CDIA
CONSUMER DATA INDUSTRY ASSOCIATION
Empowering Economic Opportunity

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The Honorable Deborah Rose
Chair, City Council Committee on Civil Rights
New York City Council
New York, NY 10007

Re: Int. No. 857, regarding the use of consumer credit history for employment purposes

Dear Chairwoman Rose:

I write on behalf of the Consumer Data Industry Association (CDIA) to offer our perspective on the fair and appropriate use of credit histories by employers in appropriate circumstances.

Thank you for allowing me appear before your committee during the April 11 hearing on the use of credit reports for employment purposes. CDIA has long played an important role in public policy discussion related to the use of credit history for employment purposes and we are grateful to continue this critical discussion with you and your committee.

By way of background, CDIA was founded in 1906 and is the international trade association that represents approximately 200 consumer data companies. CDIA members represent the nation's leading institutions in credit reporting, mortgage reporting, check verification, fraud prevention, risk management, employment reporting, tenant screening and collection services.

As your committee continues its discussion on the use of credit histories for employment purposes, we encourage you to keep in mind four important points. First, the use of credit reports for employment purposes is legally protected and the law provides consumers with substantial protections and means of enforcement. Second, credit reports for employment purposes are objectively tested. Third, credit reports for employment purposes are reliably proven predictors of risk. Finally, employers' use of credit reports is responsible, focused, and consistent with business necessity.

CDIA shares a core value with most Americans: employers want to hire the best people they can for the jobs available, and job applicants should not fear unlawful discrimination. However, in a climate of economic uncertainty, where employers are likely choosing from a large employment pool, they need to be critically careful about protecting their businesses and their customers. A credit report offers a seven-year look into an applicant's credit history and any difficulties caused by current conditions can be viewed in light of years of a prior positive credit history.

A. Credit reports for employment purposes are legally protected; Consumers are provided with substantial protections and means of enforcement.

1. *General protections*

The federal Fair Credit Reporting Act (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.[1] 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.[2]
- Consumers have a right to dispute information on their credit reports with consumer reporting agencies or lenders and the law requires dispute resolution in not more than 30 days (45 days in certain circumstances). If a dispute cannot be verified, the information subject to the dispute must be removed.[3]
- 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.[4]

2. *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. The FCRA allows employers to review the credit histories of prospective and existing employees.[5] However, this legal privilege comes with certain obligations. In short, under the FCRA (15 U.S.C. Sec. 1681b(b)):

- 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

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[1] 15 U.S.C. Sec. 1681e(b).
[2] *Id*., 1681s-2(a)(1)-(2).
[3] *Id*., 1681i(a)(1), (5).
[4] *Id*., 1681n, 1681o, 1681s.
[5] *Id*., 1681b(a)(3)(B).

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.

3. *Credit reports do not contain racial/ethnic information; credit scores are not used for employment screening*

It is critical to consider several other protections in place for employment screening use of credit reports.

- Credit reports do not contain a consumer's race, gender, religion, creed, color, marital status, or national origin.
- Credit *scores* are not used for employment purposes.

4. *The use of credit histories to discriminate against suspect classes in employment violates existing federal and state law.*

Federal and state laws are clear. The use of a credit history to discriminate against suspect classes would violate the law. In announcing a suit against Kaplan Higher Education Corp. the EEOC said that "[i]It is a violation of Title VII [of the Civil Rights Act of 1964] to use hiring practices that have a discriminatory impact because of race and that are not job-related and justified by business necessity.[6] The EEOC filed suit in October 2009 against the Freeman Companies in federal court in Baltimore, again because of alleged discrimination in the company's use of credit histories.

B. Credit reports for employment purposes are objectively tested

The reliability of consumer reports is proven through economic incentives, regulators' reports, and consumer reviews.

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[6] EEOC Press Release, available at http://www.eeoc.gov/eeoc/newsroom/release/12-21-10a.cfm (last viewed Feb. 7, 2011). In Jan. 2013, the U.S. District Court granted Kaplan's motions to strike an expert witness' testimony and dismiss the case. The Court ruled that the EEOC had failed to provide reliable statistical evidence of discrimination, and, therefore, failed to satisfy its threshold burden of proving that Kaplan's use of credit history information resulted in a disparate impact on protected class members. *EEOC v. Kaplan Higher Educ. Learning Corp*., U.S, Dist. Ct. (N.D. Ohio), No. 1:10 CV 2882, Memorandum of Opinion and Order, Jan. 28, 2013.

1. *Economic incentives to ensure maximum reliability*

In addition to legal obligations and industry standards, there is an even bigger incentive for credit reports to be reliable. The FTC put it best: there is a "market incentive[] to maintain and improve the accuracy and completeness of [credit] reports."[7] There are approximately 200 million Americans with credit reports and credit reports are requested more than 27 million times each and every day. If credit reports were not reliable, they would not be used by businesses to manage their risks.

2. *Debunking advocacy reports*

Reports issued by the U.S. Public Interest Research Group (PIRG), Consumers Union (CU), and the Consumer Federation of America (CFA) are often cited to perpetuate the myth of inaccuracies.[8] The Federal Trade Commission reviewed the PIRG and CU reports and found "questions have…been raised about the sample size and representativeness of the samples", and neither of these organizations "relied on the participation of all of the…key stakeholders in the credit reporting process."[9] The General Accountability Office reviewed available literature on perceived inaccuracies, including the PIRG, CU, and CFA reports and concluded that:

> [t]wo of the studies did not use a statistically representative methodology because they examined only the credit files of their employees who verified the accuracy of the information, and it was not clear if the sampling methodology in the third study was statistically projectable. Moreover, all three studies counted any inaccuracy as an error regardless of the potential impact. Similarly, the studies used varying definitions in identifying errors, and provided sometimes obscure explanations of how they carried out their work. Because of this, the findings may not represent the total population of credit reports maintained by the CRAs. Moreover, none of these groups developed their findings in consultation with members of the credit reporting industry….[10]

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[7] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003, Dec. 2004, 7* ("FTC Report, 2004").

[8] For example, the first PIRG report, issued in 1998, reviewed 133 files of 88 people (out of 200 million Americans with credit histories). The second PIRG report in 2004 reviewed the credit reports of 154 people, most of whom were PIRG members or staffers. The sample sizes were not representative of the population, nor were the conclusions drawn statistically sound. For example, PIRG did not seek the input of creditors with regard to likelihood of an adverse credit decision, and based its conclusions on its own staffs' opinions as to who would or would not receive credit. Consumers Union's report was based on its asking 57 employees and their relatives to obtain their credit reports and identify anything they thought was wrong, regardless of whether it might actually impact the credit decision and again based on the consumers' own conclusions.

[9] FTC Report, 2003, iii.

[10] *General Accounting Office, Consumer Credit – Limited Information Exists on Extent of Credit Report Errors and Their Implications for Consumers*, GAO-03-1036T (July 31, 2003), 9-10.

3. *What regulators report*

The Federal Reserve has reviewed the reliability of consumer reports and made several observations. Most importantly, the Federal Reserve, which looked at over 300,000 credit reports, noted that:

> Overall, research and creditor experience has consistently indicated that credit reporting company information…generally provides an effective measure of the relative credit risk posed by prospective borrowers.[11]

4. *New academic and government research*

In 2013, the Federal Trade Commission (FTC) published a congressionally mandated study on credit report accuracy. The FTC looked at all of the primary groups that participate in the credit reporting and scoring process: consumers; lenders/data furnishers (which include creditors, lenders, debt collection agencies, and the court system); score developers; and the national credit reporting agencies. The FTC report is based on work with 1,001 participants who reviewed 2,968 credit reports.[12] The FTC found that:

- 97.8% of all credit reports are materially accurate, meaning that only 2.2 % of credit reports had an error that would increase the cost of credit or a loan in the credit market.[13]
- 88% of all errors could be attributed to data being transmitted to credit bureaus by data furnishers.[14]

The FTC findings are consistent with academic research completed in 2011. In 2011, the Policy and Economic Research Council (PERC) published a review of 2,000 consumers and more than 81,000 credit accounts for those consumers on their credit reports[15]. The study was the most comprehensive and statistically sound study to ever be performed on the accuracy of data collected and maintained by Equifax, Experian and TransUnion and it is the first (and

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[11] *An Overview of Consumer Data and Consumer Reporting, Federal Reserve Bulletin, Feb. 2003, 50-51* (citations omitted); *See also, Credit Reporting Accuracy and Access to Credit, Federal Reserve Bulletin, Summer 2004, 320.*

[12] *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003, Dec. 2012,* A-4, available at www.ftc.gov/os/2013/02/130211factareport.pdf.

[13] Id., A-4.

[14] Id., Appendix D.

[15] Michael A. Turner *et al., U.S. Consumer Credit Reports: Measuring Accuracy and Dispute Impacts,* Policy & Economic Research Council (PERC) (May 2011), available at http://perc.net/files/DQreport.pdf. In response to criticism of PERC's work by several consumer activists, PERC published a follow-up paper restating the validity of its work and reiterating its support by its independent, peer-review board. Michael A. Turner, *General Response to Criticisms of recent PERC report: U.S. Consumer Credit Reporting: Measuring Accuracy and Dispute Impacts,* Policy & Economic Research Council (PERC) (August 2011), available at http://perc.net/files/GR.pdf.

only) third-party peer-reviewed study dealing with the issue of credit report errors and their material effect on the creditworthiness of consumers. Among other findings, PERC found that:

- Less than one percent (0.93%) of all credit reports examined by the consumers prompted a dispute that resulted in a credit score correction and an increase of a credit score of 25 points or greater.
- After the dispute process ran its course, one-half of one percent (0.50%) of all credit reports examined by consumers had credit scores that moved to a higher "credit risk tier" as a result of a consumer dispute.
- 95% of all consumers who participated in the dispute process were satisfied with the outcome.

5. *What consumers reviews show*

Between December 2004 and December 2006, over 52 million free credit reports were provided to consumers who exercised their right to obtain a free credit report under the FCRA. CDIA estimates that through the combination of direct-to-consumer products and consumers exercising their rights under the FCRA (including the right to one free disclosure per year), nationwide consumer reporting agencies issued over 160 million disclosures from December of 2004 to June 2007.

Data from free credit reports provided to consumers who exercised their right to a free credit report under the FCRA shows that 89% of the credit file disclosures issued resulted in no disputes. There are a number of points to consider with regard to the 11% of consumers who did submit a dispute:

- Out of 52 million credit file disclosures reviewed by consumers, only 1.98% of these resulted in a dispute where data was deleted.
- More than half of all disputes are in reality a request that data furnishers update accurate data in a more timely fashion.
- A dispute is not synonymous with an error. Approximately one-third of consumer disputes are from credit clinic attempts to delete accurate data.

6. *Credit reports are a reliably proven predictor of risk*

Employers work hard to create working environments that are free of fraud and theft for themselves, their customers, and their other employees. It is important to consider the issue in light of some key statistics provided by the Association of Certified Fraud Examiners (ACFE). For example,

- The ACFE reviewed occupational fraud between early-2006 and early-2008. The top two red flag warnings exhibited by perpetrators associated with the fraud were instances where the fraudster was living beyond his or her financial means (present in 39% of all cases with a median loss of $250,000) or experiencing financial difficulties (present in 34% of all cases with a median loss of $111,000).[16]

- Employee theft accounts for nearly $1 trillion annually. The average employee embezzlement totals more than $175,000, but that number increases to $200,000 for organizations with less than 100 employees.
- The most common occupational frauds in businesses involve employees writing fraudulent company checks, skimming revenues, and processing fraudulent invoices.

There are other studies that highlight the business need for credit checks in targeted circumstances:

- The "[r]esults from a [study of] of 2519 employees indicated that those with financial history concerns were significantly more likely to engage in counterproductive work behaviors than those without financial history concerns."[17]
- "Those who have high levels of personal financial wellness reported better performance ratings, less absenteeism, and less work time used for personal financial matters."[18]
- "Some employees are financially stressed and this negatively affects their attitudes and behaviors at work."[19]
- "Past research has supported the relationship between financial distress and workplace absenteeism. Those reporting less financial distress miss fewer days of work. Efforts to reduce financial distress, then, also may result in less employee absenteeism. Financial education has been found to be related to reduced financial distress. Employers who provide workplace financial education, then, may see a decline in both the level of financial distress exhibited by employees and also a reduction in absenteeism."[20]
- Deborah Price, founder of the Money Coaching Institute, a California-based organization that assists clients with financial problems noted that "[o]ver time,

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[16] Association of Certified Fraud Examiners 2008 Report to the Nation. <http://www.acfe.com/documents/2008-rttn.pdf> (viewed March 11, 2010) ("ACFE Report").

[17] Edward S. Oppler, *et al.*, *The Relationship Between Financial History and Counterproductive Work Behavior*, International Journal of Selection and Assessment Volume, vol. 16, no. 4 (Dec. 2008), available at http://www.wright.edu/~brian.lyons/IJSA_2008.pdf (last visited April 17, 2013).

[18] Joo, S. (1998). Personal financial wellness and worker job productivity. Unpublished doctoral dissertation, Blacksburg: Virginia Polytechnic Institute & State University, available at http://scholar.lib.vt.edu/theses/available/etd-4198-155242/unrestricted/FRONTM_1.PDF (last visited Feb. 7, 2011).

[19] Kim, J., & Garman, E. T. (2003). Financial stress and absenteeism: An empirically derived research model, Financial Counseling and Planning, 14(1), 31–42, available at http://www.personalfinancefoundation.org/research/vte/An-Empirically-Derived-Research-Model.pdf (last visited Feb. 7, 2011).

[20] Prawitz, A. D., Haynes, G., Garman, E. T., Shatwell, P., Hanson, K. C., & Hanson, E. W. (2010). Employee financial distress, emotional health risk, and absenteeism. Proceedings of the 2010 Annual Eastern Family Economics/Resource Management Conference, 4-6, available at http://mrupured.myweb.uga.edu/pdfs/EFERMA_TwoMedicineHealth_financial_distress_emotional_health.pdf (last visited Feb. 7, 2011) (citations omitted).

[employees] who are burdened by debt become less reliable, patient, and productive."[21]

- A San Francisco Chronicle article showed that 20% of all data breaches are committed by employees or insiders, and that the amount of data accessed by internal breaches is two-and-a-half-times larger than other breaches."[22]

7. *Employers use credit history checks in a responsible and focused manner*

We know that our member companies – and most employers – use credit checks in a responsible and manner. Any claims of widespread disparate impact are simply not true. The Society for Human Resources Management (SHRM) estimates that 53% *of employers* use credit histories for certain positions. CDIA data shows that 15% *of all employee background checks* (perhaps from these 53% of employers) involve a credit history review.

In July 2012, the Society for Human Resources Management ("SHRM") released a survey on employer use of credit histories. The SHRM survey found that 47% of employers conduct a credit background check on employees, down from 53% in 2010. SHRM also reported that of those 47% that do conduct credit background checks, most employers use credit for selected positions within their companies. 87% consider credit histories because the position requires a fiduciary duty or financial responsibility; 42% consider credit histories for senior executive positions; 34% consider them for positions where there is access to highly confidential employee salary, benefits, or personal information; and 25% in situations where the person is in a position of financial trust.

The SHRM report goes on to say that 58% of those companies that use credit checks do so only after a conditional job offer is made and 33% do so after a job interview. Finally, SHRM reports that negative credit information is not always a bar to employment. It is clear from the SHRM report that the most significant negative credit events are debts in collection (21% to 61% of specific employment positions) and judgments (18% to 31% of specific employment positions). Yet, foreclosures, tax liens, and many other debts will not affect most applicants' ability to get a job.23 According to the SHRM findings, among organizations that do perform credit history checks, 80% percent have hired someone despite a poor credit reports. Finally, the SHRM data indicates that employers look for significant, long term financial difficulty, not for difficulties that may be associated with a loss of a job. In short, employers use credit checks in a responsible and focused manner.

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[21] Price, Deborah, Responding to Workers' Financial Crises, First Quarter 2009, 10 available at http://www.pfeef.org/research/efd/EAP_Article%20January%202009.pdf (last viewed, Jan. 31, 2011).

[22] Alejandro Martínez-Cabrera, How some ex-employees turn to cybercrime, San Francisco Chronicle, April 8, 2010 < http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/04/07/BUDB1CQ2E8.DTL> (last visited April 8, 2010).

[23] Background Checking: The Implications of Credit Background Checks on the Decision to Hire or Not to Hire, Society for Human Resources Management, July 17, 2012, available at http://www.shrm.org/Research/SurveyFindings/Articles/Pages/CreditBackgroundChecks.aspx.

Conclusion

As shown above, the use of a prospective employee's credit history is legally protected, objectively tested, and reliably proven to predict risk. Many safeguards exist for employers to ensure that credit information is used where it is job related and consistent with business necessity.

CDIA hopes that this information is helpful to your committee as continues the discussion of credit history use as an employment screening tool. We remain willing to serve as a resource about the industry in an effort to work together to craft sound public policy.

Sincerely,

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