

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

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

To Whom It May Concern:

These remarks are submitted jointly by the National Employment Law Project (“NELP”) and Community Legal Services, Inc. (“CLS”) in response to the request for public comments on the proposed Fair Credit Reporting Act (“FCRA”) notices published by the Federal Trade Commission (“Commission”).

While the proposed notices are clear improvements over the current versions, our overarching concern is that the proposed notices do not specifically or adequately address the FCRA issues implicated by commercially prepared criminal background reports. We recommend that the Commission create a separate model Summary of Rights and user notice geared toward criminal background reports prepared for employment purposes and further address criminal record issues in its generic notice.

Background on NELP and CLS

For years, NELP and CLS have been recognized as leaders and experts nationally for workers who are the subjects of criminal background reports. Our advocacy has included active engagement with federal agencies and participation in and coordination of litigation with a national impact. We have also provided support to advocates working on a state and local level around the country through training, consultation, and providing model documents and other information. We are very familiar with both the provisions of FCRA that apply to criminal background reports prepared by consumer reporting agencies (“CRAs”) for employment purposes and with the FCRA violations that are rampant in the industry.

NELP was founded 40 years ago to promote the employment rights of the working poor and unemployed. Responding to the post 9/11 expansion of criminal background checks

for employment, NELP launched a major initiative to protect the rights of millions of workers subjected to the new employment screening mandates. In 2004, NELP initiated the Second Chance Labor Project, incorporating this work into its four major priority areas that seek to expand employment protections and promote economic opportunity.

Specifically, the Project enforces the civil rights and consumer protections of federal laws that apply to criminal background checks for employment, and promotes model reforms of federal, state and local laws to ensure more fair and accurate criminal background checks.

Since 1966, CLS has been the provider of free legal services on civil matters to the low income residents of Philadelphia. In addition to individual representation, CLS engages in impact advocacy with state and national repercussions. The highest client demand for employment law services from CLS is for issues relating to criminal records. In 2009, we assisted 691 persons with criminal record issues (representing almost half of the requests for employment law representation). In this practice, CLS frequently see FCRA violations involving commercially prepared criminal background reports, even for clients who in fact have no criminal records.

In CLS's experience, both CRAs and employers regularly violate FCRA's rules regarding criminal background reports. The following violations have appeared in CLS's cases repeatedly.

- Information is inaccurate, such as improper grades of offenses or incorrect case outcomes.
- Dispositions of cases are not reported.
- There is a mismatch between a client and someone of the same or similar name, leading to criminal cases wrongly being attributed to the client (also called a "false positive").
- When a CRA is not certain about a match, it "over-reports" cases with a disclaimer that the cases may not be about the subject of the report.
- The same cases are reported multiple times.
- The information is presented in a prejudicial manner that makes the person's record look worse than it is.
- Expunged cases are reported.
- Arrests more than 7 years old are reported.
- Criminal identity theft is not corrected.
- A pre-decision copy of the report is not provided to the employee.

Usually, these reports are brought to CLS by its clients because they have lost job opportunities as a result of the FCRA violations. CLS's experience in getting corrections by CRAs and reconsideration by employers has been mixed. Clients who have tried to fix errors on their own have had even less success.

In CLS's experience, its clients seldom have understood the Summary of Notice or their rights under FCRA. The generalized FCRA notice does not adequately and effectively inform them of how FCRA applies to their criminal background reports.

The Commission Should More Specifically Address the Application of FCRA to Criminal Background Reports in its Summary of Rights

The Commission's simplification and clarification of the proposed model Summary of Rights for consumers is a welcome development. Without question, the model notice will communicate FCRA information more effectively.

But we urge the Commission to further improve the proposed notice by specifically addressing FCRA rules applicable to criminal background reports. We recommend both that the Commission prepare a Summary of Rights specifically tailored to criminal background reports and that it provide further information on the rights and obligations related to criminal background checks in its generic notice.

A separate model notice for criminal background checks is needed because of the exponential increase in the frequency of these reports

Criminal records have become ubiquitous in this country. Nearly one in three adults in this country (31.7 percent) has a criminal record that will come up in a background check.¹ The impact is even more pronounced on communities of color. For example, African Americans account for 28.3 percent of all arrests in the United States, although they represent just 13 percent of the population.²

Meanwhile, employers' use of background checks has skyrocketed. According to a survey published this year by the Society of Human Resources Management, 92 percent of their members perform criminal background checks on some or all job candidates, while 73 percent perform checks on *all* job candidates.³ That represents a major increase, up from 51 percent just 4 years ago.⁴ More than 60 percent of employers responding to a major survey were unwilling to hire individuals discovered to have criminal records.⁵

Fueled by this employer demand, the commercial criminal background screening industry has burgeoned. A 2005 report by the National Task Force on the Commercial Sale of

¹ Estimate provided by National Employment Law Project, "Testimony of Maurice Emsellem, Hearing on Collateral Consequences of Criminal Convictions: Barriers to Reentry for Formerly Incarcerated," NELP (June 9, 2010) at p.2, fn.3, available at www.nelp.org.

² U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States, 2008*, at Table 43.

³ Society for Human Resources Management, "Background Checking: Conducting Criminal Background Checks" (January 22, 2010), at p. 3.

⁴ The survey from 1996 did not appear to distinguish between whether members performed background checks on some or all of the job candidates. Evren Esen, "SHRM Workplace Violence Survey," Society for Human Resources Management (January 2004) at p. 19.

⁵ Holzer, Raphael, Stoll, "Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and Their Determinants" (October 2001).

Criminal Justice Record Information was the first comprehensive examination of the role of commercial vendors.⁶ Although the task force was unable to quantify the number of commercial background screeners or the checks they produced, it estimated that there are hundreds, maybe even thousands, of regional and local companies, in addition to several large industry players.⁷ ChoicePoint, one of the world's largest screening firms, which accounts for 20 percent of the industry, conducts over 10 million background checks annually.⁸ Another major firm, USIS Transportation Services, reported in 2008 processing 14 million requests per year on behalf of 30,000 client employers.⁹

As a result of the industry's growth, it has coalesced around a trade association, the National Association of Professional Background Screeners (NAPBS). NAPBS was founded in 2003 to promote and protect the screening industry. NAPBS boasts of having hundreds of members. Among its committees is a "government relations" group, and it retains Greenberg Traurig, LLP as its lobbyist.¹⁰ By contrast, the millions of people who are the subjects of these background checks have no organized voice, beyond a score of organizations like ours.

The routine failures of many employers and commercial screening firms to comply with the basic mandates of FCRA have been documented. For example, one study found that many on-line record providers were not seriously responding to the basic requirements of FCRA, including failing to ensure that the data is used for permissible purposes, likely failing to provide the summary of consumer rights, and furnishing all arrest information without observing the seven-year FCRA limit on arrests.¹¹

Moreover, the recent filing of numerous national FCRA class actions against both criminal background screeners and employers underscores the breadth of noncompliance with the law. Pending actions raise claims under §1681k (lack of contemporary notice, or strict procedures to assure information is complete and up to date) and §1681i (refusal to conduct timely investigations for consumers who did not meet requirements imposed by CRA);¹² §1681e(b) (failure to use reasonable procedures to assure maximum possible

⁶ SEARCH, the National Consortium for Justice Information and Statistics, Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information (2005), at vi.

⁷ Id. at 7. Another study identified more than 400 commercial background screeners as a result of a search of the Internet. See, e.g., the research cited in Shawn Bushway, Shauna Briggs, Faye Taxman, Meredith Thanner, and Mischelle Van Brakle, "Private Providers of Criminal History Records: Do You Get What You Pay For?" in Shawn D. Bushway, Michael Stoll and David Weiman (eds.), *Barriers to Reentry? The Labor Market for Released Prisoners in Post-Industrial America* (Russell Sage Foundation 2007) [hereinafter "Private Providers of Criminal History Records"], at 176.

⁸ "The Trouble With Background Checks," *Business Week* (May 29, 2008).

⁹ Id.

¹⁰ The source of the information provided in this paragraph is NAPBS's website, www.napbs.com.

¹¹ Shawn Bushway, et al., "Private Providers of Criminal History Records", supra note 7.

¹² Ryals v. HireRight Solutions, et al. No. 3:09-cv-00625-RLW (E.D. Va.).

accuracy for multiple reporting of cases¹³ and for reporting expunged cases¹⁴); and §1681b(b)(3) (no pre-adverse action disclosure containing copy of report, no written description of FCRA rights, and no pre-adverse opportunity to dispute accuracy of report).¹⁵

For these reasons, now more than ever, the public must be adequately informed about their basic FCRA protections in the context of criminal background reports. We submit that the Commission should present consumers with as much information specific to criminal records as possible, including a customized Summary of Rights.

Recommendations

1. ***The Commission should prepare a customized Summary of Rights for criminal background reports.*** The notice in the Federal Register, the Commission observed that the proposed Summary of Rights uses the term “credit report,” even though consumers may receive a FCRA-covered consumer report in other contexts. It asked, “Would it be more effective and is it feasible to create a separate model Summary of Rights to send to consumers who request reports that contain non-credit information?” 75 Fed. Reg. 52657. In the context of criminal background reports, we answer that question resoundingly in the affirmative.

Lawyers are able to apply abstract principles to specific factual situations. But in our experience, that is not true for many lay people, especially those with limited educations. We believe that many persons who are subject to criminal background reports will not be able to understand their rights without a model notice laying out their rights in context.

We recommend that the Commission prepare a separate summary of rights for criminal background reports in the employment context. We suggest that it address 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 employer must provide a clear written notice to the job applicant that it may obtain a criminal background report, and must obtain written authorization from the job applicant to get the report.
- The job applicant must get a copy of the report at least 5 business days before an employer makes a decision on it.

¹³ Smith v. HireRight Solutions, et al., 4:10-cv-444 (N.D. Okla.).

¹⁴ Henderson v. HireRight Solutions, et al., 10-cv-443 (N.D. Okla.).

¹⁵ Williams v. Prologistix, No. 1:10-cv-00956 (N.D. Ill.); Hunter v. First Transit, No. 1:09-cv-06178 (N.D. Ill.); Joshaway v. First Student, No. 2:09-cv-02244 (C.D. Ill.).

- The employer must inform the job applicant if s/he is being denied a job based on the report.
- Information about how to fix a criminal background report must be provided, including the name, address and telephone number of the criminal background check preparer.
- The subject has the right to free copies of reports and file disclosures from companies providing criminal record providers under certain circumstances.
- The employer does not have the right to use the criminal background report for purposes other than the employment purpose for which the report was acquired.

We are providing a suggested model of a criminal record Summary of Notice with these comments.

2. *At a minimum, the Commission should make changes to the proposed model Summary of Rights that will better inform subjects of criminal background reports about their rights.*

The Commission should make the following changes to its model notice whether or not it agrees to a customized Summary of Notice.

- 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 before an employment decision is made based upon it.
- The “Fix Mistakes” section should say that arrest records generally can be reported for only 7 years.

The rights mentioned in the latter two bullets are critical rights for people who are subjects of criminal background reports. The right to a pre-decision copy of a report is particularly important, because it allows a job seeker to correct errors and/or to advocate with the employer about why s/he should be given a chance despite having a record. Yet these rights are not mentioned in the generic notice.

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 use 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 for a time period of 5 business days 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.

The Commission is to be commended for this important initiative to improve its FCRA notices in order to better inform the public of the law. However, it will far better serve the millions of Americans who are subject to criminal background checks if it provides more information about those reports, particularly in separate notices.

Thank you for your attention to these comments.

Very truly yours,

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Your Rights Under the Fair Credit Reporting Act When You Are Seeking a Job or Promotion

Many employers buy commercially prepared consumer reports about their employees and job applicants. Usually, these reports include a criminal background check. They can also include other information, such as your credit history, your employment history, your addresses, and your inclusion in a theft database by an employer or a retailer. If an employer buys a consumer report about you, you have certain rights under the Fair Credit Reporting Act.

- **GET** notice
- **GIVE** permission
- **GET** a copy
- **FIX** mistakes and eliminate old information

GET Notice & GIVE Permission

BEFORE the employer gets a consumer report with your information, the employer must:

- Give you written notice that the employer is going to get a report
- Get your written permission to get the report

AFTER an employer takes an “adverse action” such as a decision not to hire or promote you or to fire you, it must notify you that the decision was based on the consumer report.

GET a Copy

BEFORE taking “adverse action” against you based on a consumer report, the employer must give you a copy of the report **at least 5 business days** before taking that action.

EVERY 12 MONTHS you can get a free copy of a file on you maintained by a consumer reporting company that prepares reports for employers. You can get an additional free report if: (1) you are the victim of fraud; (2) you are on public assistance; or (3) you are unemployed but expect to apply for employment within 60 days. You can check the websites of consumer reporting companies to learn how to request a copy of your file.

FIX Mistakes and Eliminate Old Information

- If incorrect information is included on your consumer report, you have the right to contact the consumer reporting company that provided the report and ask for an investigation.
- Write a letter to the consumer reporting company, tell them about the mistake, and ask them to correct it.
- Arrests that do not lead to conviction can be reported for only 7 years, unless the job at issue pays \$75,000 or more. Bankruptcies can be reported for 10 years. Criminal convictions can be reported indefinitely. Other negative information in consumer reports bought by employers can be reported only for 7 years.

ADDITIONAL RIGHTS

- You may have a right to sue in federal or state court for violations of this law. Contact the Federal Trade Commission for more information, or visit www.ftc.gov.
- State law may give you other rights or more protections, including limiting what may be reported on your consumer report. Contact your state or local consumer protection agency or your state Attorney General for more information (www.naag.org).