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January 13, 2014

Prof. Anita Ramasastry
Chair, Scope & Program Committee
Uniform Law Commission
111 N Wabash Ave
Suite 1010
Chicago, IL 60602

Re: Objections to the creation of a drafting committee as proposed by the
Criminal Records Accuracy and Access Study Committee

Dear Prof. Ramasastry:

I write on behalf of the Consumer Data Industry Association ("CDIA") to respectfully request that that the Uniform Law Commission *not* appoint a drafting committee as proposed by the Criminal Records Accuracy and Access Study Committee. We take this position for four important reasons:

- (1) The Study Committee has not demonstrated that its proposal is appropriate under the ULC's Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform and Model Acts;
- (2) Alternatively, if there is to be a drafting committee it should focus on records in the hands of government, not in private hands;
- (3) The accuracy of criminal records is comprehensively addressed by long-standing federal and state laws so that no additional legislation is necessary; and
- (4) While we applaud the Study Committee's limitation of its recommendation from accuracy *and* access to *just* accuracy, the issues of accuracy and access may be too interconnected to deconstruct in a drafting process, and these issues, when connected, are too fraught with social and political conflicts.

CDIA is uniquely positioned to offer comments on this process. CDIA was founded in 1906 and is the international trade association that represents nearly 200 consumer data companies. Our members are the leading providers of criminal background checks for employment screening in the United States. Employers, as well as landlords and property managers, use criminal histories provided by our members to screen job or residential applicants to keep their businesses, customers and employees safe.

The Study Committee issued a final report on Dec. 16, 2013 and it is this report on which we offer comments.¹ We applaud the Study Committee for discussing accuracy issues because accurate records are in everyone's best interests. Since 1970, the consumer reporting industry has been required by the Federal Fair Credit Reporting Act ("FCRA") to maintain accuracy standards in the use of criminal histories. Criminal histories are widely yet carefully used by employers in making employment decisions because, in part, the records provided by consumer reporting agencies adhere to legal accuracy standards. Continued access to these criminal records by employers is critically important in protecting the employers' businesses, their consumer customers, and their other employees. We are grateful that the Study Committee was thoughtful to limit its recommendations to accuracy issues and not access issues, yet there are a number of points we wish to raise for consideration by the Uniform Law Commission.

1. The Study Committee has not demonstrated that its proposal is appropriate under the ULC's Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform and Model Acts

We believe that the recommendations from the Study Committee do not meet several key, required criteria that are prerequisites required by the ULC's Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform and Model Acts ("Statement of Policy").²

A. There is no obvious reason for an act so that its preparation will be a practical step toward uniformity of state law or at least toward minimizing the diversity of state law, § 1(c)(1).

The Statement of Policy requires an "obvious reason" for an act that will be a practical step toward uniformity. It is unlikely that a drafting committee for criminal records will be a practical step towards uniformity, nor is it clear that further legislation directed towards accuracy is warranted. The Study Committee sets forth *opinions* that

¹ Study Committee on Criminal Records Access and Accuracy Final Report to Scope and Program, Dec. 16, 2013 ("December Final Report").

² Available at <http://www.uniformlaws.org/Narrative.aspx?title=Criteria%20for%20New%20Projects>.

there are concerns with the accuracy of criminal histories, but opinions are not obvious reasons. Part III of the December Final Report offers five bullet points of “the most common types of inaccuracies associated with criminal records.”³ These bullet points are unsupported by evidence.

The Report states a position of “The Need for a Uniform Law to Address the Accuracy of Criminal Records” and then proceeds to list “Types of Inaccuracies Associated with Criminal Records.”⁴ According to the December Final Report the “most common types of inaccuracies associated with criminal records include:”

- “Incompleteness, such as records with no information on the disposition after an arrest or other charge has been entered in a database.
- “Errors that appear in a public record, such as incorrect data entry, double-entry of an offense, and no report of the disposition of arrests after charges were dropped.
- “Criminal identity theft: when a person who is arrested gives the name, date of birth, and/or social security number of another person.
- “‘False positives’ and ‘false negatives,’ such as a criminal record that is attributed to someone who is not the person charged with the offenses.
- “Errors in reports prepared by commercial vendors, such as mismatches; multiple reports; reporting cases that have been expunged; reporting cases with dispositions that are not up-to-date; and presenting information in a confusing and prejudicial fashion.”

There is a critical problem with these statements of alleged inaccuracies: None of these statements are supported by empirical evidence and three of the five bullet points are not inaccuracies at all.

i. The first and third bullets do not reference inaccuracies

The first bullet references “incompleteness” of records, yet incompleteness is not inaccuracy. An incomplete record, for example, where an arrest is reported but a conviction is not, is indeed accurate as the record has been reported. If there is additional disposition information necessary for an employer making a decision on a criminal record, federal and state laws afford ample opportunities for job applicants to provide that information. For example, an employer must provide a copy of the criminal history used by the employer (under law a criminal history is referred to as a

³ December Final Report, at 3.

⁴ *Id.*

consumer report) to the applicant upon request before making an adverse employment decision.⁵

The third bullet on arrestees providing false names or false identifications is also not an error in a criminal history. It is a fact, not an error, when an arrestee attempts to evade law enforcement by providing false information. Victims of identity theft have ample opportunities under existing federal and state law to correct records.

ii. The second and fourth bullets are unsupported by any authority

Two other bullets, the second and fourth bullets, on incorrect data entry and on “false positives” and “false negatives”, have no evidentiary support for these claims. If these errors are so common, surely there would be authority to support them, yet there is no such evidence.

iii. The fifth bullet is built on flimsy authority

a. In general

The fifth bullet on errors in reports from commercial vendors is supported by 30 lines from one 600 page book, with a few footnotes.⁶ The footnotes are to cases where the accuracy of criminal histories was called in to question and rightly adjudicated under the FCRA, under which alleged inaccuracies in criminal histories provided by commercial vendors are treated.⁷ A few citations to a few cases does not in this case become an “obvious reason” for an act. Rather, the litigation demonstrates an effective remedy for adjudicating alleged inaccuracies.

b. The December Final Report relies on a NELP report that does not deal with accuracy other than on FBI records, which is beyond the reach of state legislation

The December Final Report notes that the Study Committee reviewed a July 2013 report from the National Employment Law Project (“NELP”).⁸ Reliance on this report as the basis for uniform state legislation is undeserved because this report does not

⁵ 15 U.S.C. § 1681b(b)(3). For additional information about the legal requirements of the use of criminal histories, including the legal requirements relating to accuracy, *see, infra*, at 9.

⁶ Love, Roberts & Klingele, *Collateral Consequences of Criminal Convictions: Law, Policy and Practice* (NACDL/West, 2013), § 5:18.

⁷ 15 U.S.C. § 1681 *et seq.*

⁸ Michelle Natividad Rodriguez, Maurice Emsellem, *Accurate FBI Background Checks for Employment; REWARD: GOOD JOBS*, July 2013 (“NELP, Accurate FBI Background Checks”).

address accuracy other than for FBI records, whose records are beyond the reach of state legislation. Under Statement of Policy § 1(a), FBI records would not be an appropriate subject matter.⁹

B. There is no reasonable probability that a uniform act will be accepted and enacted by a substantial number of states, § 1(c)(2).

The December Final Report assumes that a uniform act will create uniformity in the presentation and transmission of criminal history records across the United States. There are nearly 18,000 different law enforcement agencies¹⁰ and over 16,000 courts in the U.S.¹¹ It seems unlikely that any number of states would be able to create uniformity in the reporting and transmission of criminal history information from all these agencies, courts and offices to the general public. These 34,000 different law enforcement agencies and courts vary dramatically in size, scope, budgets, priorities, management, and willingness to adapt to a uniform system of data collection, retention, and transmission. There is little or no reasonable probability that a substantial number of states would adopt a uniform act creating conforming national standards of accuracy.

C. Since the December Final Report addresses issues that are controversial because of disparities in social, economic, or political policies or philosophies among the states a drafting committee should not be created, § 1(e)(2).

Yet another factor in the Statement of Policy weighing against the creation of a drafting committee is § 1(e)(2) which rejects creation of drafting committees where the subject matter at hand is “controversial because of disparities in social, economic, or political policies or philosophies among the states.” The subject matter for proposed legislation on which December Final Report focuses is the very embodiment of disparities in social, economic, and political philosophies among the states.

⁹ Although NELP did issue a report on the alleged inaccuracies of criminal records more generally, it was not relied upon as a basis for the December Final Report. Should the Study Committee or other proponents of a uniform act choose to cite to this study at some point in the future, we would appreciate the opportunity to respond at that time. Michelle Natividad Rodriguez, Maurice Emsellem, *65 Million Need Not Apply; The Case for Reforming Criminal Background Checks for Employment*, National Employment Law Project, March 2011, available at http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1 (“NELP, 65 Million”).

¹⁰ Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 2008*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, July 2008, available at <http://www.bjs.gov/content/pub/pdf/csllea08.pdf>.

¹¹ National Center for State Courts, *Number of Courts*, State Court Organization, Table III.34.c, available at http://data.ncsc.org/OvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikview_ia&anonymous=true&bookmark=Document%5CBM136.

The Study Committee's attention to the accuracy of criminal records is deeply intertwined with access to criminal records. It is the topic of access under current prevailing law, not accuracy *per se*, that drives, from some quarters, determined demand for law reform. Access to and use of criminal records is often, at bottom, about whether and when an employer should be able to access criminal records to conduct a background check on an existing or prospective employee. These issues elicit passionate discussions about race and opportunity on the one hand, and the need to protect society, businesses, customers, and employees on the other.¹²

The U.S. Equal Employment Opportunity Commission held a hearing in July 2011 on the use of "arrest and conviction records as a hiring barrier"¹³ because Blacks and Hispanics are disproportionately represented in the U.S. prison population.¹⁴ One member of the Study Committee testified at the EEOC hearing¹⁵ and a second Study Committee member has commented widely on employers' limited use of criminal histories in making employment decisions.¹⁶

¹² See, generally, Hearing before the U.S. Commission on Civil Rights, *Impact of Criminal Background Checks*, Dec. 7, 2012 ("USCCR Hearing"). In a press release announcing the hearing, the USCCR noted that

Employers use criminal history checks to help ensure a safe environment for customers and employees, reduce legal liability for negligent hiring, reduce or prevent theft, embezzlement or other criminal activity, comply with state laws requiring background checks, and assess overall applicant trustworthiness. From the EEOC's point of view, the increased use of criminal background checks may indicate possible disparate impact discrimination under Title VII of the Civil Rights Act.

available at http://www.usccr.gov/press/2012/PR_11-29_CriminalBackgroundChecks.pdf.

¹³ Hearing before the U.S. Equal Employment Opportunity Commission, *Arrest and Conviction Records as a Hiring Barrier*, July 26, 2011 ("EEOC July 2011 Hearing").

¹⁴ *Id.*, Statement of Commissioner Stuart Ishimaru, available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm>.

¹⁵ For a summary of Study Committee member Prof. Stephen Saltzburg's support for limiting or prohibiting criminal histories for employment, *see, eg.*, EEOC July 2011 Hearing, written statement of Prof. Saltzburg, available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/saltzburg.cfm>, and testimony of Prof. Saltzburg, available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm>.

¹⁶ For a summary of Study Committee member Margaret Colgate Love's support for limiting or prohibiting criminal histories for employment, *see, eg.*, Love, Margaret Colgate, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 *Harvard Law J.* 3, 792 (2011).

The EEOC July 2011 Hearing laid the foundation for EEOC guidance¹⁷ issued the following year that at least some employers view as limiting the use of criminal history background checks for employment.¹⁸

There are few things more important to individuals than working at a good job for a good wage, and there are few things more important to employers and society than keeping their businesses, customers, and employees safe from financial or violent crimes. Sometimes the tension between these interests leads to an outpouring of emotion, especially when race is involved, as it often is with criminal history background checks.¹⁹ Given the high-tension and high-drama that can sometimes come from public policy debates about criminal background checks, the December Final Report is too laden with unseen minefields of political, economic, and social cleavages to warrant the appointment of a drafting committee, even given the Report's limitation of scope to accuracy.

There are plenty of examples highlighting the disparities of social, economic, or political philosophies among the states.²⁰ The EEOC Enforcement Guidance is being challenged in federal court by the State of Texas because

if state agencies choose to comply with the EEOCs interpretation, they not only violate state law, but also must begin evaluating and hiring felons to serve in law enforcement, teach in local elementary schools, nurse veterans and the disabled, counsel juvenile detainees, and coach little league.²¹

On July 24, 2013, nine state attorneys general, all Republicans, wrote a letter to the EEOC objecting to the EEOC's filing of litigation against two companies accusing of

¹⁷ Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, No. 915.002 (Apr. 25, 2012) ("Enforcement Guidance").

¹⁸ *Eg.*, In March 2013, the Senate Appropriations Committee directed the EEOC to report to Congress "detailing the steps [the EEOC] has taken to alleviate confusion about the new guidance". Cong. Rec. S. 1311 (daily ed. March 11, 2013).

¹⁹ *See, generally*, EEOC July 2011 Hearing where stark differences were on display in political philosophies and race.

²⁰ *See, eg., id.*, written statement of Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, available at http://www.ojp.usdoj.gov/newsroom/testimony/2011/11_0726asolomon.pdf ("the impact of having a criminal record has been shown to be exacerbated for African-Americans, who may already experience racial discrimination in the labor market and who are more likely than whites to possess a criminal record.").

²¹ Press release, Texas Attorney General, Nov. 4, 2013, accompanying the filing of litigation, *Texas v. EEOC*, U.S. Dist. Ct. (N.D. Tex., no. 5:13-cv-00255-C), available at <https://www.oag.state.tx.us/oagnews/release.php?id=4570>

violating the Enforcement Guidance.²² As the EEOC was drafting its guidance, four state attorneys general, two Republicans and two Democrats, wrote to the EEOC expressing “grave concern about the EEOC's contemplation of a fundamental alteration of its longstanding interpretation of Title VII regarding the legality of employer criminal background checks.”²³ Not only are there disagreements across states, there are also disagreements within states. Legislation pending in New Jersey to limit the use of criminal background checks is opposed by Republicans and supported by Democrats.²⁴

2. If there is to be a drafting committee it should focus on records in the hands of government, not in private hands

Employers make careful, yet regular use of criminal background checks to protect their business, customers, and other employees.²⁵ Employers and those commercial entities that collect and disseminate criminal history information rely on governmental sources for that information. The commercial entities are professional institutions legally bound to federal and state accuracy standards. These businesses have been highly regulated for decades.

While much of the arguable criticism about the accuracy of criminal histories concerns not the private sector, but the accuracy of records maintained by the public sector and provided to the private sector.²⁶ The tens of thousands of law enforcement agencies and court clerks’ offices across the country are the original sources of the data. If there is to be a drafting committee, it should be limited to government records, as the original sources of the data, and not include the private sector.

²² Letter from Attorneys General Patrick Morrissey (West Virginia), Tim Fox (Montana), Luther Strange (Alabama), Jon Bruning (Nebraska), John Suthers (Colorado), Alan Wilson (South Carolina), Samuel Olens (Georgia), John Swallow (Utah), and Derek Schmidt (Kansas) to the EEOC, July 24, 2013.

²³ Letter from Attorneys General Dustin McDaniel (Kentucky), Peter Kilmartin (Rhode Island), Samuel Olens (Georgia), and J.B. Van Hollen (Wisconsin) to the EEOC.

²⁴ See, *Space Says Ban Government Intrusion – Not the Box*, blog posting of New Jersey Assemblyman Parker Space (R), available at <http://www.njassemblyrepublicans.com/?tag=opportunity-to-compete-act>, and *Watson Coleman, Green, Spencer & Wimberly’s Opportunity to Compete Act Advanced by Assembly Committee*, New Jersey Assembly Democrats press release, Dec. 16, 2013, available at <http://www.assemblydems.com/Article.asp?ArticleID=7515>.

²⁵ *Background Checking—The Use of Criminal Background Checks in Hiring Decisions*, Society for Human Resources Management, July 19, 2012, available at

<http://www.shrm.org/Research/SurveyFindings/Articles/Pages/CriminalBackgroundCheck.aspx>.

²⁶ See, NELP, *Accurate FBI Background Checks*.

3. The accuracy of criminal records is comprehensively addressed by long-standing federal and state laws so that no additional legislation is necessary

Since 1971, the FCRA has served employers and applicants alike to allow vibrant and lawful use of criminal history information, provisions to ensure maximum possible accuracy, 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.”²⁷ Many states have their own state FCRA laws.²⁸

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.²⁹ 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.³⁰
- 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.³¹
- 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.³²

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

²⁷ Remarks of FTC Chairman Tim Muris, October 4, 2001 before the Privacy 2001 conference in Cleveland, Ohio.

²⁸ *Eg.*, Cal. Civ. Code § 1785 *et seq.*; N.Y. Gen. Bus. L. § 380 *et seq.*

²⁹ 15 U.S.C. § 1681e(b).

³⁰ *Id.*, § 1681s-2(a)(1)-(2).

³¹ *Id.*, § 1681i(a)(1), (5).

³² *Id.*, § 1681n, 1681o, 1681s.

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,³³ This legal privilege comes with certain obligations. Under § 1681b(b) of the FCRA:

- 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.

³³ *Id.*, § 1681b(a)(3)(B).

4. **While we applaud the Study Committee's limitation of its recommendation from accuracy *and* access to *just* accuracy, the issues of accuracy and access may be too interconnected to deconstruct in a drafting process, and these issues, when connected, are too fraught with social and political conflicts**

The Study Committee is named the "Criminal Records Access and Accuracy" Study Committee. Nevertheless, after careful deliberations on the issue of "access," the December Final Report rejects the concept of a drafting committee being appointed to deal with "access" issues. Rather, the December Final Report recommends formation of a drafting committee solely "to prepare a uniform law on the accuracy of criminal records."

There are sound reasons for the December Final Report's narrowed recommendations. Yet, as demonstrated above, it may be an impossible task for a drafting committee, arguably limiting its focus to accuracy issues, to avoid repeated attempts to embroil it in "access" issues. The ULC carefully allocates its limited resources to projects with a high degree of assurance of success. It does not launch drafting projects on all issues. Because of its organizational commitment to affirmatively advocate for adoption of uniform acts it produces, the ULC must consider the function it thereby requests its Commissioners to perform in their home states. Resolution of these issues are clearly set forth in the ULC's Criteria for New Projects.

The very importance of these issues, coupled with the tremendous cleavages and conflicting value systems at stake and are reflected in major political activity. Hence, these issues will likely be resolved in various forums over the years ahead. A ULC drafting committee is not the best forum in which to consider these highly politicized issues.

Conclusion

The ULC should *not* appoint a drafting committee as recommended by Study Committee for the reasons explained above and noted again here: (1) The Study Committee has not demonstrated that its proposal is appropriate under the ULC's Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform and Model Acts; (2) Alternatively, if there is to be a drafting committee it should focus on records in the hands of government, not in private hands; (3) The accuracy of criminal records is comprehensively addressed by long-standing federal and state laws so that no additional legislation is necessary; and (4) While we applaud the Study Committee's limitation of its recommendation from accuracy *and*

access to *just* accuracy, the issues of accuracy and access may be too interconnected to deconstruct in a drafting process, and these issues, when connected, are too fraught with social and political conflicts.

Sincerely,

A handwritten signature in blue ink, appearing to read 'E. Ellman', with a long horizontal flourish extending to the right.

Eric J. Ellman
Senior Vice President, Public Policy and Legal Affairs

cc: Members of the ULC Scope and Program Committee
Bob Tennessen, Chair, Criminal Records Accuracy and Access Study Committee
Richard T. Cassidy, Esq. Chair, Executive Committee