



Written Comments Submitted for the Record
from the
Consumer Data Industry Association
to the
Over-Criminalization Task Force of the House Judiciary Committee
in connection with the Task Force's Hearing on
Collateral Consequences
June 26, 2014

On June 26, 2014, the Over-Criminalization Task Force (“Task Force”) of the House Judiciary Committee held a hearing on collateral consequences of criminal convictions. A number of statements were made during that hearing that require clarification and elaboration.

The Consumer Data Industry Association (“CDIA”) is the international trade association representing the companies that conduct criminal background checks on behalf of their employer and landlord clients. CDIA is well-positioned to offer comments to the Task Force on the value of criminal background checks, the consumer protections associated with criminal checks, and the laws that regulate those checks.

We respectfully request that this comment be included in the record of the June 26 Task Force hearing on collateral consequences.

CDIA offers the following points: (1) The accuracy of 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 magic point of redemption when an ex-offender is no longer likely to reoffend; and (5) FBI criminal searches have been criticized for being incomplete, but private sector searches are often more comprehensive.

We agree with the chairman when he noted that criminal background checks are important to protect public safety, especially in workplaces. We also agree that in the U.S. we must work to help rehabilitate ex-offenders and to lessen the risk of their reoffending following release.

1. The accuracy of 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 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.”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
- 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

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

² *E.g.*, 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).

⁵ *Id.*, § 1681i(a)(1), (5).

⁶ *Id.*, § 1681n, 1681o, 1681s.

- 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:

- 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.

One of the witnesses at the Task Force hearing, Mr. Rick Jones, said the FCRA was frequently violated, yet he offers no authority to suggest that was the case. The FCRA is a carefully thought out balancing of many interests. Criminal background checks under the FCRA are dependable and trusted.

2. Employers use criminal histories fairly and responsibly

⁷ *Id.*, § 1681b(a)(3)(B).

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 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.

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

The public and private sectors make regular use of criminal background checks. 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. If there were as many errors in these checks as has been alleged, criminal histories would not be used. Yet, public and private employers continue to conduct criminal background checks every day.⁹

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

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>.

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/>.

Mr. Jones, in his 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 Mr. Jones is referring to the work of Alfred Blumstein and Kiminori Nakamura.

Even if the Task Force 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 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

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).

¹² *Id.*, 90.

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. FBI criminal searches have been criticized for being incomplete, but private sector searches are often more comprehensive.

While many people think the FBI criminal history database is the touchstone for all criminal history information, it is not. Checking the FBI database alone offers an incomplete picture in to someone's criminal history. While the FBI database can be a source for criminal history information it should not be the only source.

According to a U.S. Attorney General's report on background screening,

[t]he fact is that there is no single source of complete information about criminal history records. A check of both public and commercial databases and of primary sources of criminal history information such as county courthouses would, perhaps, provide the most complete and up-to-date information.¹⁴

In the end,

[c]ommercial databases...offer other information that may not be available through state and FBI repository checks. A search of commercially available databases may reveal charges and dispositions not reported to the state or national repositories [and] records relating to some offenses are not reported to the FBI...Even state repositories may not have records on less serious offenses that have not been forwarded by local law enforcement agencies. Some of this information may be available through certain commercial databases.¹⁵

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 The Attorney General's Report on Criminal History Background Checks, U.S. Dep't. of Justice, Office of the Att'y. Gen. (June 2006), 54, www.justice.gov/olp/ag_bgchecks_report.pdf.

¹⁵ *Id.*, 54.

Conclusion

CDIA thanks the Over-Criminalization Task Force (“Task Force”) of the House Judiciary Committee for allowing CDIA to offer written testimony following the hearing.

A number of statements were made during that hearing that warranted clarification and elaboration: (1) The accuracy of criminal records is comprehensively addressed by the 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 magic point of redemption when an ex-offender is no longer likely to reoffend; and (5) FBI criminal searches have been criticized for being incomplete, but private sector searches are often more comprehensive.

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Thank you again for allowing CDIA to comment. Please let us know if we can be of further assistance to the Task Force.