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November 8, 2021

Alan Dunklow  
Assistant Attorney General  
Office of the Attorney General  
200 St. Paul Place  
Baltimore, Maryland 21202

**Re: Comments on Proposal to Amend Regulation COMAR 02.06.01 (Public Information Requests)**

Dear Mr. Dunklow:

I write on behalf of the Consumer Data Industry Association ("CDIA") to comment upon the proposal by the Attorney General to amend Regulation COMAR 02.06.01 Public Information Requests to define a number of items of personally identifiable information as "Sociological Information" that would not be disclosed in response to a request to inspect or copy public records of the Office of the Attorney General (the "Proposal").<sup>1</sup> Sociological Information is defined in the proposed subpart .17 to include social security number, address, DOB, phone number and driver's license number. Under the Proposal, Sociological Information may be disclosed to limited persons, including "with the consent of the person in interest." CDIA requests that the Attorney General reconsider the proposal to suppress the Sociological Information from being accessible in the public record given the important role that these identifiers play in the accuracy of consumer reports.

Over 100 years old, CDIA is an international trade association for consumer reporting agencies, and it is the largest trade association of its kind in the world. Among other activities, CDIA provides business and professional education for its members, and produces educational materials for consumers on their rights and the role of consumer reporting agencies in the marketplace. CDIA's members play a vital role in the American economy by creating, maintaining, and communicating consumer reports—including, where applicable, criminal background information—on millions of American consumers to employers, principal and general contractors, landlords, property management companies, nonprofits, government agencies, and law enforcement agencies.

When conducting a search for criminal records, a consumer reporting agency (also known as a background screening company) uses identifiers like social security number, driver's license, date of birth provided by the consumer and obtained in public records as an indispensable tool to identify records that pertain to the consumer applicant and eliminate records of other persons with the same name. Public record data, including records related to the activities of the Office of the

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<sup>1</sup> Maryland Register, Vol. 48, Issue 21 (October 8, 2021).

Attorney General, is crucial to the smooth functioning of the U.S. and Maryland economies.<sup>2</sup> Consumer reporting agencies, including the nationwide credit bureaus, regional and specialized credit bureaus, and background check and residential screening companies, use public record data every day to help consumers achieve their financial and personal goals, and to help businesses, governments, property managers, and volunteer organizations avoid fraud and manage risk. Additionally, other states use public record data to comply with their own internal statutory requirements for a “multi-state,” “multi-jurisdictional,” or “national” criminal state background check using date of birth and driver’s license number.<sup>3</sup>

Thousands of employers in Maryland and across the country, both private and public, use some form of a background check (which is a type of consumer report) to evaluate job applicants or to monitor existing employees for ongoing compliance with job requirements. The results of criminal record searches (often conducted nationwide) are a key component of these reports. Employers of all sizes, across a myriad of industries, are often *required* to conduct these background checks of potential and existing employees. *See, e.g., NASA v. Nelson* (2011) 562 U.S. 134, 150 (acknowledging the legitimate needs of the government, as an employer, to screen employees for drug use and other elements of their background).

The Proposal does allow access to the Sociological Information to the requestor “with the consent of the person in interest;” however, it is unclear as to what constitutes consent. Assuming that “with the consent of the person in interest” is intended to include a consumer’s application for employment and related consent for the employer to obtain a background check (as required by FCRA § 1681b(b)(2)(A)(ii)), that exception is too limited. A number of employers, especially with regarding to government employees, must monitor employees for ongoing compliance with law and applicable codes of conduct. In such cases, employers may need to search public records on a regular basis to assure the employee’s conduct continues to comply with their terms of employment. This includes those engaged in mortgage lending<sup>4</sup>, financial services<sup>5</sup>, and persons with various levels of

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<sup>2</sup> As of 2020, 94% of American employers state that their organization conducts one or more types of employment background screening, and 73% of employers have a documented screening policy. HR.com and Professional Background Screening Association, *Background Screening: Trends and Uses in Today’s Global Economy* (2020), available at <https://pubs.thepbsa.org/pub.cfm?id=459B8AB7-OCEA-625E-0911-A4A089DE5118> (accessed Oct. 12, 2021).

<sup>3</sup> *See, e.g.,* Conn. Gen. Stat. Ann. § P.A. 21-23, § 10 (providing that, instead of a criminal history records check, a potential employee may submit to a “national criminal background check that includes a multistate and multijurisdictional criminal record locator”); 40.1 R.I. Gen. Laws Ann. § 40.1-25.1-1 (requiring all persons over the age of 18 who are seeking employment at facilities operated by the department of behavioral healthcare, developmental disabilities, and hospitals, to undergo a national criminal background check); Wyo. Stat. Ann. § 31-20-106 (providing that in order to hire a driver for a transportation network company, the company shall conduct “[a] local and national criminal background check on the individual that shall include review of multistate and multijurisdictional criminal records locators.”).

<sup>4</sup> 12 U.S.C. §5103 (requiring state licensure or federal registration as a mortgage loan originator, after passing a satisfactory background check as required by 12 U.S.C. §5104(a), which must verify that the individual meets the required of demonstrating “financial responsibility, character, and general fitness” under §5104(b)).

<sup>5</sup> For example, a financial institution subject to FDIC requirements must confirm that the job applicant has not engaged in acts of dishonesty, breach of trust, or money laundering prior to hiring. (12 U.S.C. § 1829.)

government security clearances.<sup>6</sup> Further, when there is a suspicion of wrongdoing, the employer may need to engage in a specific investigation of that consume without the consumer’s knowledge to prevent them from hiding evidence of wrongdoing. The FCRA specifically provides a process where the investigation may continue in the absence of consent of the consumer. *See* 15 U.S.C. § 1681a(y). In such cases, notifying the consumer in advance of such activities could thwart the investigation; thus, advance consent is not always appropriate or possible to obtain.

The Proposal does not identify any reason for the amendment that creates this class of information and why it will be removed from the publicly available information from the Office of the Attorney General. If, however, the Attorney General is concerned with protecting consumers from identity fraud, CDIA respectfully requests that the Attorney General consider the fact that identifying information contained in public records plays an important role in data matching, and helps improve authentication and reduce the risk of identity fraud.<sup>7</sup> Further, courts and regulators, including the Maryland Commissioner of Financial Regulation, expect consumer reporting agencies to use multiple identifiers to ensure that records are accurately matched to consumers as part of a consumer reporting agency’s responsibility to use reasonable procedures to assure maximum possible accuracy of the information that they provide on consumers.<sup>8</sup> For these reasons, CDIA respectfully requests that the Attorney General consider the negative impact of the removal of the identified Sociological Information from the Office’s records and continue to make that information available to the public.

Sincerely,



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

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<sup>6</sup> Comprehensive clearance checks must be conducted to assess an individual’s “loyalty and allegiance to the United States, including information relevant to strength of character, honesty, discretion, sound judgment, reliability, ability to protect classified information, etc.” *See* SEAD-4 *National Security Adjudicative Guidelines*, Office of the Director of National Intelligence, found at <https://www.odni.gov/files/NCSC/documents/Regulations/SEAD-4-Adjudicative-Guidelines-U.pdf>.

<sup>7</sup> *See* “Understanding the Public Access Debate,” Coalition for Sensible Public Records Access, available at <https://cspra.org/public-records/> (accessed Oct. 12, 2021).

<sup>8</sup> *See, e.g., TransUnion LLC v. Ramirez* (June 25, 2021, No. 20-297) 594 U.S. \_\_\_, 2021 WL 2599472 (implying that TransUnion, one of America’s major consumer credit reporting agencies, risked exposure to liability under the Fair Credit Reporting Act (“FCRA”) for failing to use reasonable procedures to assure maximum possible accuracy in maintaining credit files (another type of consumer report), because TransUnion cross-checked against terrorist watchlists by first and last name only); COMAR 09.03.07.05 B.(3) (requiring consumer reporting agencies to “use personal information and public available information to match tax liens and judgments to the appropriate consumer report . . .”).