



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/fcrarevisednotices/>)

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 the East Bay Community Law Center, 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

The Law Center is the East Bay's largest provider of free legal services and a nationally recognized legal teaching clinic of Berkeley's Boalt Hall School of Law. Each year the Law Center serves more than 5,000 community members. The Law Center's Clean Slate Practice has become the primary provider of legal services and community education on criminal records remedies in Alameda County. In this capacity, the Clean Slate Practice has directly served thousands of people with prior arrests, prosecutions, and convictions who were pursuing criminal records remedies in order to clean up their record. Our office has helped thousands of individuals obtain expungements, felony reductions, and other remedies so that they may finally put their pasts behind them and increase their chances of finding employment.

The majority of our clients receive criminal background reports prepared by commercial vendors, but they are unaware of the consumer protections available under FCRA for these reports. To remedy this, the Clean Slate Practice educates clients about their rights under both FCRA and its California counterpart, ICRAA. Our office has become the regional expert in consumer protections for people with criminal records.

Drawing on these experiences, the Law Center supports the creation of separate consumer and user notices for employment reports. Separate notices will inform the thousands of clients we serve, as well as the millions whom we cannot reach, of their rights under FCRA.

Further, as demonstrated by our clients' experiences, potential employers and the private screening industry routinely fail to comply with their FCRA obligations. Often, our clients are never provided—and indeed are sometimes refused—copies of their reports, even when the employer explicitly states that the report was a factor in denying them employment. Errors that we have seen in criminal background reports include the following:

- Information is inaccurate.
- Expunged cases are reported.
- The same cases are reported multiple times.
- The information is presented in a misleading manner that makes the record look worse than it actually is.
- Identity theft is not corrected.
- The record of another person with the same name is incorrectly included in our client's criminal background check.
- Arrests more than 7 years old are reported.

Clean Slate clients are routinely denied employment based on errors contained in their criminal background reports. Often, after receiving an erroneous report, clients will contact the consumer reporting agency (CRA) to have the errors corrected. Even in cases where the CRA is willing to correct the errors in the original report and furnish the employer with a new, accurate copy, our clients find that, more often than not, it is already too late: the damage has been done, and the position has been filled.

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 CRA'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 that are used in employment and housing determinations.

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 impacted because they are more 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, we have found that 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 special FCRA rules applicable to criminal cases and reports purchased for employment purposes.

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 based on it.
- The job applicant has the right to free copies of criminal background reports and to 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. Clients of the Clean Slate Practice and others who do not have the advantage of our services will benefit greatly if the proposed FCRA notice for employment purposes is adopted.

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 based 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 when criminal background reports are furnished. Integrating all relevant rules into one document would more effectively communicate employer obligations. Moreover, with the addition of 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 informing employers that they must provide a copy of the report to applicants/employees before taking an adverse action must indicate that the applicants/employees have five business days to respond before the adverse action is taken.
- The notice should state that employers generally cannot consider arrests that did not lead to convictions after 7 years.
- Employers should be informed that state law may require them to follow additional consumer protection laws.

As the private screening firm industry continues to expand 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 we see on a regular basis. 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.

If I can be of any further assistance in this matter, please do not hesitate to contact me at (510) 548-4040.

Very truly yours,

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Jessie Warner
Policy Director, Clean Slate Practice
East Bay Community Law Center