

**Transition Paper for the Federal Trade Commission:
It's Time to Regulate the Background Screening Industry**

**From: Community Legal Services, Inc., Philadelphia, PA
Legal Action Center, New York, NY
National H.I.R.E. Network, New York, NY
National Employment Law Project, Oakland, CA
Sargent Shriver National Center on Poverty Law, Chicago, IL
National Consumer Law Center, Boston, MA (on behalf of its low income clients)**

Executive Summary

The title of this paper succinctly states its theme: **The Federal Trade Commission (FTC) must make a priority of regulating the commercial background screening industry.** The commercial background screening field has burgeoned over the last decade, with virtually no federal oversight, despite the applicability of the Fair Credit Reporting Act (FCRA) to its members and the products they generate. Working without federal supervision, many commercial background screening firms have produced poor quality reports that have cost job seekers employment. In the most extreme cases, these inaccurate and misleading screening reports have shut out people from their careers. FTC oversight is clearly called for and long overdue, especially given the anticipated explosion of background checking as millions of unemployed workers in our current economic downturn seek new jobs.

Commercial background screeners provide a growing number of services to employers at this point, including “theft databases.” However, their bread and butter remains criminal background checking. The most common FCRA violations in criminal background reports prepared by commercial background screeners include:

- Inaccurate reports (data is simply incorrect);
- Mismatched records of identically named people, resulting in reports on the wrong person;
- ‘Over-reporting’ information with a disclaimer when uncertain of a match;
- Not understanding and correcting criminal identity theft;
- Presenting criminal record information in misleading formats prejudicial to the worker;
- Not eliminating expunged cases from their privately maintained “shadow databases.”

In addition, employer compliance with FCRA mandate -- particularly the requirement that the employer provide the worker with a copy of the background screening report relied on in advance of denying or terminating employment--is the exception rather than the rule.

The organizations submitting this paper make the following recommendations for FTC action.

1. ***FTC should make enforcement actions for FCRA compliance by commercial background screeners a high priority.***
2. ***FTC should audit some of the major commercial background screeners for common FCRA violations.***
3. ***FTC should likewise audit some major, nationwide employers for compliance with FCRA mandates.*** Our experience shows that employer compliance with FCRA mandates is the exception rather than the rule, and may cost workers the jobs they seek.
4. ***FTC should promulgate regulations or industry standards for commercial background screeners.***
5. ***FTC should support private enforcement efforts in FCRA litigation against commercial background screeners.***
6. ***FTC should bring special regulatory attention to the theft databases.***

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The organizations submitting this paper represent and advocate for people with employment problems related to criminal records, including problems caused by background reports prepared by commercial background screeners. They have also seen other legal problems caused by these firms, such as those caused by inaccurate and misleading “theft” databases. In addition, the National Consumer Law Center has decades of experience as an advocate representing consumers under the Fair Credit Reporting Act (FCRA).

The results of criminal background checks are crucially important to job seekers and current employees who are screened, as the reports often determine whether employment will be offered (or whether an employee will be terminated). At this point, there can be no question that having a criminal record will reduce employment prospects substantially.¹ To the extent that errors about criminal and other records are made in reports prepared by commercial background screeners, these errors can cost American workers and their families dearly in lost earnings. Given the widespread unemployment resulting from the current economic turmoil, millions of Americans seeking new jobs will be at the mercy of commercial background screeners in the next few years.

The title of this paper succinctly states its theme: **The Federal Trade Commission (FTC) must make a priority of regulating the commercial background screening industry.** The commercial background screening field has burgeoned over the last decade, with virtually no federal oversight, despite the applicability of FCRA to its members and the products they generate. Working without federal supervision, many commercial background screening firms have produced poor quality reports that have cost job seekers employment. In the most extreme cases, these inaccurate and misleading screening reports have shut out people from their careers. FTC oversight is clearly called for and long overdue, especially given the anticipated explosion of background checking as millions of unemployed workers in our current economic downturn seek new jobs.

¹ See, e.g., the research cited in Shawn Bushway, Shauna Briggs, Faye Taxman, Meridith Thanner, and Mischelle Van Brakle, “Private Providers of Criminal History Records: Do You Get What You Pay For?” in Shawn D. Bushway, Michael Stoll and David Weiman (eds.), Barriers to Reentry? The Labor Market for Released Prisoners in Post-Industrial America (Russell Sage Foundation 2007) [hereinafter “Private Providers of Criminal History Records”], at 174.

The Rise of the Commercial Background Screening Industry

Employers conducting criminal background checks can get them from a variety of sources. Sometimes, employers obtain “rap sheets” directly from public sources, such as the courts or their state’s central repository. However, many employers purchase criminal background reports from commercial background screeners, which in turn obtain the information from public sources and prepare reports.

The burgeoning growth of the commercial background screening industry is well documented. A recent report by the National Task Force on the Commercial Sale of Criminal Justice Record Information was the first comprehensive examination of the role of commercial vendors.² Although the task force was unable to quantify the number of commercial background screeners or the checks they produced, it estimated that there are hundreds, maybe even thousands, of regional and local companies, in addition to several large industry players.³ Among the latter, the report noted that ChoicePoint conducted around 3.3 million background checks in 2002, most of which included a criminal record check.⁴ USIS Transportation Services reported having 30,000 clients and processing more than 14 million reports per year.⁵

As a result of the industry’s growth, it has coalesced around a trade association, the National Association of Professional Background Screeners (NAPBS). Founded in 2003, NAPBS was founded to promote and protect the screening industry. Currently, NAPBS boasts of having 586 members. Among its committees is a “government relations” group with the mission of “coordinat[ing] and engag[ing] in policy and political advocacy with

² SEARCH, the National Consortium for Justice Information and Statistics, Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information (2005) [hereinafter National Task Force Report on Commercial Sale of Criminal Record Information], at vi.

³ Id. at 7. Another study identified more than 400 commercial background screeners as a result of a search of the Internet. “Private Providers of Criminal History Records,” supra note 1, at 176.

⁴ Id. ChoicePoint, which claims to check job applicants for half of the country’s 100 largest companies, was acquired by the Reed Elsevier Group for \$4.1 billion in February 2008. Chad Terhune, “The Trouble with Background Checks,” BusinessWeek (May 29, 2008).

⁵ National Task Force Report on Commercial Sale of Criminal Record Information, supra note 2, at 8.

Federal, State, and Local Government,” and it retains Greenberg Traurig, LLP as its lobbyist.⁶

By contrast, the millions of people who are the subjects of these background checks have no organized voice, beyond a score of organizations like ours. For the countless numbers of violations of FCRA by this industry, there are only a handful of reported FCRA decisions in litigation involving background checks. However, the consequences of FCRA violations in the background check industry are often quite severe – jobs, and sometimes careers, lost.

With the financial success of the criminal background screening business, commercial background screening firms have quickly expanded into related products for their employer customer base, many of which we have discovered when clients have presented them as the reason that they lost a job. ChoicePoint, for instance, has a theft database known, in an Orwellian twist, as “Esteem,” through which subscribers can learn whether a job candidate has been fired for or prosecuted for theft. USIS offers “Drive-A-Check,” or “DAC” as it is better known, an employment history database used by 2,500 companies that employ persons with commercial drivers licenses. Many companies offer “social security number traces.” For each type of database, the industry has faced few, if any, attempts to insure that their operations comply with FCRA, while untold numbers of workers have been caused personal and financial hardship because they are at the mercy of the commercial background screeners.

FCRA Obligations for Commercially Prepared Background Checks

The commercial background screening industry’s members are “consumer reporting agencies” governed by FCRA.⁷ Numerous FCRA rights are implicated with respect to both the commercial background screening company and the employer that purchases their reports.

Among the duties of commercial background screeners compiling reports for employers are the following.

- Commercial background screeners may not report arrests or other adverse information (other than convictions of crimes) which are more than seven years old, provided that the report does not concern employment of an individual who

⁶ The source of the information provided in this paragraph is NAPBS’s website, www.napbs.com.

⁷ 15 U.S.C. §§ 1681-1681u. See Dalton v. Capital Associated Industries, 257 F.3d 409, 415 (4th Cir. 2001); Poore v. Sterling Testing Systems, Inc., 410 F.Supp.2d 557, 569 (E.D. Ky. 2006); Obabueki v. ChoicePoint, Inc., 145 F.Supp.2d 371, 394-96 (S.D.N.Y. 2001), affd, 319 F.3d 87 (2d Cir. 2003).

has or will have an annual salary that is \$75,000 or more.⁸ 15 U.S.C. §§ 1681c(a)(5), 1681c(b)(3).

- Commercial background screeners must use “reasonable procedures” to insure “maximum possible accuracy” of the information in the report. 15 U.S.C. §1681e(b).
- A commercial background screener reporting public record information for employment purposes which “is likely to have an adverse effect on the consumer’s ability to obtain employment” must either notify the worker that the public record information is being reported and provide the name and address of the person who is requesting the information or the commercial background screener must maintain strict procedures to insure that the information it reports is complete and up to date. 15 U.S.C. §1681k.

Among the duties that FCRA imposes when an employer uses a report provided by a commercial background screener for purposes of a hiring decision are the following.

- The employer must provide a clear written notice to the job applicant that it may obtain a consumer report. 15 U.S.C. § 1681b(b)(2). It also must obtain written authorization from the job applicant to get the report. 15 U.S.C. § 1681b(b)(3). Therefore, in situations where a commercial background screener is involved, persons with criminal records ought to be made aware that their criminal record will be scrutinized.
- If the employer intends to take adverse action based on the report, a copy of the report and an FTC Summary of Rights must be provided to the job applicant before the action is taken. 15 U.S.C. § 1681b(b)(3). The obvious reason for this requirement is to permit a job applicant to address the report before an employment decision is made.
- Afterwards, the employer, as a user of a consumer report, must notify the job applicant that an adverse decision was made as a result of the report and must provide, among other things, the name, address and telephone number of the commercial background screener and the right to dispute the accuracy or completeness of the report. 15 U.S.C. § 1681m(a).

Unfortunately, while commercial background screeners tend to acknowledge the applicability of FCRA to their product, a review of their websites often does not reveal procedures to comply with these legal requirements.⁹

⁸ For many years, the seven year limit also applied to reporting of convictions. However, this seven year limit was eliminated by Congress in the Consumer Reporting Employment Clarification Act of 1998, P.L. 105-347, Sect. 5.

⁹ “Private Providers of Criminal History Records,” supra note 1, at 186-88.

Common FCRA Violations by Commercial Background Screeners on Criminal Record Reports, and by Employers that Use the Reports

Legal advocates representing people with criminal records regularly see cases in which the criminal record leading to a client being rejected was generated by a commercial background screener. We have found the following inaccuracies with the reports and other non-compliance with FCRA's requirements by the commercial background screeners and the employers who purchase their reports.

1. **Inaccurate reports:** Sometimes, data simply is reported incorrectly, such as when the grade of the offense (felony, misdemeanor, etc.) is wrong.

In a recent case, Community Legal Services, Inc. (CLS) challenged a report that did not provide outcomes of arrests, information readily available of the website of the Administrative Office of Pennsylvania Courts. Outcomes for each such arrest were favorable to the employee who was fired, including acquittals on numerous serious charges. Unfortunately, and remarkably, the commercial background screener rejected the challenge.

2. **“Mismatching” of records:** In a growing number of cases, a criminal record is reported by the commercial background screener that belongs to a different person of a same or similar name (sometimes called a “false positive”). This danger is especially present for people with common names, and for this reason affects Hispanic individuals disproportionately. Often, the commercial background screener has ignored data indicating that the record did not belong to the subject of the background check, such as a date of birth, middle initial, or suffix (such as ‘Sr.’ or ‘Jr.’).

CLS brought and settled FCRA litigation against a commercial background screener that wrongly reported a conviction for our client. Although the person who was convicted had a name match with our client, their dates of birth did not match. Moreover, the screener had also obtained a clear report on our client from the Pennsylvania State Police (the PSP) and had looked at court records. The PSP report was more reliable, because its database is searchable by social security number as well as date of birth. Nevertheless, the conviction was reported as belonging to our client, who was fired as a result of it.

In another “mismatch” case, the commercial background screener searched the database of the Administrative Office of Pennsylvania Courts for a client with a common name. It reported 18 different criminal cases against our client—none of which was his. The screener failed to examine the year of birth connected with each case; almost none of the defendants were even born in the same decade as our client! This case illustrates why searches by name only should never be permitted.

In another case, the screener reported that our client was in sex offender databases in two states with which our client has no connection whatsoever. When one state's sex offender registry was checked, there was no person by our client's name recorded. For the second state, there was a registered person with a similar name, but that person was 22 years old, while our client was 58 years old.

Several commercial background screeners appear to cull their records from state "inmate lookup" databases. These databases—which frequently list the locations of inmates in state custody, the crimes which resulted in the incarceration and the sentence imposed—were established to permit families, counsel and crime victims to locate inmates and were never intended as criminal record repositories. The information they list is incomplete and not always vetted for accuracy.

What appears to be a recent growth area for the commercial background screening industry is selling "50-state" background checks. In most cases, the screener appears to use criminal court databases which permit matches by only name and date of birth. In a country of 300 million people, such searches lead to false positives, even when there is an exact match by date of birth as well as name, and particularly for people with common names. We have seen several such cases.

The errors that we have seen in individual cases have been borne out in research. In a study of 28 commercial background screeners, six required only that a name be provided, and five required only name and date of birth.¹⁰ The research and the cases show the need for standards concerning adequate indicia of reliability for matching purposes.

- 3. "Over-reporting" information:** Sometimes if a commercial background screener is not sure about a match, it will report a criminal case in a manner such as the following: "There is a conviction with Mr. X's name. This may or may not be your Mr. X." Unfortunately, employers usually assume that the commercial background screener has done the work for them (that is, after all, why they spent the money for the background check) and reject the person rather than inquiring further.

Another variation on this theme takes place when screening reports include criminal record information that predates the stated scope of the search period. For example, ChoicePoint sometimes notes that the search period is limited to seven years, but then reports conviction history that took place more than seven years ago. This is misleading, and may cause problems for the prospective employee who has correctly answered "no" when asked whether he has been convicted of a crime within the last seven years, only to have his older crimes

¹⁰ Id. at 187. Moreover, in our experience, even firms that require more information to be submitted by their customers (such as social security numbers) may perform checks and provide results based solely on name and/or date of birth.

reported. The employee may then be denied the job on the mistaken assumption that he has lied on his application.

4. **Not understanding, and failing to address, criminal identity theft:** Criminal identity theft occurs where someone who was arrested used the victim's name and personal identifiers as an alias, resulting in the perpetrator's record being reported as the victim's record. Criminal identity theft is a surprisingly common problem, with the primary criminal justice report examining this phenomenon estimating that 400,000 Americans were victimized in a year's period.¹¹ But in some cases of criminal identity theft, commercial background screeners refuse to correct their reports even when proof of the identity theft is provided, such as verification by law enforcement that is based on a fingerprint comparison.
5. **Presenting the criminal record information in a way that is prejudicial to the worker:** Commonly, commercial background screeners lay out their reports in a manner that several criminal charges connected with one arrest look like they involve multiple incidents. This is a very serious issue, as one or two criminal cases can result in a 30-page report. In situations where a criminal case initiates in one court and is transferred to another court for adjudication or is appealed, we have also seen commercial background screeners report the same case twice or more (and have had challenges on such grounds rejected). Other reports provide information under misleading headings. We have seen non-criminal conviction information listed under the heading "Scope of Search: Felony and Misdemeanor," for example.
6. **Maintaining their own databases and not eliminating expunged cases:** Several of the larger commercial background screeners sometimes create their own "shadow databases" from information that they have obtained from public sources. However, when a case has been expunged from the public record, it sometimes remains in the company's database.¹² The victims of this practice often have had no interaction with the criminal justice system for years. In states like Illinois where the legislatures have granted expungement rights, disclosure of these records undermines these legislative policy decisions, as well as doing a disservice to the persons whose expungements are undermined.
7. **Lack of employer compliance with their FCRA responsibilities:** If, for instance, employers complied with their obligation to provide job applicants with a copy of their report prior to an adverse employment decision, many of the errors and mis-matches might be worked out. Moreover, even people whose criminal records are reported correctly could have an opportunity to put their best foot

¹¹ Report of the BJS/SEARCH National Focus Group on Identity Theft Victimization and Criminal Record Repository Operations (Dec. 2005), at 2.

¹² Adam Liptack, "Criminal Records Erased by Courts Live to Tell Tales," New York Times, Oct. 17, 2006.

forward, to explain why they present minimal risk despite their records. However, in our experience, employers seldom comply with this obligation.

“Theft” Databases

In the last two years, CLS, which has a broad employment law practice for low wage workers, became aware of “theft” databases as retailer workers who were fired for alleged financial improprieties learned that they had been put in a database that other retailers accessed when they applied for work with them. Very few of the cases that CLS has seen involve “theft” as it is typically understood (that is, taking money or merchandise from the store). To the contrary, they have involved alleged non-compliance with employer policies on issues such as the use of employee discounts or “rewards” policies for purchasing store merchandise.

In each case, CLS’s client signed an “admission” under duress from loss management personnel and often with assurances that the written statement would resolve the matter. In no case was the worker advised that the statement would be submitted to a theft database that is accessed by other retailers in the hiring process. Consequently, they have been stymied from finding work in the retail field in which they are experienced.

In two cases now in litigation brought by private counsel, CLS clients who deny having committed theft have been harmed by ChoicePoint’s Esteem database.

- Mr. P was an assistant manager for a drug store which accused him of cash register fraud and theft of merchandise. According to the finding of an unemployment compensation referee, he did not commit such acts, and he signed a so-called “admission” under duress. Nevertheless, Esteem’s report has cost Mr. P at least two jobs of which he is aware. He now works as a barista at Starbucks, not having been able to find another managerial-level job in retail.
- Ms. M had worked in retail for decades, most recently as an assistant manager for a drug store. She was accused of misusing her employee discount card by permitting her grand-niece whom she had raised to use it. Ms. M had thought that she was complying with the employer’s policy of permitting employee discount use by a “co-dependent family member who resides with the associate.” Nevertheless, she signed an admission which, she was assured, would conclude the matter. To the contrary, this experienced retail manager endured a lengthy unemployment spell until she was able to convince another retailer to give her a chance.

Both Mr. P and Ms. M challenged their inclusion in Esteem’s theft database. In both cases, ChoicePoint failed to reinvestigate the incident, and the reports stood.

ChoicePoint’s operation of its “theft” database violates 15 U.S.C. §1681e(b), requiring reasonable procedures to assure the maximum possible accuracy of the information, including in the following ways.

- ChoicePoint provides no uniform standards or criteria for what constitutes “theft” or “fraud” or “signed admissions statements,” leaving its contributing subscribers to make their own determinations.
- It does not review the “signed admissions statements,” essentially publishing any report that is labeled by the furnisher as a theft.
- Subscribers are allowed to hide from the employees who sign the admissions statements the fact that their statement will be provided to a national database that will be searched by other retail employers as part of their hiring protocols.
- “Admissions statements” can be obtained in coercive environments, without any means for retractions.
- ChoicePoint’s Esteem reports do not allow any exculpatory or contradictory material, such as a finding in an unemployment compensation procedure that the worker did not commit misconduct or “confessed” under duress.

Not only workers fired for theft end up in the Esteem database; many alleged shoplifters also do. Nor does ChoicePoint have the only theft database, although Esteem may be the most prominent; so does, for instance, USIS. And to add insult to injury, these cases are often paired with “civil recovery” efforts, in which lawyers write demand letters which threaten litigation to recover the alleged loss, damages, and often hefty attorneys’ fees.¹³ Given the vulnerable situations in which people who are in these databases find themselves, these databases cry out for FTC oversight.

Recommendations

1. ***FTC should make enforcement actions for FCRA compliance by commercial background screeners a high priority.*** Certainly the growth of the industry and the industry’s impact on the employment of millions of Americans who are looking for work demands FTC’s attention.
2. ***FTC should audit some of the major commercial background screeners for common FCRA violations.*** The problems that we have listed could be used as a checklist.

¹³ Esteem indicates that it “partners” with Palmer, Reifler & Associates, a Florida law firm from which CLS has most often seen such exorbitant demand letters. Palmer Reifler’s collection methods have resulted it being sued in a national RICO class action. *Veronica Kelly v. Palmer, Reifler & Associates*, No. 08-21843-CIV-Moreno/Torres (S.D. Fla. filed June 26, 2008). See also, e.g., Ann Zimmerman, “Big Retail Chains Dun Mere Suspects in Theft,” *Wall Street Journal* (Feb. 20, 2008).

3. ***FTC should likewise audit some major, nationwide employers for compliance with FCRA mandates.*** Our experience shows that employer compliance with FCRA mandates is the exception rather than the rule, and may cost workers the jobs they seek.
4. ***FTC should promulgate regulations or industry standards for commercial background screeners.*** At the least, these standards should govern matching and report presentation.
5. ***FTC should support private enforcement efforts in FCRA litigation against commercial background screeners.*** An impediment to meaningful FCRA enforcement is the holding of several courts of appeals interpreting the Act as precluding private actions for injunctive relief. Where litigation against commercial background screeners reveals systemic procedural deficiencies, the only type of action that could feasibly address the problem is a request for class-wide injunctive relief. FTC should support such efforts – as a necessary law-enforcement supplement to its limited resources – by issuing a regulation or policy statement endorsing the availability of private injunctive relief and/or by filing amicus briefs in cases where commercial background screeners take the position that such relief is not available under FCRA.
6. ***FTC should bring special regulatory attention to the “theft” databases.*** Without this regulation, retail workers in particular are vulnerable to being shut out of their profession unfairly.

We welcome the opportunity to provide work with you to implement these suggestions. Please do not hesitate to contact us if you have questions or would like further information on any of the matters we have discussed in this paper.

Contact: Sharon M. Dietrich, Managing Attorney, Community Legal Services, 1424 Chestnut Street, Philadelphia, PA 19102. Phone: 215-981-3719. Email: sdietrich@clsphila.org.

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