



Written Comments Submitted for the Record
from the
Consumer Data Industry Association
to the
House Subcommittee on Workforce Protections
in connection with the Committee's Hearing on March 24, 2015 on
H.R. 548, "Certainty in Enforcement Act of 2015"; H.R. 549, "Litigation Oversight Act of
2015"; H.R. 550, "EEOC Transparency and Accountability Act"; and H.R. 1189,
"Preserving Employee Wellness Programs Act"

On March 24, 2015, the House Subcommittee on Workforce Protections held a hearing that again calls attention to the confusion the Equal Employment Opportunity Commission (EEOC) has created with the Commission's criminal history guidance. One of the bills discussed at the hearing, the Certainty in Enforcement Act of 2015, H.R. 548, would go a long way to clearing up employer confusion and making safer and more stable workplaces.

A number of statements were made during the March 24 hearing that require clarification and elaboration. That is the focus of this submission.

Founded in 1906, the Consumer Data Industry Association ("CDIA") is the international trade association representing the companies that conduct credit and criminal background checks on behalf of their employer and residential owner/manager clients. CDIA represents more than 100 consumer data companies. Our members are the nation's leading institutions in credit reporting, mortgage reporting, check verification, fraud prevention, risk management, employment screening, tenant screening, and collection services.

CDIA shares a core value with most Americans: employers should be able to hire the best people for the jobs available, and job applicants should not fear unlawful discrimination. In 2014, GFK Roper surveyed the nation and found that 91% of Americans supported employers using conviction records at least some of the time. This same survey found that 79% of Americans would feel safer as employee working for an employer that conducts a criminal history background check on its employees.

In a climate of economic uncertainty, it is critical that employers be vigilant about protecting their businesses and their customers while preventing unlawful hiring practices. Fair and appropriate uses of credit criminal histories offer one important tool among many for employers to protect themselves, their other employees, and their customers.

CDIA offers the following points: (1) The use of credit and criminal records is comprehensively addressed by the Federal Fair Credit Reporting Act (“FCRA”); (2) Employers use criminal histories fairly and responsibly; (3) Criminal histories are reliable and tested in the marketplace every day; (4) There is no certain point of redemption when an ex-offender is no longer likely to reoffend; (5) There were outlandish statements made that if H.R. 548 passed, 70 million people with criminal histories would never work again; and (6) A number of misstatements were made about the role credit checks play in employment screening.

1. The use of credit and criminal records is comprehensively addressed by the Federal Fair Credit Reporting Act (“FCRA”).

Since 1971, the FCRA has served employers and applicants alike to allow lawful use of criminal history information, provisions to ensure maximum possible accuracy and consumer protections, and substantial systems to correct any inaccuracies that may exist. The FCRA is “an intricate statute that strikes a fine-tuned balance between privacy and the use of consumer information.”¹ Many states have their own state FCRA laws.²

A. General protections

The FCRA governs consumer reports, regulates consumer reporting agencies, and protects consumers. Consumer reporting agencies are required to maintain reasonable procedures to assure maximum possible accuracy.³ There are many other consumer protections as well. For example:

- Those that furnish data to consumer reporting agencies cannot furnish data that they know or have reasonable cause to believe is inaccurate, and they have a duty to correct and update information.⁴

¹ Remarks of FTC Chairman Tim Muris, October 4, 2001 before the Privacy 2001 conference in Cleveland, Ohio.

² *Eg.*, Cal. Civ. Code § 1785 *et seq.*; N.Y. Gen. Bus. L. § 380 *et seq.*

³ *Id.*, § 1681e(b).

⁴ *Id.*, § 1681s-2(a)(1)-(2).

- Consumers have a right to dispute information on their consumer reports with consumer reporting agencies or lenders and the law requires dispute resolution within 30 days (45 days in certain circumstances). If a dispute cannot be verified, the information subject to the dispute must be removed.⁵
- A consumer reporting agency that violates federal law is subject to private rights of action, enforcement by the Federal Trade Commission (“FTC”), and state attorneys general.⁶

B. Protections specific to employment screening

In addition to the general protections above, there are protections specific to the use of consumer reports for employment purposes.

For example, under § 1681k of the FCRA, a consumer reporting agency which “furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer’s ability to obtain employment,” such as criminal record information, must either

- notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the employer to whom such information is being reported; or
- “maintain strict procedures designed to insure” that the information being reported is complete and up to date, and such information “shall be considered up to date if the current public record status of the item at the time of the report is reported.”

As a result of these requirements, consumer reporting agencies that are including criminal record information in an employment report must either notify the consumer of that fact or access directly the most up-to-date information.

In addition, although the FCRA allows employers to review the criminal histories of prospective and existing employees,⁷ this legal privilege comes with certain obligations. Under § 1681b(b) of the FCRA:

⁵ *Id.*, § 1681i(a)(1), (5).

⁶ *Id.*, § 1681n, 1681o, 1681s.

⁷ *Id.*, § 1681b(a)(3)(B).

- An employer must certify to the consumer reporting agency that the employer has and will comply with the employment screening provisions of the FCRA, and that the information from the consumer report will not be used in violation of any applicable federal or state EEO laws or regulations.
- Prior to requesting a consumer report, an employer must provide to the prospective employee a written disclosure that a consumer report may be obtained for employment purposes and the consumer must authorize the employer's use of a consumer report. The disclosure document provided to the consumer must contain only the disclosure.
- Prior to taking an adverse action, the employer must provide to the consumer a copy of the consumer report and the summary of rights mandated by the FTC. The employer must provide a second adverse action notice if an adverse action is actually taken.

Criminal background checks under the FCRA are dependable and trusted.

2. Employers use criminal histories fairly and responsibly

In July 2012, the Society for Human Resource Management (“SHRM”) released a study on employer use of criminal histories. Of the 69% of employers that do conduct a criminal background check on employees, SHRM reported 69% consider criminal histories because the position requires a fiduciary duty or financial responsibility; 66% consider them for positions where there is access to highly confidential employee salary, benefits, or personal information; 55% will review a criminal history for positions with access to corporate or personal property, including technology; 48% of employers will consider criminal histories for senior executive positions; and 37% for safety-sensitive positions, like transportation and the operation of heavy equipment. The SHRM study shows that employers weigh different offenses differently, consider the severity of the crime, and examine the distance in time between an offense and the job application.⁸ In short, employers use criminal checks in a responsible and focused manner.

⁸ *Background Checking—The Use of Criminal Background Checks in Hiring Decisions*, Society for Human Resource Management, July 19, 2012, <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/CriminalBackgroundCheck.aspx>.

3. Criminal histories are reliable and tested in the marketplace every day

The public and private sectors make regular use of criminal background checks.⁹ These checks are done to help employers reduce crime and violence in the workplace, especially when those workplaces are in homes. There is a clear value to criminal background checks.

4. There is no certain point of redemption when an ex-offender is no longer likely to reoffend.

Tanya Clay House, for the Lawyers' Committee for Civil Rights Under Law, in her response to a question, said that there are studies that suggest that after a certain number of years a person is less likely or no more likely to reoffend than anybody in the general society might. We presume Ms. House was referring to the work of Alfred Blumstein and Kiminori Nakamura.

Even if the Committee considers Profs. Blumstein and Nakamura's latest findings, as was the case with their 2009 study¹⁰, their 2012 report remains incomplete and "some important next steps should still be pursued."¹¹ No matter how much research is undertaken, the search for a single bright redemption line is likely doomed

⁹ In the public sector, for example, the Office of Personnel Management ("OPM") conducts over two million investigations each year. <http://www.opm.gov/investigations/background-investigations/>.

¹⁰ Blumstein, A. & Nakamura, K. (2009). Redemption in the presence of widespread criminal background checks. *Criminology*, 47(2) ("Blumstein & Nakamura, 2009").

¹¹ Alfred Blumstein and Kiminori Nakamura, Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences, Oct. 2012, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf> ("Blumstein & Nakamura, 2012"), 90. For example, the authors acknowledge that:

The estimates of redemption shown in this report are based on the length of time since the *first* arrest or conviction. In this sense, we only address redemption for first-time offenders. Although such *first-time* offenders can be viewed as most deserving of redemption, it is possible to extend the concept of redemption to people with more than one prior criminal event. Employers also routinely receive applications from individuals with multiple arrests or convictions who have stayed clean a reasonable length of time. How do the redemption estimates vary with the number of prior crime events?"

Id., 90-91 (emphasis original).

to fail. Not only do the authors concede “[t]hose with no prior record . . . are inherently less risky than those with a prior record,”¹² but separately, Prof. Blumstein himself has acknowledged the overwhelming difficulties facing those trying to predict and compare future criminal behavior by ex-offenders and non-offenders:

[A]n individual with a prior violent conviction who has been crime-free in the community for twenty years is less likely to commit a future crime than one who has been crime-free in the community for only ten years. But neither of these individuals can be judged to be less or equally likely to commit a future violent act than comparable individuals who have no prior violent history. It is possible that those differences might be small, but making such predictions of comparable low-probability events is extremely difficult, and the criminological discipline provides no good basis for making such predictions with any assurance that they will be correct.¹³

Since even the latest research from Profs. Blumstein and Nakamura has been criticized, a redemption period may not exist and, in any event, it may be impossible to predict.

5. There was an outlandish statements were made that if H.R. 548 passed, 70 million people with criminal histories would never work again.

In her opening statement, Ms. House gave in to bold exaggeration when she said, without equivocation, that “H.R. 548 would automatically exclude all of these Americans -- 70 million Americans -- from the workforce.” That statement may be hyperbole at its best. One would think that before the EEOC passed its criminal guidance no ex-convict ever had a job, when we know that is not so. It is irresponsible to suggest that no one with a criminal record will ever work again.¹⁴

¹² *Id.*, 90.

¹³ *El v. SEPTA*, 479 F.3d 232, 246 (3d Cir. 2007) (citing expert testimony of Dr. Alfred Blumstien. App. 953) (internal citations omitted in original) (emphasis added).

¹⁴ Before the EEOC drafted its guidance, it heard at a public meeting from an exemplary employer who hires ex-offenders. *Hearing before the U.S. Equal Employment Opportunity Commission, Hearing to Examine Arrest and Conviction Records as a Hiring Barrier, written statement of Michael Curtin, CEO, DC Central Kitchen, July 26, 2011*, available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm>, (“we graduated 91 students, seventy-one of those were ex-offenders”).

In 2005, long before the EEOC passed its guidance, the Idaho Department of Commerce & Labor, in Partnership with Idaho State Police and Idaho Department of Corrections, surveyed Idaho employers “to measure how receptive Idaho employers are to hiring ex-offenders”.¹⁵ The results might surprise those who feel ex-offenders will never find a job, ever. The Idaho “[s]urvey results indicate a high disposition on the part of Idaho employers to hire ex-offenders.”¹⁶

The survey focused in on several trades and professions and the willingness of employers in these areas to hire ex-offenders. In the building and construction trades, for example, between 74% and 88% of businesses would hire ex-offenders for jobs like welding, commercial trucking, and electrical wiring. These are “good” paying jobs according to the survey.¹⁷ And for public-facing jobs, 86% of employers in accommodation and food service would hire ex-offenders and 72% of retail employers.¹⁸

The SHRM data and the research from Idaho Commerce & Labor shows how strongly employers value second chances and how there are and will be many opportunities for ex-convicts in the workplace.

¹⁵ *Enhancing Employment Opportunities for Ex-Offenders: A Survey of Idaho Employers by Idaho Commerce & Labor in Partnership with Idaho State Police and Idaho Department of Corrections*, Idaho Commerce & Labor, 2006, 1, available at https://labor.idaho.gov/publications/Employment_Oppor_ExOffenders.pdf.

¹⁶ *Id.*, 7.

¹⁷ *Id.*, 3, 6.

¹⁸ *Id.*, 4.

6. A number of misstatements were made about the role credit checks play in employment screening.

A. Credit scores are not used in employment, but credit histories are reliable predictors of risk.

Representative Adams suggested African-Americans were excluded from the workforce because they have low credit scores. However, it is well-established that credit scores are not used by employers to make hiring decisions.¹⁹

Credit histories are used by employers because they are reliable predictors of risk. So much so that the EEOC has determined that “[o]verdue just debts increase temptation to commit illegal or unethical acts as a means of gaining funds to meet financial obligations.”²⁰ Because of the risk that delinquent debt can pose, the EEOC runs credit checks on applicants for 84 of the agency’s 97 positions.²¹

B. Employers use credit history checks in a responsible and focused manner

We know that our member companies – and most employers – use credit checks in a responsible and manner. CDIA data shows that just 15% of all employee background checks involve a credit history review. In July 2012, SHRM released a survey on employer use of credit histories. The SHRM survey found that 47% of employers conduct a credit background check on employees, down from 53% in 2010. SHRM also reported that of those 47% that do conduct credit background checks, most employers use credit for selected positions within their companies. 87% consider credit

¹⁹ *Eg., Tales from the Unemployment Line: Barriers Facing the Long-Term Unemployed, Before the S. Committee on Health, Education, Labor & Pensions, 112th Cong. (Dec. 8, 2011), S. Hrg. 112-877, 52-52 (Response to Questions of Sen. Enzi by Christine L. Owens) (“The reference to ‘credit ratings’ in my written testimony was a mistake... It does not include the individual’s credit score, but the underlying information provided above gives rise to the individual’s credit score.”).*

²⁰ *EEOC v. Kaplan*, No. 1:10-cv-02882-PAG (U.S.C.A. 6th Cir.) Doc #: 103-16, Jan. 3, 2013, 20 of 26, page ID No. 5112. Positions subject to credit checks include not just criminal investigators, senior inspector, auditors, and HR and IT professionals, but also for public affairs specialist writer-editors, research librarians and GS-8 secretaries (\$47,000). *Id.*, 24 (page ID no. 5116) and 25 (page ID no.5117)

²¹ *Kaplan*, 750 (6th Cir.).

histories because the position requires a fiduciary duty or financial responsibility; 42% consider credit histories for senior executive positions; 34% consider them for positions where there is access to highly confidential employee salary, benefits, or personal information; and 25% in situations where the person is in a position of financial trust.²²

The SHRM report goes on to say that 58% of those companies that use credit checks do so only after a conditional job offer is made and 33% do so after a job interview. SHRM reports that negative credit information is not always a bar to employment. It is clear from the SHRM report that the most significant negative credit events are debts in collection (21% to 61% of specific employment positions) and judgments (18% to 31% of specific employment positions). Yet, foreclosures, tax liens, and many other debts will not affect many applicants' ability to get a job. According to the SHRM findings, among organizations that do perform credit history checks, 80% percent have hired someone despite a poor credit reports. Finally, the SHRM data indicates that employers look for significant, long term financial difficulty, not for difficulties that may be associated with a loss of a job.²³ In short, employers use credit checks in a responsible and focused manner.

Conclusion

We are pleased that the House Subcommittee on Workforce Protections held a hearing that again calls attention to the confusion EEOC has created with its criminal history guidance. One of the bills discussed at the hearing, the Certainty in Enforcement Act of 2015, H.R. 548, would go a long way to clearing up employer confusion and making safer and more stable workplaces.

A number of statements were made during the March 24 hearing requiring clarification and elaboration and that is the focus of this submission. We hope that this testimony brings more clarity to the record.

²² SHRM Survey. See, *Background Checking—The Use of Credit Background Checks in Hiring Decisions*, available at www.shrm.org/Research/SurveyFindings/Articles/Pages/CreditBackgroundChecks.aspx.

²³ *Id.*

CDIA shares a core value with most Americans: employers should be able to hire the best people for the jobs available, and job applicants should not fear unlawful discrimination. In a climate of economic uncertainty it is critical that employers be vigilant about protecting their businesses and their customers while preventing unlawful hiring practices. Fair and appropriate uses of credit criminal histories offer one important tool among many for employers to protect themselves, their other employees, and their customers.