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March 27, 2017

The Honorable Hannah-Beth Jackson
Chair, Senate Judiciary Committee
The Honorable Nancy Skinner
Chair, Senate Public Safety Committee
Sacramento, CA 95814

Re: Opposition to S.B. 393, relating to arrests

Dear Chairwoman Jackson and Chairwoman Skinner:

I write on behalf of the Consumer Data Industry Association (CDIA) to respectfully submit our opposition to [S.B. 393](#). The bill would make it more difficult for employers, non-profits, and landlords in the state to conduct criminal background checks on employees, volunteers, and renters. The unnecessary difficulty in criminal background checks under the bill could make for less safe workplaces and apartment buildings, and more dangerous places for volunteers and communities in need.

CDIA is an international trade association, founded in 1906, of more than 130 corporate members. Its mission is to enable consumers, media, legislators and regulators to understand the benefits of the responsible use of consumer data which creates opportunities for consumers and the economy. CDIA members provide businesses with the data and analytical tools necessary to manage risk. They help ensure fair and safe transactions for consumers, facilitate competition and expand consumers' access to a market which is innovative and focused on their needs. CDIA member products are used in more than nine billion transactions each year.

There are a number of problems with the bill, which we would like to call to your attention.

1. There is already robust regulation in place for criminal background check companies, known as consumer reporting agencies, and additional regulation is unnecessary

The bill imposes a number of new obligations on consumer reporting agencies (“CRAs”), yet the bill ignores long-standing, time-tested regulation of CRAs. The federal Fair Credit Reporting Act (“FCRA”),¹ governs consumer reports, regulates consumer reporting agencies, and protects consumers. Consumer reporting agencies are required to maintain reasonable procedures to assure maximum possible accuracy.² 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.³
- 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 the disputed information cannot be verified it must be removed.⁴
- A consumer reporting agency that violates federal law is subject to private rights of action, enforcement by the Consumer Financial Protection Bureau (“CFPB”), the Federal Trade Commission (“FTC”), and state attorneys general.⁵

California has a robust state law that also regulates CRAs and many of the provisions in the FCRA are also found in state law.⁶

¹ 15 U.S.C. § 1681 *et seq.*

² *Id.*, § 1681e(b).

³ *Id.*, § 1681s-2(a)(1)-(2).

⁴ *Id.*, § 1681i(a)(1), (5).

⁵ *Id.*, § 1681n, 1681o, 1681s.

⁶ Cal. Civ. Code § 1785.1 *et seq.* The California Credit Reporting Agencies Act (“CCRA”) imposes accuracy and correction obligations on CRAs. *See, id.*, §§ 1785.14(b), 1875.16.

2. The bill makes it harder for consumer reporting agencies to know that a record has been expunged, which makes it harder to stop reporting an expunged record

CDIA members do not report convictions that have been expunged, but the bill makes it harder for criminal background check companies (known as consumer reporting agencies) to know whether a record has been expunged. Section 851.867(f)(3)(A) would require consumer reporting agencies (“CRAs”) to delete expunged information, yet CRAs maintain records of expungement to prevent the re-reporting of that expunged information. Deleting a record of expungement makes it easier to report that expungement, much to the detriment of the subject of the record.

Neither the bill nor section 851.867(f)(3)(A) provides an allowance for trial courts or the Department of Justice to, on their own initiative, send to CRAs regular updates of expunged records. CRAs can only stop reporting expunged records when they are called to the attention of the CRAs by the courts or the Department of Justice. Yet, the bill makes it harder for data subjects and CRAs because it does not call for regular reporting to CRAs. Just as the federal Fair Credit Reporting Act (“FCRA”) imposes obligations on data furnishers, like banks, to regularly update information to CRAs on credit information, the bill should obligate the California courts and agencies to update CRAs on expungements.

3. The bill imposes substantial, strict liability for innocent mistakes

Section 851.867(g)(2)(B) does not, but should, allow for some time, like 30-days, for CRAs to make necessary changes to their systems to prevent the reporting of expunged records. This section does not, but should, require CRAs to have actual knowledge in order to make changes since constructive knowledge puts too great a liability burden on innocent mistakes. This section also imposes penalties that are not in line with the culpability of the alleged violator.

4. The bill should only regulate criminal history reports to end-users, not reports issued to other CRAs

Consumer reporting agencies are heavily regulated by the federal and state consumer reporting laws and are already required to adhere to accuracy obligations imposed by those laws. Section 851.867(f)(C)(ii) could apply to reports issued to both end users and CRAs. When a CRA that resells a criminal report to another CRA, which will ultimately go to the end user, the first CRA might need to report a record of expungement to the second CRA so that second CRA knows not to report that expungement to the end user.

5. The bill attempts to regulate records outside of California

Section 851.867(f)(C)(ii) would give national application to uses of records outside California and this is neither fair nor appropriate. Our members provide criminal history information to businesses that operate in many states, with jobs and apartment communities across the United States and in other countries. Our members also provide criminal records for the federal government. The bill applies too broadly in its reach beyond California.

6. The bill is not drafted precisely enough to distinguish between acquitted and dismissed charges

Section 851.867(1)(B)(ii) through (v) are imprecise in their drafting because they fail to account for the possibility that some charges fall into one provision (e.g., dismissed) and others fall into another provision (e.g., acquitted).

7. Summary

We oppose S.B. 393 for several reasons. First, the bill ignores long-standing, time-tested regulations imposed on consumer reporting agencies. In addition to bypassing these credit reporting laws, the unnecessary difficulty in criminal background checks under the bill could make for less safe workplaces and apartment communities, and more dangerous places for volunteers and communities in need.

Sincerely,



Eric J. Ellman
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