Also, the provision that prohibits residency preferences is inconsistent with State and Federal law should be replaced with a provision placing the burden on a landlord to demonstrate why a residency preference is both necessary and “the correct tool to address an important goal and is not inconsistent with the New Jersey Fair Housing Act.” (2)

RESPONSE: The Agency declines to include the commenter’s proposed “heavily disfavored in most circumstances” statement in the rule, noting that such a position is not universally supported. For example, Edward G. Goetz, professor of urban and regional planning at the Humphrey School of Public Affairs and director of the Center for Urban and Regional Affairs at the University of Minnesota, has forcefully rebutted six specific criticisms made against the application of such preferences, concluding that

“[c]ommunity preference policies are an important and effective strategy for minimizing displacement and ensuring that long-term residents benefit from neighborhood improvements[.]” Edward G. Goetz, *Criticisms About Community Preference Policies Are Misguided*, Nov. 14, 2019, available at <https://shelterforce.org/2019/11/14/criticisms-about-community-preference-policies-are-misguided>.

The Agency believes N.J.A.C. 5:80-7.5(c), as amended, sufficiently places the burden of persuasion on landlords/owners to demonstrate that any requested local residency preferences will not have a discriminatory effect or disparate impact. In particular, paragraph (c)1 both prohibits residency preferences from being a prerequisite for admission and requires Agency and HUD approval in order for such preferences to be applied. Additionally, paragraph (c)2 conditions such preferences on compliance with State and Federal fair housing and civil rights laws and the goals of a project’s Affirmative Fair Housing Marketing Plan. Further, N.J.A.C. 5:80-7.4(b) expressly prohibits any action in the tenant selection process that might result in discrimination. In summary, the Agency believes that the tenant selection standards rules, as amended, provide adequate safeguards against the abuse of local residency preferences.

19. COMMENT: N.J.A.C. 5:80-7.3 should clarify and strengthen provisions regarding comments from prior landlords by establishing a general framework for the consideration of such comments in the tenant selection process. Additionally, “blanket exclusions” of prospective tenants based on the comments of prior or current landlords should be prohibited in favor of “individual determinations of suitability for residency” and prospective tenants should be allowed the opportunity to respond to landlord comments, as well as to provide documentation in support of their responses. (2)

RESPONSE: The Agency believes N.J.A.C. 5:80-7.3(b)2 adequately explains that prior and current landlord comments are among the factors that may be considered in the screening of applicants for tenancy. Landlords are obliged to make diligent inquiry in the tenant selection process. The rule does not specifically address the particular weight that may or must be afforded to recommendations from prior

landlords. However, the rules do expressly enjoin landlords from rendering tenant selection decisions that have, or may have, a disparate or discriminatory effect.

The Agency agrees with the commenter that tenants should be given the opportunity to respond to prior and current landlord comments and produce documentation in support of their positions. Accordingly, the Agency is adding the following sentence to the end of N.J.A.C. 5:80-7.3(b)2 upon adoption: “Prior to a decision on admission being made, applicants shall be given an opportunity to respond to any comments as to their prior or current tenancy made by prior or current landlords and to produce any documentation bearing on the comments or their response to them.”

20. COMMENT: The commenter, voicing “concerns about the clarity” of the language of amended N.J.A.C. 5:80-7.3(b)2, suggests rewriting the paragraph as follows:

Prior landlord references shall not be determinative in the tenant selection process.

A responsible tenant may receive a bad recommendation just as a disruptive tenant might receive a good recommendation.

The endorsement of a prior landlord is preferable to the judgment of a present landlord. Present landlords may misrepresent whether a present tenant is responsible because they fear losing a current tenant. The present landlord’s interests are not always the same as the owner’s interests. (2)

RESPONSE: The Agency respectfully disagrees with the commenter’s proposed changes. The Agency acknowledges the possibility of the hypothetical response posited by the commenter; however, the proposed changes create a broad limitation on landlords in response to this single hypothetical landlord response. Landlords are obliged to make a diligent inquiry in the tenant selection process. This inquiry will generally include consideration of recommendations from prior landlords.

The Agency is satisfied that the use of such recommendations is adequately addressed at N.J.A.C. 5:80-7.3(b)2, particularly since in various places, the rules and statutes expressly enjoin landlords from

rendering tenant selection decisions that may have, or will have, disparate or discriminatory impacts. Further protections in this regard are afforded to tenants by virtue of provisions barring blanket disqualifications of tenants, requiring landlords to conduct individualized assessments, and permitting tenants to challenge or object to perceived negative information associated with their applications for tenancy.

21. COMMENT: The Agency should prohibit first-come, first-served waitlist practices and should instead mandate that all Agency-financed housing units utilize a lottery system. (2)

RESPONSE: The comment regarding the prohibition of first-come, first-served waiting lists does not relate to a proposed amendment. Therefore, no response is made.

22. COMMENT: The commenter expresses skepticism of the need to accept over-income tenants to attain full occupancy at any Agency-financed project. At N.J.A.C. 5:80-7.6(b), the Agency should define a “good faith effort” to attract income-eligible applicants. The comment cites improper affirmative marketing or improper or illegal tenant selection procedures as “likely” the only reasons full occupancy is not attained solely with income-eligible tenants and posits that a “good faith effort” should include, among other things, publication of “advertisements” in newspapers and on radio or television stations, seeking aid from community and regional organizations, and imposing a minimum four-month pre-occupancy marketing term. (2)

RESPONSE: The Agency does not believe that “good faith effort” needs to be defined in this context. Viewed as a whole, the tenant selection standards rules provide ample guidance and requirements for actions landlords must take to market their projects, including compliance with the project’s Affirmative Fair Housing Marketing Plan (AFHMP), which, among other things, requires detailed information as to the means to be undertaken to market the project and mandates the designation of at least one community

contact organization for each targeted population. Compliance with all such requirements is inherent in a “good faith effort.”

Additionally, the Agency believes certain of the commenter’s proposed requirements would impose unnecessary cost and time constraints upon landlords and thereby contravene an Agency policy objective of maintaining adequate project cash flow. In particular, since most leases require only a 30- or 60-day pre-termination notice, the commenter’s proposed minimum four-month pre-occupancy marketing term would result, in many instances, in at least a two- or three-month compulsory vacancy term for any unit being vacated. The Agency deems such an outcome to be economically infeasible.

23. COMMENT: If the actions suggested by the commenter in Comment 22 to fulfill a landlord’s requirement to make a “good faith effort” to market units do not produce an income-eligible tenant, owners should be required to consult with the owners of at least two nearby Agency-financed projects to see if those projects have an income-eligible prospective tenant is on their waiting lists. (2)

RESPONSE: For the reasons expressed in the Response to Comment 22, the Agency does not believe a “consultation” requirement is necessary. Further, the Agency does not want to encourage the “poaching” of prospective tenants from the waiting lists of one or more Agency-financed projects by another Agency-financed project. Additionally, tenants may have different reasons for applying to different projects. If a prospective tenant did not apply for the waiting list of a particular project, there may be reasons for that decision. Otherwise, the prospective tenant may reasonably be expected to already be on that project’s waiting list.

24. COMMENT: The Agency should mandate that all owners comply with Federal language requirements and should require landlords to accept tenant applications both on-line and in paper format. (2)

RESPONSE: The comment regarding the language and formatting requirements of tenant applications does not relate to a proposed amendment. Therefore, no response is made.

25. COMMENT: The Agency should “strengthen” its AFHMP rule at N.J.A.C. 5:80-22 to ensure equitable tenant selection. (2)

RESPONSE: As the commenter acknowledges, the comment regarding “strengthen[ing]” the AFHMP does not relate to a proposed amendment. Therefore, no response is made.

26. COMMENT: N.J.A.C. 5:80-7.2(a) should be amended to include only “clear and unambiguous language.” For example, the terms “responsible tenants” and “costly consequences” should be defined or eliminated from the rule. (2) (The Agency notes that the term “costly consequences” appears at N.J.A.C. 5:80-7.2(b), not (a)).

RESPONSE: The Agency does not agree that the terms “responsible tenants” and “costly consequences,” as used in the context at N.J.A.C. 5:80-7.2(a) and (b), require definition or removal from the rule. N.J.A.C. 5:80-7.2, General policy, must be considered as a part of the regulatory scheme encompassed within the Tenant Selection Standards rules. It sets forth broad statements of policy, rather than imposing specific standards to which landlords/owners must strictly adhere in a legal sense. Landlords are obliged to comply with the entirety at N.J.A.C. 5:80-7 – including the many anti-discrimination and affirmative action provisions thereof and cross-references therein to standards imposed by the FCHA, DCR, and other Federal and State legislation and regulations – and will of necessity have an appropriate understanding of those applicants who are likely to be “responsible tenants.” Landlords may, thus, be expected to rein in any inclinations they may have to act on “implicit bias or overzealous approaches to tenant selection,” as cautioned by the commenter. Additionally, landlords/owners will be aware that improper or illegal tenant selection practices may result in “costly consequences” without the need to set a specific dollar figure on

the amount of those potential consequences. The Agency, therefore, believes that the language at N.J.A.C. 5:80-7.2(a) and (b), as amended, is amply clear and unambiguous.

27. COMMENT: The COVID-19 pandemic has exposed that many families, particularly low-income families, may be beset by credit history setbacks and evictions through no fault of their own. The commenter stresses that not only the pandemic, but also less momentous events that occur “on a daily basis,” constitute “mitigating circumstances” that may impact a person’s history. Therefore, landlords should “individually assess” each applicant to ensure that she or he is being evaluated in terms of her or his ability to meet lease obligations going forward, instead of routinely denying tenancy to those with “a trouble[d] financial history.” (2)

RESPONSE: The Agency thanks the commenter for the thoughtful Comment. The Agency notes that the Tenant Selection Standards rules are intended to provide guidance for both the present and the future and should not, therefore, be dictated solely by reference to the current global pandemic, as cataclysmic as that event is. The Agency also points to its experience that, because of prompt governmental action, tenant evictions have been, and are now, actually fewer than was the case pre-pandemic. Thus, an individualized assessment of a prospective tenant may reveal that continued residency (as opposed to eviction) during the pandemic, enabled by the mitigating circumstance of eviction moratoria, does not necessarily foretell success in meeting the prospective tenant’s obligations under a lease going forward.

In conclusion, the Agency agrees with the commenter that affordable housing should be available to provide prospective tenants with “a path forward.” The Agency’s approach, as set forth in the adopted amendments, requires a fair and detailed evaluation of a prospective tenant’s prospects, which evaluation should consider both the positive and negative aspects of the prospect’s profile. The Agency does believe that an applicant’s past record – properly evaluated – should be considered in making a realistic evaluation.

Summary of Agency-Initiated Changes:

1. In the last sentence at N.J.A.C. 5:80-7.3(b)4, the Agency is moving the second comma from after the phrase “discriminating against any person” to after the phrase “may have the effect of” to correct a drafting error in the notice of proposal and make sense of the sentence.

2. In the last sentence of N.J.A.C. 5:80-7.5(c)2, the Agency is moving the second comma from after the phrase “may result in” to after the phrase “outcomes inconsistent with” to correct a drafting error in the notice of proposal and make sense of the sentence.

Federal Standards Statement

The adopted amendments are intended, among other things, to eliminate discriminatory practices/considerations from the tenant selection process at Agency-financed housing projects. The adopted amendments require compliance with the NJLAD, the State Fair Housing Act, and, upon its effective date, the FCHA, which go beyond Federal law in the breadth of the populations to which they apply and in certain protections afforded to applicants for tenancy. However, it is not only appropriate, but necessary, to enforce the provisions of the State acts even when they exceed Federal law in order to eliminate discrimination in the tenant selection process.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

5:80-7.3 Screening criteria

(a) (No change from proposal.)

(b) Owners may consider the following factors when screening applicants. These factors are not all inclusive and the absence of any of these factors is not sufficient reason to reject an applicant. Costs of credit checks may be charged as a project expense.

1. (No change.)

2. Comments from prior landlords: Tenants with histories of damaging units may present high risks. The endorsement of a prior landlord is preferable to the judgment of a present landlord. A responsible tenant may receive a bad recommendation just as a disruptive tenant might receive a good recommendation from the present landlord. The present landlord's interests are not always the same as the owner's interests. ***Prior to a decision on admission being made, applicants shall be given an opportunity to respond to any comments as to their prior or current tenancy made by prior or current landlords and to produce any documentation bearing on the comments or their responses to them.***

3. (No change from proposal.)

4. Prior exposure to the legal system: Owners often seek information regarding prospective tenants' contacts with the legal system. Tenants may not be rejected solely due to contact with the legal system. Particular care must be taken to avoid rejecting tenants in a manner that results in, or may have the effect of*,* discriminating against any person*[,]* because of factors described in the NJLAD or other State or Federal fair housing or civil rights laws.

i. Prior or current involvement in civil actions: Prospective tenants may be involved in civil litigation for any number of reasons that would not affect their desirability as tenants, or which might justify rejection. A tenant may not be rejected ***solely*** because he or she has sued or been sued by a prior landlord or has participated in a class action lawsuit against a landlord. An owner may nevertheless inquire about the circumstances and outcome of such a suit. A judgment or verdict in favor of a tenant shall not be grounds to reject a prospective tenant.

ii. Involvement with the criminal justice system: HUD and the New Jersey Division on Civil Rights have determined that some tenant selection practices that include criminal background checks may have the result of unlawful discrimination because they have a disparate impact based on race or national origin or because they are often used as a pretext for treating prospective tenants differently based on race or national origin. Accordingly, an owner may not reject a tenant's application solely on the grounds that the tenant has had prior contact with the criminal justice system. Owners may nevertheless reject a prospective tenant who has been convicted of serious crimes or felonies, including, but not limited to, crimes of violence, domestic abuse, or the manufacture or distribution of illicit substances, when the rejection of such prospective tenant is necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, such as the protection of any person or property. Owners may also consider the number of prior convictions of other offenses, but shall discount those which are remote in time or may not reasonably represent the prospective tenant's current behavior. For example, an owner may generally reject a tenant who has been convicted of a serious offense or a series of lesser offenses but may not do so if such offenses occurred in the prospective tenant's youth or ***[in decades past]* *more than 10 years ago***. Owners should conduct an individualized assessment when determining if a prospective tenant is to be rejected based on criminal history and such assessment should take into account the nature and severity of the individual's conviction or convictions; the

amount of time that has elapsed since the criminal conduct occurred; the age of the individual at the time of the conduct; the individual's tenant history before and after the conviction or conduct; and any rehabilitation efforts undertaken by the prospective tenant. Convictions for minor offenses, such as disorderly persons or traffic offenses or misdemeanors, particularly if occurring in the prospective tenant's youth or *[in decades past]* ***more than 10 years ago***, shall not be grounds to reject an otherwise qualified prospective tenant. Arrests not resulting in conviction shall not be considered.

5:80-7.5 Priorities and preferences

(a) *[Owners shall give priority or preference]* ***Priorities or preferences*** for admission to otherwise eligible applicants **[at]** ***are governed by*** (b) and (c) below, so long as such priorities and preferences are consistent with State and Federal fair housing and civil rights laws and rules, the owner's Affirmative Fair Housing Marketing Plan, and with all the formation and financing documents and regulatory agreements governing the project to the extent **[that]** they do not conflict with any applicable fair housing or civil rights laws.

(b) (No change from proposal.)

(c) **[Residency preferences shall be as follows]** ***The following applies to local residency preferences***:

1. (No change from proposal.)

2. The Agency will approve the use of local residency preferences only if such preferences will not be inconsistent with State and Federal equal opportunity requirements and will not frustrate achievement of the goals of the Affirmative Fair Housing Marketing Plan. For example, if the Agency determines that affirmative marketing goals and objectives cannot reasonably be achieved with a residency preference for all units, the Agency may deny a request for use of residency preferences or approve it for only a portion of the units. Residency preferences may be used during initial rent-up and to fill vacancies occurring subsequent to the rent-up period. Residency preferences shall not be permitted if the application of such preferences will be inconsistent with, or may result in*[,] outcomes inconsistent with*,* the NJLAD or other State or Federal fair housing or civil rights laws, rules, or regulations.

i. - iii. (No change.)

(d) (No change.)

(e) (No change from proposal.)