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CONSUMER DATA INDUSTRY ASSOCIATION
Empowering Economic Opportunity

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May 31, 2016

Massachusetts Department of Criminal Justice Information Services
Office of the General Counsel

Via electronic mail:

Re: Comments on proposed revisions to several provisions of Title 803 of the Code of Massachusetts Regulations

To Whom It May Concern:

On behalf of the Consumer Data Industry Association (CDIA), thank you for the opportunity to comment on several proposed revisions to several provisions Title 803 of the Code of Massachusetts Regulations. There are substantial revisions to many provisions of Title 803 and in addition to offering comments here, we would suggest the Department of Criminal Justice Information Services ("Department" or "DCJIS") extend the comment period for an additional 30 days.

CDIA is an international trade association, founded in 1906, of more than 130 corporate members. Its mission is to enable consumers, media, legislators and regulators to understand the benefits of the responsible use of consumer data which creates opportunities for consumers and the economy. CDIA members provide businesses with the data and analytical tools necessary to manage risk. They help ensure fair and safe transactions for consumers, facilitate competition and expand consumers' access to a market which is innovative and focused on their needs. CDIA member products are used in more than nine billion transactions each year.

CDIA offers general comments that cover a range of proposed rules: 803 CMR 2.00- Criminal Offender Record Information (CORI), 803 CMR 5.00- CORI- Housing, 803 CMR 7.00- Criminal Justice Information System, and 803 CMR 11.00- Consumer Reporting Agency. As provided in a notice of public hearing from the Department, the Department is "gathering comments, ideas, and information concerning" the above noted parts of Title 803 as well as 803 CMR 8.00, Obtaining CORI For Research Purposes, 803 CMR 9.00- Victim Notification Registry, and 803 CMR 10.00- Gun Transaction Recording.[1]

CDIA members are consumer reporting agencies ("CRAs") and CRAs are required to adhere to the strict provisions of the Federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, and Chapter 93, §§ 50-68 of Massachusetts General Laws concerning Consumer Credit Reporting Agencies ("State FCRA"). These laws set strong legal standards for the accuracy, acquisition, maintenance, and dissemination of consumer reports by consumer reporting agencies. These laws also govern the reporting of information to and the use of the information from consumer reporting agencies by businesses like employers, landlords, and property managers. Criminal histories collected, stored, and provided by consumer reporting agencies would be governed by the FCRA and the State FCRA.

The revisions to the above Titles were driven by Executive Order 562 which, by its very title, is intended to "reduce unnecessary regulatory burden[s]."[2] CDIA believes that in several key areas, like those noted in this comment, the Department has not made enough changes to CORI rules that would meet the Executive Order's obligations. The Executive Order requires, among other things, that "the costs of the regulation do not exceed the benefits that would result from the regulation", that "the regulation does not exceed federal...", that "less restrictive and intrusive alternatives have been considered and found less desirable based on a sound evaluation of the alternatives", and that "the regulation does not unduly and adversely affect Massachusetts citizens and customers of the Commonwealth, or the competitive environment in Massachusetts". The proposed change to CORI do meet these key markers laid out by the Executive Order.

There are a number of significant problems with the current CORI process. First, there is an unnecessary requirement for a separate CORI authorization form, even when the applicant is signing a broader FCRA authorization. Second, there remains a

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[1] http://www.mass.gov/eopss/docs/chsb/dcjispublichearingnotice.pdf. The public hearing notice set a comment deadline of May 30, 2016. Since May 30 is Memorial Day this comment is timely filed on May 31, 2016.

[2] http://www.mass.gov/governor/legislationexecorder/execorders/executive-order-no-562.html.

troubling prohibition against a CRA retaining a copy of a report it provides. Third, there is a requirement that the employer must inspect a government-issued photo identification and also sign the form. Some of these issues are slightly addressed by the proposed new regulations, but not enough. Fourth, the need to maintain a need-to-know list and individual agreements of non-disclosure for CORI-authorized staff is an unnecessary burden that only slows the employment and residential process.

1. **There is an unnecessary requirement for a separate CORI authorization form, even when the applicant is signing a broader FCRA authorization.**

There is no change in the proposed new regulation to allow an FCRA authorization form to take the place of the MA standalone form. A provision in 803 CMR 2.09(1) imposes additional paperwork burdens on businesses requiring them to submit a CORI acknowledgement form for each subject checked which includes every consumer's signature. This is a complicated and unnecessary burden given the existing well-established process in the FCRA. Under the FCRA, 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 be "clear and conspicuous", contain only the disclosure and allow for the consumer's authorization.[3]

The additional acknowledgment is an unnecessary obstacle to getting job applicants screened quickly and getting them in to their jobs quickly. For those who are able to take advantage of the proposed addition of electronic submissions in 803 CMR 2.10, this electronic submission route may, if further amended, mitigate the paperwork burdens imposed by 2.09(1). Yet, there is no relief from the burdens of 2.09(1) for those unable to complete the processes electronically.

While the electronic submission process in 2.10 sounds promising, it has limited benefits. Under this section, after the CORI authorization is completed electronically, the authorization form must then be notarized. It is counter-intuitive to allow for an electronic process, but then require the notice include the ancient relic of a notarized signature. An electronic system does not speed up the process if the application then has to be printed and notarized. The proposed regulation must allow for more verification options when the form is completed electronically. An alternative *authentication* method should be allowed in this process. There are many examples on which the Department can rely from the public and private sectors to allow for online authentication without the hurdles of a notarized signature.

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[3] 15 U.S.C. § 1681b(b)(2).

2. The proposed changes carry-over a troubling prohibition from CRA retaining a copy of the reports they provide.

Under existing rules, CRA can only retain a copy of the CORI information if it is a "decision maker" in the hiring process as defined in the regulation.[4]

A. In general, CRAs have substantial requirements on storage and destruction of data and no additional requirements should be necessary.

The regulations place exacting storage and destruction requirements on CRAs for CORI information. These provisions should be repealed because consumer reporting agencies are naturally held to high storage and destruction standards by both internal policies and external laws. For example, the "Safeguards Rule",[5] promulgated by the FTC under the Gramm-Leach-Bliley Act ("GLBA")[6], requires consumer reporting agencies and others to

> (1) Ensure the security and confidentiality of customer records and information; (2) protect against any anticipated threats or hazards to the security or integrity of such records; and (3) protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer.[7]

In addition to the requirements imposed in safeguarding information in the hands of a CRA, the FCRA also imposes standards for disposal of consumer report information on "any person that maintains or otherwise possesses consumer information, or any compilation of consumer information, derived from consumer reports for a business purpose to properly dispose of any such information or compilation."[8] Methods of physical destruction are also discussed in the rules promulgated under the FCRA.[9] The myriad of internal and external requirements on data storage and disposal for CRAs obviates the need for additional requirements like those found in the proposed regulation.

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[4] 803 CMR 11.8.

[5] 16 C.F.R. Part 314, Standards for Safeguarding Customer Information.

[6] 15 U.S.C. §§ 6801(b), 6805(b)(2).

[7] 67 Fed. Reg. 36484 (May 23, 2002).

[8] 15 U.S.C. § 1681w(a)(1).

[9] 16 C.F.R. Part 682. The FTC provided some examples of document destruction to include the "shredding of papers containing consumer information so that the information cannot practicably be read or reconstructed" and "the destruction or erasure of electronic media containing consumer information so that the information cannot practicably be read or reconstructed." 16 C.F.R. § 682.3(b).

B. CRAs are not decision-makers, but must be able to retain information

Section 11.08(1) prohibits a CRA from "electronically or physically stor[ing] CORI results unless the CRA has been authorized by its iCORI registered client to act as the decision maker."[10] CRAs need to be able to store CORI information, yet are not, by their very nature, decision makers. Moreover, it is not obvious what relationship exists, if any, between the act of storing CORI results and making hiring decisions on behalf of an employer that would justify predicating the storage of CORI results on being authorized to make hiring decisions.

Consumer reporting agencies are retained by their employer, landlord, or property manager clients to obtain criminal history information on prospective employees or tenants. CRAs provide the information to their business clients and it is the clients who make the employment or residential rental decisions – not CRAs. We are not aware of any CRA that is willing to serve as a decision maker for its clients, nor is it likely that any employer that would be willing to give its hiring authority away to a third party CRA. However, even though CRAs do not act as decision makers, they still have a need to retain CORI information. Among other things, a CRA may need to refer back to the CORI information it provided for compliance or litigation reasons, or to re-verify the accuracy of the information if it was disputed by the consumer.

Further, Section 11.08(1) would pose a significant impediment on a CRA's' ability to quickly and effectively resolve consumer disputes regarding the accuracy and completeness of information provided by such CRAs, which would frustrate DCJIS' goal of increasing transparency in the use of criminal records by employers in the Commonwealth.

3. The requirement that the employer must inspect a government-issued photo identification and also sign the form is also an unnecessary obstacle to obtaining authentication.

Similar to the burdens noted above that an electronic process must include a notarized signature. When an employee is looking for work and an employer is looking to retain someone, they both want the process to go as quickly as possible, even when a background check is required. The application process grinds down further when an employer is required to inspect a photo identification to move the application process along.

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[10] The regulation defines a "decision maker" as "[a]n entity that requests, receives, or reviews CORI results and is authorized by its client to decide whether to hire or accept an individual based on the CORI received from the DCJIS." 803 CMR 11.02.

The proposed rule ignores the requirement that a photo identification be presented to employers when they complete an I-9, a form used to verify an employee's identity and to establish that the worker is eligible to accept employment in the United States.[11] The proposed state requirement is yet another redundant burden imposed on employers. This photo ID requirement does not comport with Executive Order's demand for efficient in government.

4. **The need to maintain a need-to-know list and individual agreements of non-disclosure for CORI-authorized staff is an unnecessary burden that only slows the employment and residential process.**

Although the catalyst for this new regulation was an executive order to reduce the regulatory requirements on businesses, and to generally make dealing with the government easier, the new proposed regulation have the opposite effect. There are several new obligations which create new paperwork burdens, and add new and challenging requirements.

There is a new regulation for employers, and landlords in 803 CMR 2.16(3) and on CRAs in 803 CMR 11.7(2) to maintain a "maintain a need to know list and individual agreements of non-disclosure for CORI authorized staff". This is precisely the type of over-regulation the Executive Order was trying to avoid. Adding additional burdens and complexities on business, without an overarching rationality to the burdens does nothing to protect consumers and only further stands in the way of getting people in to jobs and apartments quickly while maintaining safe places to work and live.

5. **Conclusion**

Consumer reporting agencies are required to adhere to the strict provisions of the FCRA and the State FCRA. These laws set strong legal standards for the accuracy, acquisition, maintenance, and dissemination of consumer reports by consumer reporting agencies. These laws also govern the reporting of information to and the use of the information from consumer reporting agencies by businesses like employers, landlords, and property managers.

The revisions to the above Titles were driven by Executive Order 562 which, by its very title, is intended to "reduce unnecessary regulatory burden[s]."[12] CDIA believes that in several key areas, like those noted in this comment, the Department has not made enough changes to CORI rules that would meet the Executive Order's obligations.

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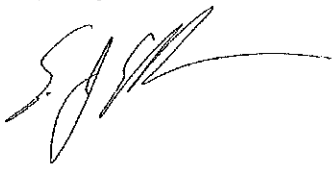
[11] 8 U.S.C. § 1324a.

[12] http://www.mass.gov/governor/legislationexecorder/execorders/executive-order-no-562.html.

There are a number of significant problems with the current CORI process. First, there is an unnecessary requirement for a separate CORI authorization form, even when the applicant is signing a broader FCRA authorization. Second, there remains a troubling prohibition against a CRA retaining a copy of a report it provides. Third, there is a requirement that the employer must inspect a government-issued photo identification and also sign the form. Some of these issues are slightly addressed by the proposed new regulations, but not enough. Fourth the need to maintain a need-to-know list and individual agreements of non-disclosure for CORI-authorized staff is an unnecessary burden that only slows the employment and residential process.

I hope that these comments are helpful to the Department as it might further consider ways to make an impact in promoting safe places to work, live and volunteer, but in a way that follows the path laid by the Executive Order to keep burdens to a minimum.

Sincerely,



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