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Via email: [publiccomments@usccr.gov](mailto:publiccomments@usccr.gov)

Dear Ms. Ostrowsky:

I am pleased that the U.S. Commission on Civil Rights ("USCCR") is conducting a hearing on the impact of criminal background checks and the EEOC's conviction records policy on employment of black and Hispanic workers. As you know, earlier this year the U.S. Equal Employment Opportunity Commission's ("EEOC") issued Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* ("EEOC Guidance"). The EEOC Guidance is worth further review and study as it impacts many hiring decisions and could increase risk workplaces all across the United States.

I write on behalf of the Consumer Data Industry Association (CDIA) to offer comments to the USCCR on the EEOC Guidance. The EEOC Guidance creates substantial employer compliance hardship, does not offer more meaningful consumer protections, and increases risk in the workplace. CDIA has included in the appendix to this comment the comments that we filed with the EEOC on July 22, 2011 ("CDIA EEOC Comment I", Appendix I) and August 9, 2011 ("CDIA EEOC Comment II", Appendix II). We also include as an appendix a February 1, 2012 comment that was signed by over 50 trade associations to the EEOC.

By way of background, CDIA was founded in 1906 and is the international trade association that represents some 200 consumer data companies. CDIA members represent the nation's leading institutions in credit reporting, mortgage reporting, check verification, fraud prevention, risk management, employment reporting, tenant screening and collection services.

When a person enters a workplace (which can sometimes be a home) that person wants to feel safe and secure. This is a value CDIA shares. Every day in this country, employers make difficult decisions based on facts to pick the right people for the right positions. Employers should be able to make risk decisions based on full, complete criminal history information and use that information responsibly, in compliance with federal and state EEO laws. These are also values CDIA shares. These values can be condensed into a single comment: “people should know that the person coming to your door won’t harm you.”<sup>1</sup>

This comment addresses several points: (1) Federal laws are in place today to require maximum possible accuracy of criminal history information and to protect job applicants; (2) Employers, Congress, and state legislators see a need to conduct criminal checks; (3) Even as criminal history reviews become more commonplace, minority hiring increases; (4) Employers use criminal record checks in a responsible and focused manner; and (5) The EEOC Guidance creates substantial employer compliance hardship, does not offer more meaningful consumer protections, and increases risk in the workplace.

**1. Federal laws are in place today to require maximum possible accuracy of criminal history information and to protect job applicants.**

Since 1971 the Fair Credit Reporting Act (“FCRA”) has served as a touchstone for consumers, employers, law enforcement, and regulators concerning the use of criminal history information. A criminal history background check performed on behalf of an employer is a “consumer report” subject to the FCRA.

***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.*<sup>2</sup> There are many other consumer protections as well. For example:

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<sup>1</sup> Carol Morello, *Census Bureau adopts strict jobs screening after incidents*, Wash. Post, May 27, 2010, quoting Robert M. Groves, director of the Census Bureau. The Census Bureau added additional background checks for their enumerators after several enumerators committed violent crimes in the private homes of the residents who the enumerators were supposed to interview for census collection. *Id.*

In our July 22, 2011 comment to the EEOC, we offered a number of stories that appeared in the media about violent crimes committed in the workplace, including homes, because a criminal check was either partially completed or not completed at all. In all of these cases, and many more like them, offenders had a past criminal history and were enabled to inflict substantial harm on present, innocent individuals. CDIA EEOC Comment I, 1-2.

<sup>2</sup> *Id.*, § 1681e(b).

- 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.<sup>3</sup>
- Consumers have a right to dispute information on their consumer reports with consumer reporting agencies or employers and the law requires dispute resolution within 30 days (45 days in certain circumstances). If disputed information cannot be verified, the information subject to the dispute must be removed.<sup>4</sup>
- 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.<sup>5</sup>

### ***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. The FCRA allows employers to review the criminal histories of prospective and existing employees.<sup>6</sup> However, this legal privilege comes with certain obligations. In short, 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.

## **2. Employers, Congress, and state legislators see a need to conduct criminal checks**

Federal law requires criminal background checks for many employment situations, including for employment benefits administration,<sup>7</sup> drivers of hazardous materials,<sup>8</sup> child care workers,<sup>9</sup> and bank employees.<sup>10</sup>

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<sup>3</sup> *Id.*, § 1681s-2(a)(1)-(2).

<sup>4</sup> *Id.*, § 1681i(a)(1), (5).

<sup>5</sup> *Id.*, § 1681n, 1681o, 1681s.

<sup>6</sup> *Id.*, § 1681b(a)(3)(B).

<sup>7</sup> 29 U.S.C. § 1111 (placing a prohibition on persons “convicted of... robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving [drugs], murder, rape, kidnaping, perjury, assault with intent to kill...”)

<sup>8</sup> 51 U.S.C. § 5103.

<sup>9</sup> 42 U.S.C. § 13041.

The federal government regularly encourages states to conduct more criminal background checks. For example, in 2010, Connecticut “received \$1.9 million from the U.S. Department of Health and Human Services to help establish a comprehensive, statewide background check program for employees of long-term care facilities.”<sup>11</sup> The grant referenced above was provided by the HHS Centers for Medicare & Medicaid Services (CMS) to “combat[] abuse and neglect in the nation’s long-term care facilities.” Six states (Alaska, Connecticut, Delaware, Florida, Missouri, and Rhode Island) were awarded \$13 million so that they could “design comprehensive applicant criminal background check programs for jobs involving direct patient care.”<sup>12</sup>

The federal government is also a substantial user of criminal background checks. According to the report, OPM conducted 2.3 million background checks in 2011. It appears that all of these checks included a criminal history search. GAO Report, 16.

Like the federal government, states require criminal background checks in many employment situations, including for loan originators, mortgage brokers, and mortgage lenders,<sup>13</sup> dental hygienists,<sup>14</sup> massage therapists,<sup>15</sup> psychologists,<sup>16</sup> tow truck drivers,<sup>17</sup> and funeral directors.<sup>18</sup> In the last few years, many bills have been introduced in state legislatures to permit or require criminal background checks for a wide array of professions and occupations, including full-time faculty or staff members at colleges and universities;<sup>19</sup> student teachers;<sup>20</sup> destination resort license holders;<sup>21</sup> bounty hunters;<sup>22</sup> fire investigators, rescue squad personnel, firefighters, and EMTs;<sup>23</sup> home care aides and assisted living facilities;<sup>24</sup> hotel employees with room key access;<sup>25</sup> HVAC licensees;<sup>26</sup> taxi license holders and non-emergency Medicaid transport vehicle drivers;<sup>27</sup> bank officers;<sup>28</sup> workers in a state office of vital statistics;<sup>29</sup> state

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<sup>10</sup> 12 U.S.C. § 1829.

<sup>11</sup> Amanda Cuba, *Experts: Theft emphasizes need for background checks*, Conn. News Times, April 29, 2011.

<sup>12</sup> U.S. Department of Health & Human Services media release “New resources available to improve patient safety and combat abuse in long-term care facilities”  
<http://www.hhs.gov/news/press/2010pres/10/20101006a.html> (last visited, July 5, 2011).

<sup>13</sup> FLA. STAT. § 494.0011(2)(c).

<sup>14</sup> PA. CONS. STAT. § 124.1.

<sup>15</sup> OHIO REV. CODE ANN. § 4731.15.

<sup>16</sup> MD. CODE ANN. HEALTH OCC. § 18-302.1.

<sup>17</sup> CAL. VEH. CODE § 2431.

<sup>18</sup> TEX. OCC. CODE ANN. § 651.259(e).

<sup>19</sup> H.B. 45 (Pa. 2011).

<sup>20</sup> S.B. 245 (Del. 2010).

<sup>21</sup> S.B. 2050 (Fla. 2011).

<sup>22</sup> H.B. 837 (Tenn. 2011).

<sup>23</sup> H.B. 2436 (Ariz. 2011); A.B. 163 (Cal. 2011); H.B. 726 (Tenn. 2011).

<sup>24</sup> S.B. 411 (Cal. 2011), S.B. 1458 (Fla. 2011); H.B. 45 (Pa. 2011).

<sup>25</sup> S.B. 297 (Pa. 2011).

<sup>26</sup> S.B. 6439 (Md. 2007).

<sup>27</sup> H.B. 1112, and 1198 (Colo. 2011).

<sup>28</sup> H.B. 1613 (N.H. 2010).

government contractors with access to confidential information;<sup>30</sup> owners of appraisal management companies;<sup>31</sup> employees with a state higher education services corporation;<sup>32</sup> and workers on ice cream trucks.<sup>33</sup> Many bills requiring criminal background checks have also been introduced at the federal level.<sup>34</sup> These are just a representative sample of many more bills in the states designed to protect workplaces.

### **3. Even as criminal history reviews become more commonplace, minority hiring increases.**

In 2010, the EEOC posted 11 new aggregate data sets from the most recent edition of its report Job Patterns for Minorities and Women in Private Industry, commonly known as the EEO-1 survey, on [www.data.gov](http://www.data.gov). The most recent data sets contain comprehensive labor force profiles of race, gender and ethnicity divided by various job categories. According to the 2008 EEO-1 survey and historical data, of the approximately 62 million private sector employees nationwide covered by the 2008 survey, about 30 million (48%) were women and 21 million (34%) were minorities; the rate of minority employment tripled between 1966 and 2008 from 11% to 34%; among the four minority groups continuously measured, the employment rate for Black or African Americans increased steadily from 8% in 1966 to 14% in 2008; and Hispanics or Latinos had the fastest growth rate in the private sector, increasing from 2.5% to over 13% between 1966 and 2008.<sup>35</sup>

### **4. Employers use criminal record checks in a responsible and focused manner**

In July 2012, the Society for Human Resources 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

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<sup>29</sup> H.B. 2454 (Kan. 2010).

<sup>30</sup> S. 5129/A. 6023 (N.Y.2011).

<sup>31</sup> H.B. 3040 (Wash. 2010).

<sup>32</sup> A. 8159/S. 3987 (N.Y. 2011).

<sup>33</sup> H.B. 2480 (Tenn. 2010).

<sup>34</sup> E.g., Child Care Protection Act of 2011, H.R. 1726 (112<sup>th</sup> Cong.) (2011) ,a bill by Rep. Dutch Ruppersberger to require criminal background checks for child care providers); and Safety for Our School Children Act of 2011, S. 124 (112<sup>th</sup> Cong.) (2011) by Sen. David Vitter “to require all public school employees and those employed in connection with a public school to receive FBI background checks prior to being hired, and for other purposes.”

<sup>35</sup> <http://www.eeoc.gov/eeoc/newsroom/release/2-5-10.cfm> (last visited April 9, 2010). See also, Weldon Latham, *Are Criminal Background Checks Discriminatory?*, Feb. 23, 2011, Diversity, Inc.

<http://diversityinc.com/article/8221/Are-CriminalBackground-Checks-Discriminatory/> (last visited June 28, 2011).

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.<sup>36</sup> In short, employers use credit checks in a responsible and focused manner.

**5. The EEOC Guidance creates substantial employer compliance hardship, does not offer more meaningful consumer protections, and increases risk in the workplace.**

The EEOC Guidance places employers in a Catch-22 when the employer is conducting a criminal background check mandated by state law but is subject to a Title VII violation. The EEOC Guidance likely rises to the level of a rule without having gone through the benefit of a rulemaking process. The fear of Title VII litigation<sup>37</sup> for violations of the EEOC Guidance makes it likely that employers will conduct less criminal background checks of employees and fewer criminal background checks means that workplaces (including homes) will be less safe.

A. The EEOC Guidance places employers in a Catch-22 when the employer is conducting a criminal background check mandated by state law but is subject to a Title VII violation.

The EEOC Guidance is clear in that it puts employers in a “no-win” situation where they could be violating federal law by complying with state law. EEOC Commissioner Victoria A. Lipnic, who voted for the EEOC Guidance,

...had hoped our Guidance could have been clearer in providing real-world practical guidance to employers. As a legal matter, federal Title VII standards preempt conflicting state employment laws. That means, if, hypothetically, a state enacted a law tomorrow which said that no one who's ever had so much as a parking ticket can be allowed to work in any industry in the state; it is likely that, as a legal matter, such a law would run afoul of Title VII and be preempted.

As a practical matter however, this Guidance offers little advice to the hypothetical employer in that state who would be forced, in my example, to choose between obeying state or federal law. I would have hoped we could have been clearer on this point and provide more meaningful direction to employers facing this situation.<sup>38</sup>

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<sup>36</sup> <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/CriminalBackgroundCheck.aspx>.

<sup>37</sup> At the EEOC meeting where the EEOC Guidance was adopted, Commissioner Ishimaru said that there were “over a hundred active investigations involving allegations of unlawful discrimination arising from criminal background checks.” EEOC Meeting, April 25, 2012, (Statement of Commissioner Stuart J. Ishimaru), transcript, <http://www.eeoc.gov/eeoc/meetings/4-25-12/transcript.cfm>.

<sup>38</sup> EEOC Meeting, April 25, 2012, (Statement of Commissioner Victoria A. Lipnic), transcript, <http://www.eeoc.gov/eeoc/meetings/4-25-12/transcript.cfm>.

B. The EEOC Guidance likely rises to the level of a rule without having gone through the benefit of a rulemaking process.

We respectfully believe that the EEOC Guidance likely rises to the level of a rule within the meaning of the Congressional Review Act (“CRA”).<sup>39</sup> The CRA incorporates by reference the definition of “rule” from the Administrative Procedure Act. The definition of a rule has been interpreted broadly to include “nearly every statement an agency may make.”<sup>40</sup> The CRA borrows the definition of a rule from 5 U.S.C. § 551, as opposed to the more narrow definition of legislative rules requiring notice and comment contained in 5 U.S.C. § 553. As a result, agency pronouncements may be rules within the definition of 5 U.S.C. § 551 and the CRA, even if they are not subject to notice and comment rulemaking requirements under section 553.<sup>41</sup> Significantly, the GAO consistently interprets the definition of a rule under the CRA as broad. Examples of documents deemed to be rules include letters, records of decision, booklets, interim guidance, and memoranda.<sup>42</sup>

C. The EEOC Guidance could make increase the risk of financial and physical crimes in workplaces, which include homes.

The increased risk of litigation for violating the EEOC Guidance and the negative publicity that comes with an EEOC lawsuit might compel employers to reduce the amount of criminal background checks they conduct on current or prospective employees. This may be what the EEOC wanted in the first place. John Hendrickson, the regional attorney for the EEOC's Chicago district recently said “I would suggest to (businesses) that they think long and hard about why they think they need to do a criminal background check”.<sup>43</sup> In recent testimony

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<sup>39</sup> The Congressional Review Act requires that any agency promulgating a covered rule must submit a report to each House of Congress and to the Comptroller General that contains a copy of the rule, a concise general statement describing the rule (including whether it is a major rule), and the proposed effective date of the rule. A covered rule cannot take effect if the report is not submitted *See*, 5 U.S.C. § 801-808.

<sup>40</sup> *See Batterton v. Marshall*, 648 F. 2d. 694, 700 (D.C. Cir. 1980). *See also* B-287557, May 14, 2001 (Congress intended that the CRA should be broadly interpreted both as to type and scope of rules covered).

<sup>41</sup> *See* B-316048, April 17, 2008 (the breadth of the term “rule” reaches agency pronouncements beyond those that require notice and comment rulemaking) and B-287557.

<sup>42</sup> *See*, for example, B-316048, April 17, 2008 (a letter released by the Centers for Medicare & Medicaid Services of HHS concerning a State Children’s Health Insurance Program measure, to ensure that coverage under a state plan does not substitute for coverage under group health plans, described by the agency as a general statement of policy, was a rule) and B-287557, May 14, 2001 (a ‘record of decision’ issued by the Fish and Wildlife Service of the Department of Interior in connection with a federal irrigation project was a rule. *See also*, B-286338, Oct. 17, 2000 (a booklet released by the Farm Credit Administration which the agency described as a non-binding policy statement was a rule); B-281575, Jan. 20, 1999 (interim guidance for investigating Title VI administrative complaints issued by EPA, which the agency characterized as non-binding, was a rule); and B-274505, Sep. 16, 1996 (a memorandum issued by the Secretary of Agriculture concerning the Emergency Salvage Timber Program was a rule).

<sup>43</sup> Ellen Jean Hirst, “Business risks rise in criminal history discrimination: The Equal Employment Opportunity Commission has sent a warning to businesses: Conduct criminal background checks at your

before the EEOC, David Burton, General Counsel, National Small Business Association said this: "I have had many conversations with sophisticated attorneys for large corporations.... They do not know how to advise their clients [about the guidance].... If they are at a loss, small firms and their generalist attorneys will fare no better."<sup>44</sup>

## 6. Conclusion

We thank the U.S. Commission on Civil Rights for allowing us the opportunity to comment on the EEOC Guidance. We hope that the USCCR will agree that: (1) Federal laws are in place today to require maximum possible accuracy of criminal history information and to protect job applicants; (2) Employers, Congress, and state legislators see a need to conduct criminal checks; (3) Even as criminal history reviews become more commonplace, minority hiring increases; (4) Employers use criminal record checks in a responsible and focused manner; and (5) The EEOC Guidance creates substantial employer compliance hardship, does not offer more meaningful consumer protections, and increases risk in the workplace.

Respectfully submitted,



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own risk", *Chicago Tribune*, Oct. 21, 2012, [http://articles.chicagotribune.com/2012-10-21/business/ct-biz-1021-eec-felony-20121021\\_1\\_criminal-records-eec-s-chicago-district-office-court-case](http://articles.chicagotribune.com/2012-10-21/business/ct-biz-1021-eec-felony-20121021_1_criminal-records-eec-s-chicago-district-office-court-case).

<sup>44</sup> Statement of David Burton, General Counsel, National Small Business Association, EEOC meeting on "Public Input into the Development of EEOC's Strategic Enforcement Plan," July 18, 2012, available at <http://www.eeoc.gov/eeoc/meetings/7-18-12/burton.cfm>.