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September 21, 2010

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex M)
600 Pennsylvania Avenue, NW
Washington, D.C. 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:

On behalf of the Public Defender Service Community Reentry Program, 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). Many of our clients are not aware of their right to challenge criminal background reports. The FACTA Notices should alert consumers of their rights to obtain and challenge a criminal background report prior to the adverse action by employers. We are requesting that FACTA Notices be modified to protect consumer rights with respect to criminal background checks, and we ask that the Commission adopt the proposed summary of rights prepared by the National Employment Law Project and Community Legal Services.

Background on Our Organization and Our Clients' Criminal Background Checks

The Public Defender Service (PDS) is principally dedicated to representing indigent persons in D.C. facing a loss of liberty as a result of involuntary commitment, criminal charges and delinquency charges. We also work with people who have criminal records, providing reentry legal services for persons transitioning back into the community after incarceration. Many of our clients are seeking assistance with employment background checks. Through our work we have learned that employer and consumer reporting agency violations of FCRA are common. The majority of our clients receive criminal background reports prepared by commercial vendors, but they are unaware of the consumer protections available under FCRA.

Many of our clients find inaccurate information contained in their criminal background reports. Errors that we have seen in criminal background reports include the following:

- Information is inaccurate.
- The record of another person with the same name is incorrectly included in our client's criminal background check.
- 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.
- Expunged cases are reported.
- Arrests more than 7 years old are reported.
- Identity theft is not corrected.

Improved notices that clearly outline consumer rights relating to criminal background checks will empower our clients to challenge inaccurate records and enable them to compete in a highly competitive job market.¹

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.

¹ Unfortunately, many qualified applicants are denied jobs based on inaccurate criminal background checks. Employers make hiring decisions based on inaccurate criminal background information without advising the prospective or current employee of their rights under FCRA. Even in instances where the employee is advised about FCRA rights, it is typically not done prior to the adverse action. As a result, qualified workers are not provided the opportunity to correct the inaccuracies and be fully considered for employment.

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,

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