

FAIR CREDIT REPORTING ACT COMPLIANCE AND THE LANDLORD

© Copyright 2000-2001 Landlord.com

Tenant screening is a popular topic on the World Wide Web and elsewhere. More and more companies are providing tenant screening services of increasing sophistication, and we advise our readers to use them. In doing so, however, the landlord subjects himself to the strictures of the Federal Fair Credit Reporting Act. This act is comprised of 24 sections of the United States Code, most of which have nothing to do with the landlord if he utilizes tenant screening reports. This article is an effort to cull those requirements that affect the landlord who uses screening services or credit reports and explore what they entail. This column is not an attempt to report upon the privacy and credit laws which may exist in particular states or localities. These are too numerous to deal with in one place.

A tenant screening report is undoubtedly a consumer report subject to the Act. The definition of "consumer report" is at 15 USC Sec. 1681(a)(d) and reads as follows:

"The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes...."

As a user of a consumer report the landlord must establish reasonable procedures to assure compliance with the law. Having and observing such reasonable procedures will ensure that in the event of an honest mistake, the landlord can avoid liability. 15 USC Sec. 1681m(d). We will attempt to suggest such procedures during the course of this column. The terms "credit report" and "tenant screening report" will be used interchangeably throughout this column.

WHEN A CREDIT REPORT MAY BE OBTAINED

The circumstances under which a consumer report may be issued are covered at 15 USC Sec. 1681(b), and in pertinent part read:

"(a)...[Any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

"(2) In accordance with the written instructions of the consumer to whom it relates.

"(3) To a person which it has reason to believe

"(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

"(F) otherwise has a legitimate business need for the information (i) in connection with a business transaction that is initiated by the consumer, or (ii) to review an account to determine whether the consumer continues to meet the terms of the account."

What this means to the landlord is that, in order to obtain a report, he must demonstrate to credit reporting agency that:

1. the applicant has requested the report, or
2. the landlord is obtaining a report in connection with an application initiated by the applicant, or
3. the landlord is reviewing the credit of an existing tenant, or a former tenant who owes him money, or
4. the landlord is reviewing the credit of an existing tenant in order to decide whether to renew a lease or otherwise continue the landlord/tenant relationship.

Should the landlord misrepresent his interest to obtain a credit report where one of these interests does not exist, he probably would be liable both to the reporting agency and the prospect or existing tenant.

Compliance requirements arise in two phases of the landlord/tenant relationship. The first is at the point at which the prospect initiates the application process. The second phase is during an existing landlord/tenant relationship, or in connection with a debt which arose out of it. A third possibility, the initiation of the application process by the landlord is a scenario we have never witnessed, and will not be discussed.

At the first phase of the relationship, the prospect has signified his desire to rent one of the available units and has filled out an application. At this point, the landlord has the right, without any authorization from the applicant, to obtain a credit report.

The key to the right to obtain a report is that there is an existing transaction. There may be no existing transaction if there is no rental unit available at the time of the application. In the event the landlord accepts applications during periods of no vacancy in order to have prospects on file in the event of a vacancy, a procedure which has been suggested by some writers, we do not recommend that a credit report be obtained until a vacancy develops and further contact is made by the landlord to assure continuing interest in pursuing the application process. In any event, there are practical reasons for not obtaining such reports, including their cost and the fact that they may become stale quickly. A report should be obtained in connection with such an application only if the prospect has explicitly and in writing authorized it and instructed the landlord to obtain it and credit reporters to supply it.

Even though written authorization is not required, any credit reporting agency will advise that it be obtained. The authorization should be included in the body of the application, in plainly visible type, immediately above the signature line or lines. The language should not only permit the landlord to obtain a report, but, and perhaps out of an excess of caution, instruct him to obtain one, and all credit reporting agencies to provide one. In the event more than one person must be checked, each such person should sign. Identification must be checked for each applicant, which the landlord should do during the application process anyway. In the event the landlord desires to put the authorization on a stand alone document, or attachment to the application, place signature lines on the document or attachment. Do not simply staple the authorization to the application form and then have the applicants sign only the form. A sample of apt language is as follows:

I/we, the undersigned, authorize and instruct [name of landlord] to obtain such credit reports and tenant screening reports as he deems necessary or prudent, and authorize and instruct any and all credit reporting agencies and tenant screening services to provide such reports to [name of landlord].

In the second phase of the landlord/tenant relationship, the parties are in the midst of a business transaction, the lease or rental agreement, or there is a debt owing as a result of it that the landlord needs to collect. Here, again, the landlord has the right to obtain credit reports without any authorization by the tenant. Obtaining a report without written authorization is not attended by the same risks as doing so before the inception of the landlord-tenant relationship because the ongoing business transaction is demonstrable. This must not, however, be construed as authorization to pull credit reports out of curiosity. The landlord would be well advised to develop a policy defining the circumstances under which a report might be obtained. Here are some examples of things that might be cited as triggers for obtaining a credit report.

1. renewal of a fixed term lease for a period greater than six months
2. default in the payment of rent for a period of more than ten days
3. occurrence of damage to the rental unit reasonably suspected to be in excess of the security deposit
4. initiation by the landlord of a legal proceeding arising out of the rental agreement
5. vacation of the rental unit with money owing

The principle is to define, but not unduly restrict, the circumstances under which a need to have the information has arisen.

There are ample reasons for such a policy. Bodies of law concerning rights to privacy exist in all jurisdictions in the United States. If the landlord obtains a credit report without the ability to define a need to know, he may well incur liability for invasion of privacy. Inquiries are reported by credit reporting agencies. Many businesses interpret repeated inquiries without an extension of credit as negative, so that such inquiries will damage the tenant's credit worthiness. Such damage might give rise to an action against the landlord in tort if he is the culprit. The landlord should set up the circumstances under which he will make credit inquiry of existing tenants in writing in advance, and stick to the policy, so he can justify his actions at a later time if necessary.

WHAT THE USER CAN AND CANNOT DO WITH THE REPORT

Credit reports can only be issued to persons who have a legitimate interest in obtaining them. This implies that the report should not be distributed or given to others. Credit reports should be kept in a secure location and access to them limited to those with a need to know.

Credit reporting firms make their money by supplying such reports for a fee. They will require that the landlord keep them confidential and not distribute copies to others. The landlord's contractual obligation with the company will prohibit him from giving a copy of the report to anyone else, even the prospect or the tenant. Unless a specific state law overrides the contract and requires provision of a copy to the prospect or tenant, the contractual obligation must be respected, or the landlord will soon find that no one will do business with him.

The landlord has every right, however, to disclose the contents of the report, as distinguished from giving a copy to the prospect or tenant, and even to show it to the prospect, at 15 USC Sec. 1681e(c):

"(c) A consumer reporting agency may not prohibit a user of a consumer report furnished by the agency on a consumer from disclosing the contents of the report to the consumer, if adverse action against the consumer has been taken by the user based in whole or in part on the report."

If the landlord, based on the contents of the report, takes an adverse action, such as denying the applicant or demanding additional consideration of any sort for the rental, then he may disclose the contents of the report. Note, however, if the landlord does not take adverse action, the company can bind him not to disclose the contents of the report. This is important as, where adverse action is taken, the landlord might wish to discuss the derogatory information with the applicant to obtain an explanation. If the explanation results in a decision not to act adversely after all, then this should be noted in the landlord's screening notes.

WHAT ADVERSE ACTION REQUIRES THE LANDLORD TO DO

The landlord must do certain things when he takes adverse action against an applicant. In some instances, the information on which the adverse action is based need not even have come from the credit report. An adverse action is defined in the FCRA as an outright denial, or a demand for more security, or any other burden to the prospect, in order to be approved. An example of this last might be the demand for an increased security deposit, or prepayment of several months rent, to compensate for greater perceived risk from a tenant who has undergone an eviction.

The exact course of action the landlord must take depends on the source of the information which leads to the adverse action. There are three possible sources of such information: 1. credit reporting agencies, 2. third parties who are not credit reporting agencies, and 3. internal records or records of affiliates.

If the landlord takes adverse action in response to information in a credit report, then 15 USC 1681m(a) specifies:

"(a) If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall

"(1) Provide oral, written, or electronic notice of the adverse action to the consumer,

"(2) provide to the consumer orally, in writing, or electronically

"(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency complies and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

"(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

"(3) provide to the consumer an oral, written, or electronic notice of the consumer's right

"(A) to obtain, under section 1681j, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60 period under that section for obtaining such a copy; and

"(B) to dispute, under section 1681i, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency."

If the reporting agency does not provide an appropriate notification letter, the following might be used as a form:

"We regret to inform you that your application to rent 1234 Main Street has been declined. This action was in whole or in part the result of information contained in a credit report. This report was supplied by Zapco Screening Services, 8888 Hindenburg Disaster Way, Anytown, MI, (999)098-wxyz, toll free (800)098-abcd. Zapco Screening Service did not make the decision to take this adverse action and is unable to provide the specific reasons why the adverse action was taken. You have a right to obtain a free copy of a report by making demand on Zapco Screening Service within 60 days of your receipt of this letter. You also have a right to dispute with Zapco Screening Service the accuracy or completeness of any consumer report furnished by them."

Despite what the federal code says, the landlord should make the disclosure in writing, in hard copy, never orally or electronically alone. Nothing can substantiate compliance more effectively than a hard copy of a letter with the note "mailed 4/29/99." The landlord should do this disclosure whether or not he has discussed the adverse action and the contents of the report informally with the applicant.

The second and third possibilities, information from third parties and information from internal records or third party affiliates, may be dealt with together. Such information could be obtained from previous landlords, employers, personal references, affiliated companies, and internal records of previous transactions. Adverse action based on these sources of information triggers no requirement of notification under the FCRA.

The Federal Trade Commission has already held that a rental agreement is not a credit transaction for the purposes of the act, although a little thought will show that it is a credit transaction, in the broad sense, in reality. This is why there is no requirement for notification. The Act requires notification if an adverse action is based on a report from a consumer reporting agency, including a screening service. But according to an FTC staff opinion only a denial of credit, which a rental agreement is not, triggers the requirement of notification based on third party provided information.

This does not entirely close the book on the issue, however. What is the rule when the landlord engages a tenant screening service and the service telephonically interviews the tenant's references and provides a summary of the interviews in its overall report to the landlord? What if the landlord denies the applicant based on information in the summary of an interview of a previous landlord or a personal reference? The Riddle opinion does not cover this contingency because it was beyond the scope of the issue presented. Good arguments exist for not giving notification under the act as well as the reverse. The purpose of the Act and its notification requirements is to alert consumers to adverse information contained in reporting databases and give the consumer an opportunity to challenge and correct adverse information. Notes of interviews are not included in a database the way credit card payments are, therefore, so the argument runs, such information should not be a notification trigger. On the other hand, it is argued with equal force, the Act is quite clear that adverse action based on a report of a credit reporting agency, of which a screening service is one, triggers notification. The prudent landlord should issue the same notification if he takes adverse action based on third party information developed by a reporting agency as he would issue if they reported an adverse court record or the like, at least until the FTC or a court of record clarifies this issue.

WHAT MAY BE CONSIDERED

The landlord is entitled to consider any information about the applicant that he has in his possession under the FCRA. Some have commented that one can consider information concerning the applicant only if it is less than seven to ten years old. FCRA limits the age of information that may be disclosed by a reporting agency at 15 USC Sec. 1681c, but has nothing to say about the age of information which the landlord may consider in making his decision to rent. The weight assigned to such information is probably slight due to its age, but that is a matter of judgment.

We have considered why the FCRA applies to landlords, what a credit report is and when it may be obtained, what may or may not be done with the report, and what to do when adverse action results from the report. It must be stressed that we deal only with the FCRA. The landlord using screening services must also inform himself of the requirements of State and local laws, because while Congress may have pre-empted the areas with which the FCRA deals, there is still considerable room for State action.