

March 2, 2012

Mr. Tom Oscherwitz
Office of Credit Information, Collections, and Deposits Markets
Consumer Financial Protection Bureau
Via email to Thomas.Oscherwitz@cfpb.gov

Dear Tom,

Thank you again for taking the time to meet with our organizations. We're writing to provide additional information on the proposed Summary of Rights and regulatory changes that Consumer Financial Protection Bureau ("CFPB") can make to strengthen the protections found in the Fair Credit Reporting Act ("FCRA").

Background

As discussed in our meeting, both commercial reporting agencies ("CRAs") and employers regularly violate the FCRA's rules regarding criminal background reports. A copy of "Stories of Persons Hurt by Background Reports Produced by Commercial Vendors," prepared by Community Legal Services, Inc. ("CLS") was provided in our meeting and provides examples of some of the common problems found on criminal background checks, including inaccuracies, incorrect information, and misleading and prejudicial formats. For many job seekers the incorrect, misleading, or inaccurate information contained on their criminal history report creates a barrier to employment. In addition, many employers fail to give sufficient time between providing a job seeker with a pre-adverse action notice and taking the adverse action, thereby denying the applicant the ability to provide accurate information or dispute their criminal history report. The following are some concrete steps the CFPB can take to remedy these and other common problems. While this is not an exhaustive list of recommendations, we believe that these changes may be more pressing or readily made by CFPB.

- 1. Finalize the Proposed Updated Summary of Rights Notice and Create a Separate Model Summary of Rights and User Notices Geared Toward Criminal Background Reports Prepared for Employment Purposes**

Importantly, while problems on criminal background checks are far too frequent, job seekers are often unaware of their rights under the FCRA. As discussed in the meeting and explained in more detail in the joint National Employment Law Project ("NELP") and CLS comments on FACTA notices dated September 20, 2010, the CFPB should move forward with updating the FCRA Summary of Rights Notice.

In August 2010, a proposed updated notice was published by the Federal Trade Commission (“FTC”). Because of the creation of the CFPB and the overlapping jurisdiction between FTC and CFPB with respect to the FCRA, the proposed changes have not been finalized. It is within the power of the CFPB to now move forward on finalizing the proposed changes and, more importantly, creating a separate model Summary of Rights and user notice geared toward criminal background reports prepared for employment purposes.

The current Summary of Rights that is to be provided to job seekers when an employer takes an adverse action based on information contained in the criminal background report does not adequately or effectively inform applicants that the FCRA applies to criminal background checks. The proposed updated Summary of Rights goes a long way in creating a more readable notice for consumers, but fails to provide information specific to criminal background reports – a big problem given the huge increase in such reports and their demonstrated and acknowledged deficiencies. Providing user-friendly materials with information specific to criminal background reports will go a long way in assisting job seekers in understanding and enforcing their rights under the FCRA.

2. Define Reasonable Procedures to Ensure Maximum Possible Accuracy

As detailed in “Stories of Persons Hurt by Background Reports,” CRAs frequently include inaccurate, misleading, and incorrect information on criminal history reports prepared for employment purposes. Because of these rampant inaccuracies, job seekers are prevented from finding work. CFPB should promulgate rules to define “reasonable procedures to ensure maximum possible accuracy” under 15 USC § 1681e(b) of the FCRA to include:

- 1) Requiring verification of arrests that lack disposition data for arrests more than one year old;
- 2) Requiring consumer reporting agencies to use all available data to determine match;
- 3) Prohibiting name only based matches;
- 4) Prohibiting multiple reports of same information regardless of source; and
- 5) Clarifying that non-conviction arrests are obsolete after 7 years, even if the defendant was convicted on concurrent charges.

a. Require Verification of Records that Lack Disposition Data for Records More than One Year Old

In the past CRAs would send “runners” to the courts to manually review criminal history information. Today it is much more common for CRAs to purchase data from public sources. Unfortunately, CRAs frequently fail to update their data sources or verify how current the data is before they submit it to employers as a criminal background report. As a result, employers are often provided with information about arrests but not the subsequent disposition of the charge. For arrests that are over one year old, it is unlikely that the case is still pending. Far more frequently the arrest has not lead to a conviction and, because of the incomplete record, the onus is placed unfairly on the job seeker to prove that he or she was not convicted.

CFPB should enact a rule requiring CRAs to verify the disposition information of any arrest over one year old. This will prevent non-conviction arrests from being reported in a way that makes them appear to be “open” or pending, thus reducing an unfair barrier to employment for job seekers.

b. Require Consumer Reporting Agencies to Use All Available Data to Determine Match and Prohibit Name Only Based Matches

In a country of over 300 million, it is unlikely that using a person’s name as the sole identifier will create a completely personalized record. A far more likely result is that many “Michael Smiths” will be lumped together. Workers and job applicants are harmed when CRAs provide information on criminal histories that do not belong to the individual consumer. Requiring CRAs to use multiple data points to make a match – specifically, all data available to the CRA and the employer – will ensure more accurate records are provided. This reduces the risk of job seekers being unfairly denied employment through no fault of their own, and is in line with the FCRA’s requirement that CRAs use “reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.” (15 USC § 1681e(b)).

c. Prohibit Multiple Reports of the Same Information Regardless of Source

From the time an individual is arrested through the final disposition of the charge, many separate agencies are involved and multiple records of the same event are created. For example, the police department will record the initial arrest, while the court may record multiple entries for entry of the initial charge, hearings, reductions and changes in the charges, dispositions, appeal, and final disposition. Further, if there are any later changes to the conviction, including reduction or dismissal of charges, those may be entered into the record as separate entries. The state’s central repository, often the state police, may also provide an independent source of information about the case.

Rather than consolidating this information to provide a single entry that provides the information relevant to the employer, CRAs will frequently include multiple entries detailing the same case. As a result, a criminal background report relating to an individual with merely a single misdemeanor conviction may be pages and pages long, as exemplified by Bahir Smith’s situation in “Stories of Persons Hurt by Background Reports.”

Mr. Smith’s single incident was reported four times. First it was presented as a match made by social security number and birthdate. Second the information was presented as a match made by last name, first name, and birthdate. Third it was presented as information obtained from the Administrative Office of the Pennsylvania Courts. Finally the same incident was again presented as information obtained from the lower court. Importantly, these four entries – comprising ten pages – provided the exact same information to the employer; Mr. Smith pled guilty to two summary offenses and two other charges were dropped.

By reporting the same minor offense multiple times and including extraneous information, the CRA's report requires close study to determine that all of the entries refer to the same incident and suggests a much more serious criminal history. This unfair and misleading presentation of information severely hinders job seekers in today's competitive job market. CRAs should be prohibited from presenting information in a misleading format and required to provide only one entry per conviction.

d. Clarify That Non-Conviction Arrests are Obsolete After 7 Years, Even if the Defendant was Convicted on Concurrent Charges

The FCRA prohibits CRAs from including "records of arrest that, from the date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period." (15 USC § 1681c(a)(2)). Despite this clear mandate, criminal background checks often provide information on non-conviction arrests that are over seven years old. Often information on these arrests is provided when the consumer received a conviction for a different charge arising from the same situation.

CFPB should clarify that charges over seven years old that have been dropped, dismissed, nolle prossed, or result in any non-conviction may not be reported by CRAs, regardless of whether other charges resulting from the same incident did indeed lead to conviction.

3. Produce guidelines on matching criteria, especially for consumers with common names.

As explained above, CRAs should be prohibited from relying on name-only matches and be required to use all available data to determine a match before providing a criminal background report. To assist CRAs, CFPB should produce guidelines on matching criteria.

4. Require thirty (30) days between pre-adverse action notice and adverse action (15 USC § 1681b(b)(3)).

The FCRA requires employers using commercially prepared background checks to provide a pre-adverse action notice and copy of the report if they are going to take an adverse action based on information included on the report. (15 USC § 1681b(b)(3)(A)). The FCRA does not, however, provide guidance on the length of time an employer must wait between providing the pre-adverse action notice and taking the adverse action. An FTC staff opinion letter dated June 27, 1997, notes that a five business day waiting period suggested by Szold & Brandwen "appears reasonable." (Weisberg (06-27-97)). As an informal opinion letter provided by staff, that suggestion is not binding on the FTC.

A July 2011 FTC staff report with summary interpretations of the FCRA notes that there is no period of time an employer must wait between providing a pre-adverse action notice and taking an adverse action, but again notes that "[s]ome reasonable period of time must elapse, [and] the minimum length will vary depending on the particular circumstances involved." (40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations, 52).

The purpose of a pre-adverse action notice is to provide the job seeker with an opportunity to dispute inaccuracies on his or her consumer report. Few employers provide sufficient time for an applicant to obtain the documentation necessary to refute an inaccurate or incomplete criminal background check. Five business days simply is not enough time.

It is within the power of the CFPB to define the length of time an employer must wait between issuing a pre-adverse action notice and taking an adverse action. In order to make the pre-adverse action notice meaningful, applicants must have an actual opportunity to refute inaccurate and incorrect data. We urge the CFPB to require thirty (30) days between the issuing of the pre-adverse action notice and the taking of the adverse action.

5. Support private enforcement efforts in FCRA litigation against commercial background screening companies by articulating that the FCRA provides for injunctive relief.

An impediment to meaningful FCRA enforcement is the holding of several courts of appeals interpreting the Act as precluding private actions for injunctive relief. Where litigation against commercial background screeners reveals systemic procedural deficiencies, the only type of action that could feasibly address the problem is a request for class-wide injunctive relief. CFPB should support such efforts – as a necessary law-enforcement supplement to its limited resources – by issuing a nonbinding guidance or policy statement endorsing the availability of private injunctive relief and by filing amicus briefs in cases where commercial background screeners take the position that such relief is not available under FCRA.

6. Require registration of consumer reporting agencies.

Currently there are no licensing requirements to become a CRA and there is no system for registration and the total number of commercial reporting agencies currently operating is unknown. One trade organization boasts over 300 members through the actual number of CRAs is likely to be far higher. As part of the larger goal of increasing compliance with the FCRA, the CFPB should require registration of consumer reporting agencies.

Conclusion

In our current economic climate, job seekers should not be confronted with unjust barriers to employment. The above recommendations are concrete steps the CFPB can and should take to ensure increased compliance with the FCRA. These regulations will ensure that accurate employers received accurate information and that job applicants are given the information and opportunity they need to secure their rights, reducing unnecessary barriers to employment and getting job seekers back to work.

Sincerely,

Madeline Neighly
National Employment Law Project

Sharon Dietrich
Community Legal Services, Inc.

Chi Chi Wu
National Consumer Law Center

Persis Yu
National Consumer Law Center