

Uniform State Laws Commission
Response to Ellman Letter, Parts 3&4
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1) Delay, if any, from seeking dispositions is well worth it, for purposes of obtaining outcomes.

- Reporting arrests without dispositions will almost always harm the defendant (if the case has been completed). Convictions on all counts is highly unusual. In a typical plea bargain, the most serious charges are the ones compromised by the DA. And of course many cases are dropped completely (and thus may not be reportable if that outcome is determined). The charges could also reflect an arrest on which prosecution was declined; the last data I saw on this is that only 28 states require the central repository to be notified if prosecution is declined.¹
- The industry's objection to Section 6(e)(2) (removing cases where 18 months have passed without conviction or pending case) is odd, because I think states already tend to have this provision or something like it. At least Pennsylvania does; 18 Pa. CSA Sect. 9121(b)(2) provides for such after 3 years (not 18 months). Provisions like this in state law are often the result of the DOJ regs.²
- Even many of the good commercial screeners would verify such results (indeed, all results). See website of [Concerned CRAs](#):

Background screening firms participating in Concerned CRAs have certified that they practices conform to the [Concerned CRAs guidelines](#):

When using criminal records in databases in the context of employment-related screening, exclusive of the screening of volunteers, tenants, and other non-employment relationships:

1. Criminal records databases compiled by non-government entities will only be used as indicators of possible records. Prior to making any report to an employer about a criminal record from a database, the CRA will verify the information directly with the

¹ . See citations and summary of state statutes in Paul L. Woodard and Eric C. Johnson, Compendium of State Privacy and Security Legislation: 2002 Overview, NCJ 187669 (U.S. Dept. of Justice, Bureau of Justice Statistics, Nov. 2003), available at <http://www.ojp.usdoj.gov/bjs/abstract/cspsl02.htm>. This awesome paper tracks the states' public records laws; one of the SEARCH guys told me that DOJ had no funding to update it, which was a terrible shame.

² 28 CFR Part 20.

reporting jurisdiction. This ensures that employers make decisions based on accurate and up-to-date information.

- Many employers do not await background check results before hiring people. Alas, we see this when our clients are fired during orientation (or other early days on the job).
- It is hard to see that “faster though inaccurate” helps any employee. You are less likely to get the job because of possible pending charges than because the BGC took too long. “Faster” only helps screeners make their case to their customers.

2) ***The FCRA is not better than even existing public record laws.***

- Substantively, the FCRA provides two accuracy standards.
 - CRAs must use “reasonable procedures” to insure “maximum possible accuracy” of the information in the report. 15 U.S.C. §1681e(b). As the words indicate, this is not remotely the same as “accuracy,” which is the standard of most public record laws. Mere inaccuracy does not establish liability under this provision of the FCRA; it must be caused by the screener’s inadequate procedures. Philbin v. Trans Union Corp., 101 F.3d 957, 963 (3d Cir. 1996)(establishing *prima facie* case). Whether a screener’s procedures are inadequate enough to lead to liability involves a balancing test, ““weighing the potential harm from inaccuracy against the burden of safeguarding against such inaccuracy.” Wilson v. CARCO Group, Inc., 518 F.3d 40, 42, 27 I.E.R. Cas. (BNA) 394 (D.C. Cir. 2008).
 - CRAs 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 person that the public record information is being reported and provide the name and address of the person who is requesting the information at the time that the information is provided to the user or the CRA must maintain strict procedures to insure that the information it reports is **complete and up to date**. 15 U.S.C. §1681k. Note that this standard of accuracy, which is not mentioned by the screeners in their letter, implicates the requirement of obtaining dispositions.
- Procedurally, the FCRA is not a better remedy.
 - Commercial screeners’ disputes remedies are uneven, to say the least. Notably, it can be impossible to determine how to file an FCRA dispute. Often, the screener is not identified. Even if you figure out the screener, you won’t necessarily know how to dispute. I recently filed a CFPB complaint when not only did the company’s website (a small vendor named “Sterling” that you may have heard of) fail to provide an address to which I could send documentation; their staff would not give me an address on the phone without a client release.

- Most enforcement is through lawsuits. You need a lawyer (and there are only a handful of lawyers in the country with experience suing background screeners), probably an expert, a federal judge, and lots of time on your hands. You will not be getting the job that brought you there.
 - By contrast, I have found the PA State Police’s “access and review” procedure (the procedure used by most states) to work well. It is easy to access (they include a form on your record that you return with your dispute) and almost always reliable. If you disagree, you can get an administrative hearing. In my years, I have had to ask for only one hearing, and the case was resolved without it.
- The FCRA has not prevented legions of errors by the commercial screening industry, leading to legions of lawsuits. Most common across the industry and troubling:
- Lack of adequate matching criteria (ie, my client Jose Rodriguez getting 60+ pages of cases that belonged to others by the same name; any case in the country without a DOB was reported to him)
 - Lack of procedures to remove expunged/sealed cases (CLS has had three class actions on this issue).
 - For more, see NCLC’s Broken Records report (which the industry absolutely hates).