

September 20, 2010

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex M)
600 Pennsylvania Avenue, NW
Washington, D.C. 20580
Submitted electronically (<https://ftcpUBLIC.commentworks.com/ftc/fcra-revised-notices/>)

RE: COMMENTS ON FACTA NOTICES, PROJECT NO. P105408, REQUEST FOR PUBLIC COMMENTS (75 Fed. Reg. 52655, August 27, 2010)

To Whom It May Concern:

On behalf of Legal Aid of Western Michigan, 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). ***Our overall comment is that the proposed notices must be improved to specifically address the issues presented by criminal background reports, preferably by creating consumer and user notices customized for employment reports.***

Background on Our Organization and Our Clients’ Criminal Background Checks

Our organization provides free civil legal assistance to low-income and elderly residents in Western Michigan. Because of the significant consequences that criminal records have on the ability of our clients to obtain employment, housing, public benefits, education, and other services, we have developed a specialized unit, the Reentry Law Project, that is dedicated to helping low-income people overcome these barriers. We work extensively with people who have criminal records. We serve approximately 400 individual clients a year just through the Reentry Law Project; many of our clients in our other programs also have criminal record issues. We also engage in extensive community education, developing materials to educate people with records about their rights. Finally, we engage in impact litigation and advocacy to reduce the barriers created by criminal records.

Throughout this work we continually see clients who have lost housing, employment or other opportunities as the result of background checks. Many of our clients undergo criminal background reports prepared by commercial vendors, but they are unaware of the consumer protections available under FCRA for these reports.

Further, in our experience, users of these reports – such as employers and landlords – routinely violate FCRA. Employers, almost without exception, make adverse employment determinations based on criminal record reports without providing a copy of the report, Summary of Rights, or Adverse Action Notice. With respect to landlords, we recently discovered that one of the major development companies in this area was running background checks on all current tenants without the tenants’ consent, and was

then evicting anyone whose report showed a felony. Tenants were given no information by the landlord about the background checks that were done.

In addition, the private screening industry routinely fails to comply with its FCRA obligations, producing reports that are riddled with errors, and that are very difficult to get corrected. Errors that we have seen include:

- Information is inaccurate.
- The same cases are reported multiple times.
- The information is presented in an unfair manner that makes the record look worse than it actually is.
- Misdemeanors are incorrectly reported as felonies.

For example, in one case our client had obtained a job with a university. The commercially prepared background report incorrectly showed a conviction for furnishing alcohol to a minor. That conviction belonged to a completely different person, with a somewhat similar name. Only after lengthy negotiations were we able to correct the report, and get the client hired into the job.

In another case, our client had been convicted of a misdemeanor, but was fired from her job as a bus driver after a private screening report incorrectly listed her as having a felony. Again, it took months of negotiation to get her reinstated and her record corrected.

In yet another case, our client, who has a record for drunken driving offenses, has those convictions incorrectly appearing on her background report as drug offenses. To make matters worse, the report also lists the convictions multiple times, and inaccurately reports a probation violation. The client lost a job opportunity at Lowes due to that report. Although we sent a demand letter to the background screening agency in early May 2010, the report has yet to be corrected.

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

We strongly commend the Commission on its simplification of the model “Summary of Rights” for consumers, which is mandated by federal law to 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.

A Customized Model Notice for Criminal Background Reports is Justified

Application of FCRA to reports generated by the private 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 disparately likely to have a criminal record.
- Meanwhile, the background check industry has vastly expanded, 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 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 them 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.

Recommendations

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

- Arrests not leading to convictions that are more than 7 years old should not be reported, unless the salary at issue is \$75,000 or more.
- The job applicant should get a copy of the report at least 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 understand that the National Employment Law Project and Community Legal Services have prepared a suggested version of such a model summary of rights.

Alternatively, if the Commission is not willing to prepare a separate summary of rights for criminal background reports, it should at least make changes to the existing model that will better inform the public about their rights.

- 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 business days before an employment decision is made on it.

- The “Fix Mistakes” section should say that arrest records generally can be reported for only 7 years.

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

For the same reasons that we support the creation of a customized summary of rights notice for criminal background reports, we believe that such a specific notice would also help employers purchasing criminal background 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 would have to also understand that other rules contained in sections more focused on credit reports also apply to it. Integrating all relevant rules into one document would more effectively communicate employer obligations. Moreover, if there were a customized employment user notice, the employer portion of the proposed user notice could be eliminated, reducing its length and complexity.

In the event that the Commission will not prepare a user notice geared to employment reports, it should make the following changes to the proposed user notice:

- At the beginning of the notice, “consumer reports” should be defined to include criminal background reports.
- The “For Employers” section should indicate that the other sections of the notice also apply to employers.
- The section indicating that a copy of a report must be provided before an adverse notice must provide a time period in which the job applicant can act on it.
- The notice should state that employers generally cannot consider arrests that did not lead to convictions after 7 years.

As the private screening firm industry expands the scope of criminal background checks for employment, further revisions of the FCRA notices as outlined above will significantly minimize the routine violations of FCRA. These improvements to the Commission’s proposed notices will go a long way to ensure stronger compliance with FCRA and protect workers and communities that are struggling in this economy to find work and support their families.

Sincerely,

Michael Chielens
Executive Director
Legal Aid of Western Michigan