Consumer Data Industry Association
1090 Vermont Ave., NW, Suite 200
Washington, D.C. 20005-4905

P 202 371 0910

Writers email: eellman@cdiaonline.org
Writer's direct dial: +1 (202) 408-7407
CDIAONLINE.ORG

VIA EMAIL: FEHCcouncil@DFEH.ca.gov

California Fair Employment and Housing Council
c/o Rachael Langston, Senior Fair Employment & Housing Counsel
Civil Rights Department
555 12th Street, Suite 2050
Oakland, CA 94607

Re: Comments to Proposed Amendments to Title 2, Section 11017.1, Employment Regulations Regarding Criminal History

Dear Ms. Langston:

I write on behalf of the Consumer Data Industry Association ("CDIA") to respectfully request that the California Fair Employment and Housing Council ("Council") consider the CDIA's comment on Proposed Amendments to California Code of Regulations, Title 2, Article 2, Section 11017.1 (the "Rule"). We request that the Council exclude consumer reporting agencies from the definition of "employer" under the Rule. Consumer reporting agencies ("CRAs") are companies that prepare background checks on prospective applicants. These companies do not take any action regarding offers of employment to applicants.

A. CDIA and Its Members' Role in Employment Screening.

The Consumer Data Industry Association is the voice of the consumer reporting industry, representing consumer reporting agencies, including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals and to help businesses, governments, and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity all over the world, helping ensure fair and safe transactions for consumers, facilitating competition, and expanding consumers' access to financial and other products suited to their unique needs.

Employers use these screening reports to evaluate applications for employment to remain compliant with a host of state and federal laws, and when it deems it appropriate to do so in order to assure the safety of their existing employees, customers, and their invitees. The State of California has a lengthy list of employers who are required to conduct background checks on potential applicants, including schools, hospitals, state and federal courts, ride-share companies, financial institutions, insurance companies, mortgage companies; home health provides, daycare providers. The list goes on.[1]

[1] *See e.g.*, Cal. Health & Safety Code § 1522 (community care employers); Cal. Health & Safety Code § 1596.871 (child day care employers); Cal. Health & Safety Code § 1568.09 (residential facilities for persons with chronic life-threatening illness); Cal. Educ. Code § 38001.5 (school security officers); Cal. Educ. Code § 44346.5; Cal. Educ. Code § 44275.4; Cal. Educ. Code § 44274.2 (teachers); Cal. Fin.

Criminal record data can be used to estimate the potential risk of future criminal activity, and in CDIA members' experience, employers do not treat all offenses equally. In particular, employers whose businesses provide care to vulnerable populations, or where consumers are placed in situations where they are at risk for their personal safety, are rightfully more concerned about the presence of violent offenses in a criminal history as opposed to nonviolent—and less severe—crimes. Moreover, the length of time since the offense occurred is a relevant factor that is considered by employers. The purpose for consideration of this information is the risk of harm created by someone likely to re-offend. The most recent study released by the federal Bureau of Statistics of the U.S. Department of Justice (July of 2021) substantiates the concern regarding violent offenders, finding that "[a]bout 1 in 3 (32%) prisoners released in 2012 after serving time for a violent offense were arrested for a violent offense within 5 years.[2] "Violent offenses" were defined to include homicide, rape or sexual assault, robbery, assault, and other miscellaneous or unspecified violent offenses.[3]

CDIA has been engaged with stakeholders at both the federal and state level on various issues related to employment screening, federal preemption, and related issues and is therefore uniquely positioned to offer comments on the question of the suitability of the topic for action by the FEHC.

B. The Proposal is Well Suited to Regulate Conduct By True Employers, But Should Not Sweep in CRAs.

The Rule looks to regulate the overall hiring process, which is outside of a CRA's role in the process. For purposes of the Rule, CRAs are not and should not be employers. Employers are companies and people who employ others for wages or salary,[4] receive applications, collect information from a multitude of sources (whose sources could include CRAs), interview applicants, review applications, make offers of employment, manage employees over the life cycle of their tenure, and terminate employees. The CRA's role is limited to the collection and communication of information the employer has deemed relevant to its position. It is the true employer that determines what information it must collect about an applicant, and determines whether that applicant is suited to a particular position.

The definition of "employer" under the Rule, however, goes well beyond what reasonably may be expected with regard to employment decisions. "Employer" would now be defined to include "a labor contractor and a client employer.–[sic]; any direct and joint employer; any entity that evaluates the applicant's conviction history on behalf of an employer, or acts as an agent of an employer, directly or indirectly; any staffing agency; and any entity that selects, obtains, or is provided workers from a pool or availability list." 1107.2(j)(2). This definition creates uncertainty with regard to the Rule's applicability to consumer reporting agencies, as most do not "evaluate the

Code § 22105.1; Cal. Bus. & Prof. Code § 10166.04 (mortgage loan originators); Cal. Fin. Code § 1300 (bank officer/employee).

[2] *Recidivism of Prisoners Released in 34 States in 2012: A 5-Year Follow-Up Period (2021-2017),* https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/rpr34s125yfup1217.pdf p. 12.

[3] *Id.* at 24.

[4] Cal. Bus. & Prof. Code § 7580.8.

applicant's conviction history on behalf of an employer" in the way CDIA presumes is envisioned by this Rule.

In short, while a CRA may "evaluate" information that is collected to determine if and how it should be reported (i.e., confirming whether the information pertains to the consumer, and where the information is reportable under applicable federal and state law), the CRA is not deciding whether the consumer should be hired for a particular job. The CRA often does not even know the nature of the position sought, or the full set of qualifications an employer may require. Instead, a CRA may summarize information contained within the consumer report it prepared and highlight information that is relevant to the employer's pre-determined criteria that the employer has shared with the CRA (i.e. identifying that no disqualifying records have been found, or noting that the applicant's state-issued license has been suspended). The employer customer then reviews any adverse information and makes a decision about whether to proceed with the process.

In fact, there are often scenarios where there is no adverse information for an employer to review. For example, if the employer is only screening for limited criminal history information, a report indicating that no records were found allows the employer to quickly move ahead to the next stage of its hiring process. The reverse is atypical, especially in fair-chance jurisdictions like California. If there is adverse information, the CRA typically sends the information to the employer for its review. There might be exceptions to this general rule, such as in highly regulated industries, where a jurisdiction's fair-chance laws are pre-empted, or not applicable.

All CRAs must comply with the federal Fair Credit Reporting Act[5] when preparing the consumer report. Congress, in drafting the FCRA, explicitly recognized the different responsibilities that CRAs and end users, like including employers, have in the preparation and use of consumer reports and took steps to assure that it be made clear to consumers that a CRA is not the decision-maker with regard to a consumer's applications in providing reports that its end users rely on.

The FCRA requires employers, prior to taking adverse action based in whole or in part on information in the consumer report, to send the applicant a pre-adverse action notice, which includes a copy of the report and a notice of the consumer's rights under the FCRA.[6] Once the employer takes adverse action with respect to the application, the FCRA requires that the adverse action notice expressly state that "**the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken**."[7] The consumer must also be provided with the CRA's name, address, and telephone number, along with notice that the consumer has a right under the FCRA to obtain a free copy of their report, and to dispute any information that the consumer believes to be in accurate.[8]

While CRAs may be involved in providing the platform through which the information is made accessible for viewing, and may even send pre-adverse action notices and adverse action notices[9] as a service provider to the employer, the CRA has no authority to make any decision

[5] 15 U.S.C. §§ 1681 *et seq* (the "FCRA").
[6] 15 U.S.C. § 1681b(b)(3)(A).
[7] 15 U.S.C. § 1681k(a)(3) (emphasis added).
[8] 15 U.S.C. § 1681m(4).
[9] 15 U.S.C. 1681m(a).

concerning an application. CRAs cannot override a decision made by the employer, nor can a CRA prevent the employer from proceeding with any decision. Without authority to control the outcome of the employment situation, the CRA cannot be said to be taking action with regard to employment.

The definition of "employer" within the Rule is inappropriately broad and sweeps into the scope of the law CRAs that cannot reasonably fulfill the Rule's requirements – even if they were inclined to do so. An example of the inappropriate breadth of the Rule is in subpart (a). This subpart prohibits an "employer" from "inquiring into, considering, distributing, or disseminating information related to the criminal history of an applicant until after the employer has made a conditional offer of employment to the applicant." While this subpart may be a workable restriction on true employers, a CRA will not reasonably be able to comply. A CRA does not know whether the employer has made a conditional offer. A CRA does not make an offer (conditional or otherwise) to the applicant. The CRA may not ever know what the true employer has done concerning the application, and has no authority to compel the true employer to do so. Moreover, a CRA does not ever "intend to deny an applicant the employment position they were conditionally offered" by the true employer; therefore, the requirements of subparts (c)(1) and (2) cannot be read to apply to a CRA.

For these reasons, CDIA respectfully suggests that the Rule's definition of an employer should be revised to expressly exclude any consumer reporting agency providing reports under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq*.

C. To the extent the Rule attempts to preclude a CRA from preparing a report that contains criminal history information, the Rule would be preempted.

The Rule would prohibit an "employer" from "inquiring into, considering, distributing, or disseminating information related to the criminal history of an applicant until after the employer has made a conditional offer of employment to the applicant," which would, presumably be argued to prevent a CRA from including criminal history information in reports. However, the contents of consumer reports are already comprehensively regulated by federal law, and the Rule would be preempted by the FCRA.

Since 1971, the FCRA has served as a comprehensive framework governing the request, preparation and use of consumer reports. The FCRA reflects a careful Congressional balancing of the public interest in the free flow of information with the need to protect the privacy and accuracy interests of consumers in the information furnished to CRAs.[10] This national approach treats all consumers consistently, leveling the playing field to facilitate access to credit for all consumers nationwide, regardless of their state of residency.

In its statement of purpose in enacting the FCRA, Congress stated:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

[10] 15 U.S.C. § 1681.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness credit standing, credit capacity, character, and general reputation of consumers.
(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.
(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.[11]

All consumer reporting agencies, including those who provide the tenant reports at issue, are subject to these requirements.

The FCRA provides extensive protections for consumers. All consumer reporting agencies are required to maintain reasonable procedures to assure maximum possible accuracy of the information in consumer reports.[12] Other protections include:

- 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.[13]
- All consumer reporting agencies must disclose to consumers, upon request, "clearly and accurately . . . all information in the consumer's file at the time of the request."[14]
- 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 information in dispute cannot be verified, that information must be removed.[15]
- A consumer reporting agency that violates federal law is subject to private rights of action, and enforcement by the Federal Trade Commission, the Consumer Financial Protection Bureau, and state attorneys general.[16]
- In the employment context, the right to pre-adverse action notice not otherwise required for consumer reports.[17]

In enacting the FCRA, Congress intended to protect the integrity of this national framework by explicitly preempting state laws that were either inconsistent with the FCRA, or that would interfere with key elements of the national credit reporting system. Congress initially established only a "conflict preemption" framework, preempting only state laws that were inconsistent with the FCRA. Pub. L. 90-321 (1968). *See* 15 U.S.C. § 1681t(a) (preempting state laws "to the extent that those laws are inconsistent with any provision of [the FCRA]"). In 1996, with the passage of the Consumer Credit Reform Act, Congress added specific "subject matters" that were reserved to federal oversight by preempting state laws "related to" those subjects (within new subsection (b)),

[11] 15 U.S.C. § 1681(a).
[12] 15 U.S.C. § 1681e(b).
[13] 15 U.S.C. §§ 1681s-2(a)(1)-(2).
[14] 15 U.S.C. § 1681g(a).
[15] 15 U.S.C. §§ 1681i(a)(1), (5).
[16] 15 U.S.C. §§ 1681n, 1681o, 1681s.
[17] 15 U.S.C. § 1681b(b)(3)(A).

and preempted specific state laws relating to specific "conduct regulated by" the FCRA (within new subsection (c)). Pub. L. No. 104-208 (1996).

The "subject matters" Congress preempted included the "information contained in consumer reports." 15 U.S.C. § 1681t(b)(1)(E). Where Congress chose to broadly preempt a given subject matter, it identified the section or subsection of the FCRA by number, used the phrase "relating to," and described the subject matter to be preempted. Relevant here, the "subject matter preemption" provision provides that "[n]o requirement or prohibition may be imposed under the laws of **any** State…with respect to **any subject matter** regulated under . . . section 1681c of [the FCRA], **relating to information contained in consumer reports**[.]" 15 U.S.C. § 1681t (emphasis added.).[18]

The legislative history of the FCRA evidences a clear Congressional intent to establish a *uniform* national standard related to credit reporting with which states could not interfere. With regard to the "subject matter" preemption framework, Representative Thomas of Wyoming explained: "[W]e have compromised on the preemption issue so companies will not have to comply with a patchwork of state laws." 140 Cong. Rec. H9797-05, H9811 (1994) (emphasis added). As Representative Castle of Delaware put it, "[t]his Federal preemption will allow businesses to comply with one law on credit reports rather than a myriad of State laws." 140 Cong. Rec. H9797-05, H9815 (1994) (emphasis added). Taken as a whole, the legislative history clearly "reflect[s] an affirmative choice by Congress to set 'uniform federal standards' regarding the information contained in consumer credit reports."[19]

While there is a split of authority on whether section 1681t(b)(1) of the FCRA preempts

[18] 15 U.S.C. § 1681t(b)(1)(E). This provision provides a limited exception for "any State law in effect on September 30, 1996[.]" Thus, no state may adopt laws after 1996 that attempt to regulate, by permitting or prohibiting, the information which may be included in consumer reports. If Congress had intended states to be able to adopt laws governing the content of consumer reports, this savings clause would not have been required.

[19] We note that the Consumer Financial Protection Bureau recently promulgated an interpretative rule purporting to overturn Congress's preemption framework. Bureau of Consumer Financial Protection, 12 C.F.R. pt. 1022, THE FAIR CREDIT REPORTING ACT'S LIMITED PREEMPTION OF STATE LAWS (June 28, 2022). It is well settled that interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Shalala v. Guernsey Memorial Hospital,* 514 U.S. 87, 99 (1995) (internal citations omitted). Moreover, CDIA believes that the CFPB exceeded its limited rulemaking authority - both under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, and the Consumer Financial Protection Act, Title X of the Dodd Frank Act, 12 U.S.C. § 5481 *et seq.*, in promulgating the rule, which renders the rule unenforceable under the Administrative Procedures Act and general Constitutional principles. *See* 5 U.S.C. § 706(2) (setting forth the scope of judicial review courts have to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "contrary to constitutional right, power, privilege, or immunity;" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"). In any case, the scope of preemption is not delegated to any agency to interpret or enforce; therefore, the issue is one to be resolved through the courts as it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

state laws as broadly as CDIA suggests, [20] there is clarity on the specific point that the FCRA preempts state law that attempts to limit the reporting of criminal record information. There is no question on this point since the sole court to have considered that question found that state law was preempted. *Simon v. DirecTV, Inc.*, No. 09CV00852PABKLM, 2010 WL 1452853, at *3-4 (D. Colo. Mar. 19, 2010), *report and recommendation adopted*, No. 09CV00852PABKLM, 2010 WL 1452854 (D. Colo. Apr. 12, 2010). In *Simon*, the district court held that section 1681(b)(1)(E) preempted a Colorado law barring the reporting of criminal history information because section 1681c (formerly, § 605) provided that the FCRA already regulates the reporting of "records of convictions of crime which antedate the report by more than seven years." *Id*. at *4. FCRA § 1681c(a)(2) provides that all conviction records, regardless of their age, may be reported indefinitely; and other criminal records, such as arrests, may be reported for up to seven years. The district court held that the Colorado law limiting the reporting of conviction records to only seven years was preempted because it "concern[ed] the same subject matter," as FCRA § 1681c(a)(2); namely, "the type of information that can be legally disclosed in consumer reports." *Id*. at *4.[21]

[20] *See Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009) (holding that § 16814t(b)(1)(A) preempts common law claims against a CRA related to its sale of reports for prescreening, explaining "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." (citations omitted)); *CDIA v. Swanson*, 2007 WL 2219389 at *9 (D. Minn. 2007) (in finding the FCRA preempted state laws regulating the sale of prescreening reports, the court stated that neither "Minnesota, nor any other state, may prohibit or regulate" what the FCRA permits); *Aleshire v. Harris*, 586 F. App'x. 668, *6 (7th Cir. 2013) ("we recently rejected the argument that section 1681t(b) should be read narrowly to apply only to state statutory claims, and we held that section 1681t(b)'s preemptive force applies equally to state common law claims"); *Sigler v. RBC Bank*, 712 F. Supp. 2d 1265, 1269 (M.D. Ala. 2010) (referring to subject matter preemption as an "absolute immunity provision" and declaring state law preempted where the allegations all related to "prescreening of consumer reports" under §1681t(b)(a)(A)); *Pinson v. Equifax Credit Info. Services, Inc.*, 316 F. App'x. 744 (10th Cir. 2009) (unpublished opinion) (holding state law claims for negligence were barred by 15 U.S.C. § 1681t(b)(1)(F)); and *Marshall v. Swift River Academy, LLC*, 327 F. App'x. 13 (9th Cir. 2009) (unpublished opinion) (state law claims barred by 15 U.S.C. § 1681t(b)(1)(F)); *Purcell v. Bank of Am.*, 659 F.3d 622, 625 (7th Cir. 2011) (finding claims related to inaccurate furnishing of data preempted by 1681t(b)(1)(F) stating "[the] extra federal remedy in § 1681s-2 was accompanied by extra preemption in § 1681t(b)(1)(F), in order to implement the new plan under which reporting to credit agencies would be supervised by state and federal administrative agencies rather than judges.") (relying on *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009)); *c.f. Consumer Data Indus. Ass'n v. Frey*, 26 F.4th 1 (1st Cir. 2022) (*reh'g denied*) (holding §1681t(b)(1)(E) should be read narrowly, not broadly, which only preempts state laws that regulate those specific items of information mentioned in 15 U.S.C. § 1681c, and remanding the case for further proceedings); and *Galper v. JP Morgan Chase*, 802 F.3d 437, 446 (2d Cir. 2015) (holding that section 1681t(b)(1)(F) should be read narrowly, and not broadly, but that nonetheless the FCRA preempted "those claims that *concern* the furnisher's responsibilities.").

[21] *CDIA v. Frey* is not inconsistent with the *Simon* court's reading of the FCRA. In *Frey*, the First Circuit declined to find that the FCRA's preemption provision 1681t(b)(1)(E) preempted all state

Respectfully, the fact that there is undoubtedly federal preemption of at least some, if not all, of the kind of information that any model rules would propose to regulate (criminal arrest data, criminal conviction data, landlord eviction proceedings, etc.), weighs in favor of the ULC not engaging in the drafting of a set of rules that may well invite more litigation and create more uncertainty.

D. Any restriction on the contents of consumer reports would also infringe on CDIA members' rights to free speech guaranteed by the First Amendment.

By restricting the right of consumer reporting agencies to include criminal history information in a report, the state would be impermissibly interfering with the CRAs' right to free speech. In short, the "right to speak is implicated when information [one] possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) (quoting *Seattle Times Co. v. Rhinehard*, 467 U.S. 20, 32 (1984). In *Sorrell*, the Supreme Court overturned a Vermont law that attempted to preclude pharmaceutical sales companies from using medical prescriber information for marketing purposes, while allowing that information to be used and shared for other approved purposes by third parties. *Id.* at 558-559. By targeting who may use the information and their purposes, the law imposed both content-based and speaker-based restrictions on speech. *Id.* at 563-564. Ultimately, the state's concern over consumer and provider privacy did not justify the intrusion on speech, and the court held that Vermont failed to sufficiently tailor the restriction given the clear burden on speech. *Id.* As the Supreme Court explained:

> The State seeks to achieve its policy objectives through the indirect means of restraining certain speech by certain speakers—that is, by diminishing detailers' ability to influence prescription decisions. **Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects.** But the "fear that people would make bad decisions if given truthful information" cannot justify content-based burdens on speech.

Id. at 576-577 (emphasis added) (citations omitted).

Here, state bans on the dissemination and use of criminal record information would suffer from the same defects. Criminal history information is public record information and is available for use by the public. The information has value and is an important tool in assuring safety of persons and properties in multi-family housing communities. Prohibiting certain members of the public (CRAs and landlords) from using this information for their desired purpose (the preparation of reports) would be subject to the same heightened scrutiny as the law in *Sorrell*.

E. Conclusion

Congress has already adopted a uniform national standard of consumer reporting in the United States within the Fair Credit Reporting Act. The FEHC should not draft a rule that interferes with that federal standard. Moreover, the Rule, as currently drafted, sweeps too broadly and could

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regulation of the content of consumer reports; however, the court suggested in its opinion that where §1681c addressed the type of information the state law would regulate, the state law may be preempted. *See Frey,* 26 F.4th at 23-24 (where the court remanded back to the district court for further briefing).

be argued to restrict the activities of persons not actually engaged in the process of evaluating applications for employment. CDIA respectfully suggests that the definition of "employer" expressly be clarified to not include CRAs.

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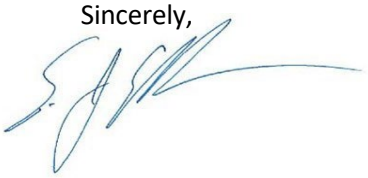
Thank you for the opportunity to share our views on the anticipated rulemaking regarding employment regulations regarding criminal history. Please contact us if you have any questions or need further information based on comments.

Sincerely,



Eric J. Ellman

Senior Vice President, Public Policy & Legal Affairs