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September 16, 2010

VIA ELECTRONIC MAIL

<https://ftcpublic.commentworks.com/ftc/fcrarevisednotices/>

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex M)
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: Comments on FACTA Notices, Project No. P105408, Request for Public
Comments (75 Fed. Reg. 52655, August 27, 2010)

To Whom It May Concern:

We are writing in response to the request for public comments on the proposed Fair Credit Reporting Act (FCRA) notices recently published by the Federal Trade Commission ("Commission") (75 Fed. Reg. 52655, August 27, 2010). We believe that the proposed notices must be improved to address specifically the issues presented by criminal background reports, preferably by creating consumer and user notices customized for employment reports.

A. Background of Goldstein Demchak Baller Borgen & Dardarian and Our Clients' Criminal Background Checks

Goldstein Demchak Baller Borgen & Dardarian is one of the oldest and most successful plaintiffs' public interest class action law firms in the country. We represent individuals in complex, class and collective action lawsuits in employment discrimination, wage and hour violations, and disability access, as well as other public interest areas. In recent years, our employment discrimination practice has included representation of individuals who have criminal records who, because of their records, have been unable to obtain employment regardless of the age or nature of their crime. We are sure you are aware of the severe adverse impact the use of criminal background checks in the screening of job applicants has on people of color. Currently, we are prosecuting a class action employment discrimination against a national bus transportation company over its criminal background check practices. We also have pending class charges of discrimination with the Equal Employment Opportunity Commission filed on behalf of a number of other rejected applicants of color challenging similar practices of multiple other companies nationwide.

Most of the rejected job applicants with criminal records with whom we have consulted receive criminal background reports prepared by commercial vendors. However, they are unaware of the consumer protections for these reports that are available under FCRA.

Additionally, we have found that many employers and private screeners routinely fail to comply with their FCRA obligations. Among the errors that we have seen in criminal background reports are the following:

- The information that is reported is inaccurate.
- The record of another person with the same name is incorrectly included in the criminal background report.
- The same cases are reported multiple times.
- The information is presented in a way that makes the record look worse than it actually is.
- Expunged cases are reported.
- Arrests more than seven (7) years old are reported.
- Identity theft is not corrected.

As an example, one of our clients was charged with felony welfare fraud in 2000. She pleaded no contest in 2002, and was sentenced to four days of jail time and five years of probation. In 2007, after she satisfactorily completed her sentence her felony conviction was reduced to a misdemeanor, pursuant to California Penal Code § 17, and then was dismissed, pursuant to California Penal Code § 1203.4, which allows a court, upon satisfactory completion of probation, to withdraw the defendant's guilty plea or plea of no contest and enter a plea of not guilty and "dismiss the accusations or information against the defendant." Although our client's conviction had been judicially dismissed, it nonetheless was reported on a criminal background check report prepared in connection with our client's 2009 conditional offer of a job. That conditional offer was rescinded.

A conditional offer of employment for another of our clients also was rescinded after a criminal record check erroneously revealed that he had been convicted of a felony in Pennsylvania at a time when he was engaged in military service overseas.

B. The Commission Should Prepare a Customized Model Summary of Rights for Criminal Background Reports.

We strongly commend the Commission's simplification of the model "Summary of Rights" for consumers, which federal law mandates be included with a consumer reporting agency's disclosure. However, as described below, we urge the Commission to further improve the proposed FCRA notices by explicitly focusing on the rights and obligations related to criminal background reports.

C. Customized Model Notice for Criminal Background Reports is Justified.

Application of FCRA to criminal background reports generated by the commercial screening industry has never been more crucial.

- Nearly one in three adults has a criminal record that will come up in a background check. Persons of color are disproportionately more likely to have a criminal record.
- The background screening industry has expanded significantly, and employers' use of background checks has skyrocketed.
- Many employers and commercial screening firms routinely fail to comply with the basic mandates of FCRA.

The Commission's proposed revisions to its notices represent a key opportunity to educate the public about the numerous FCRA rights and obligations that are implicated when a criminal background report is prepared by a commercial vendor.

The general references in the proposed model notice to "credit reports" without specific reference to criminal background checks is not sufficient. In our experience, our clients do not know that a "credit report" may include one's criminal history. For these individuals to understand how FCRA applies to criminal background reports, they need a summary of rights specifically addressing the issues implicated. Moreover, the special FCRA rules applicable to criminal cases and reports purchased for employment purposes should be highlighted.

1. Recommendations

We recommend that the Commission prepare a customized summary of rights for criminal background reports that is focused on the employment context. At a minimum, the summary should address the following key rights:

- Arrests not leading to convictions that are more than seven (7) years old should not be reported, unless the salary for the job at issue is \$75,000 or more.
- The job applicant should receive a copy of the report at least five (5) business days before an employer makes a decision on it.
- The job applicant has the right to free copies of criminal background reports and file disclosures from commercial vendors of those reports.

We are aware that the National Employment Law Project and Community Legal Services have proposed a model summary of rights. We urge the Commission to adopt it.

Alternatively, if the Commission declines to prepare a separate summary of rights related to criminal background reports, it, at a minimum, should revise the existing model so that it will better inform the public about these rights. Such revisions should include:

- Instead of referring to “credit reports,” the notice should refer to “consumer reports” and define that term to include criminal background reports. The notice should also refer to “jobs” and “criminal background reports” throughout.
- In the first set of bullet points, add the right to get a copy of a criminal background report at least five (5) business days before an employment decision is made on it.
- The “Fix Mistakes” section should state that arrest records generally can be reported for only seven (7) years.

D. The Commission Should Prepare a Customized Model User Notice for Criminal Background Reports

Similarly, we believe that a specific user notice focused on criminal background reports also would help employers that purchase such reports better understand their obligations under FCRA.

The proposed user notice has a lengthy section devoted to employment reports. However, to fully understand its obligations, an employer also would have to understand that other rules contained in the sections more focused on credit reports also apply to it. Integrating all relevant rules into one document would more effectively communicate employer obligations. Moreover, a customized employment user notice would eliminate the need for the employer portion of the proposed user notice, thereby reducing its length and complexity.

In the event that the Commission declines to prepare a user notice specifically focused on employment reports, it should make the following revisions to the proposed user notice:

- “Consumer reports” should be defined at the beginning of the notice to include criminal background reports.
- The “For Employers” section should indicate that other sections of the notice also apply to employers.
- The section indicating that a copy of a report must be provided before an adverse action must provide a time period in which the job applicant can act on the report.
- The notice should state that employers generally cannot consider arrests that did not lead to convictions that are more than seven (7) years old.

As employers expand their use of commercial screening firms to conduct criminal background checks for employment, further revisions of the FCRA notices, as outlined above, can significantly minimize the routine violations of FCRA. These suggested improvements to the Commission’s proposed notices will ensure greater compliance with FCRA and protect the rights of the growing number of individuals with criminal records who are struggling in this economy to find work, support their families and become productive and contributing members of their communities.

Thank you for your consideration of these comments.

Sincerely,

Teresa Demchak

Roberta L. Steele

TD/kbm