



May 27, 2016

DCJIS
Office of the General Counsel

RE: Creative Services, Inc. Comments on the Proposed Revisions to DCJIS Regulations

Creative Services, Inc. (CSI) is a Massachusetts based background screening and security consulting firm located in Mansfield, Massachusetts that serves public and private, regulated and non-regulated, profit and not-for-profit clients throughout a wide range of industries, across the country and around the globe. Among many of the memberships, licenses and certifications currently held, CSI is proud to be a Founding Member and Accredited Member of the National Association of Professional Background Screeners (NABPS).

Background on Background Checks

Employers, otherwise known as “End Users,” often utilize the services of background screening firms, otherwise known as “Consumer Reporting Agencies” or “CRAs” to conduct background checks for employment purposes on applicants, employees and/or volunteers, otherwise known as “consumers” for a number of reasons including:

1. Meeting statutory or regulatory requirements in hiring;
2. Protecting vulnerable populations;
3. Assisting in maintaining safe workplaces;
4. Conducting due diligence to reduce exposure for negligent hiring claims; and/or
5. Confirming information provided to the End User in the application process is accurate to mitigate opportunities for negative news headlines.

End Users often opt for CRA’s to conduct employment screening services because the End Users do not have the expertise and/or resources internally to conduct background checks which have not only national but international reach.

There are a variety of search components that can make up a background check including employment verifications, education verifications, criminal record checks, sanctioned or debarred lists searches, credit reports, licensing verification, and motor vehicle record checks, among many others.

The Criminal History Search

A criminal record search is typically a standard component of an employment background check. Generally, a criminal background search consists of searching criminal records in all jurisdictions in which the consumer has resided for the past seven years.

It is important for End Users to search beyond just a consumer's current residence as the opportunity exists that the consumer recently moved to their current jurisdiction but may have criminal records that exist in jurisdiction(s) in which they previously resided.

The jurisdictions to be searched are identified through data provided by the consumer as well as information gathered in a residency search. Criminal records are searched at the statewide or county level. Often, a criminal search at the federal level may also be included. For purposes of these comments, we will focus on the county and statewide searches.

End Users can opt to use a county criminal record search or a statewide criminal record search through iCORI in the Commonwealth of Massachusetts. End Users are well served to run statewide criminal record searches through iCORI in Massachusetts to yield the most amount of information for dollars spent, however, there are issues facing End Users and CRA's as discussed below.

The Role of the CRA

CRA's, in providing background checks, technically referred to as "consumer reports", are subject to the Federal Trade Commission's enforcement of the Federal Fair Credit Reporting Act (FCRA). The FCRA has consumer protection requirements throughout the consumer report process.

In an abbreviated summary, among many other requirements, CRA's providing consumer reports:

1. Must first have permissible purpose under Section 604 [15 U.S.C. §1681b] to furnish a consumer report to any End User. Employment purposes satisfies this requirement;
2. Must have End User certification regarding End User's compliance with FCRA requirements regarding:
 - a. Disclosure to the consumer;
 - b. Pre-adverse action notice to the consumer; and
 - c. Adverse action notice to consumer;
3. Must have End User certification that information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and
4. Shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

In addition, under Section 613 [15 U.S.C. § 1681k(a)], when a CRA provides a consumer report to an End User for employment purposes and the report contains items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment, the CRA shall either:

- 1.) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or
- 2.) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported

CRA as Decision Maker

Distinct from decision makers using consumer reports for purposes other than employment, the CRA's role in compiling information for a consumer report for employment purposes as directed by and requested by an End User, is generally limited to the compiling information and forwarding to the End User for the hiring decision. Rarely, if ever, does the CRA play a role as a "decision maker" relative to hiring or retention decisions. In some cases, adjudication standards may be set in advance to where the CRA may administer pre-adverse action notices based on a pre-established directive from the End User, however, even in these cases, the decision maker role is still reserved for the End User.

In fact, under certain circumstances as defined within the FCRA, specifically under Section 604 [15 U.S.C. §1681b(3)(B) (i)(III)], End Users are required to provide notification to the consumer that "the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific reasons why the adverse action was taken;"

Conflict of Law

Storage and Retention of iCORI Reports - FCRA Obligations

CRA's are subject to Section 611 [15 U.S.C. § 1681i] of the FCRA relating to reinvestigations of disputed information by consumers. This section states:

if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer or reseller.

This FCRA obligation requires that the full and complete report be available to the CRA to administer proper re-investigation procedures as well as in the event of a full file disclosure request by the consumer.

CRA's are also subject to FCRA Section 618 [15 U.S.C. § 1681p] which defines the statute of limitations as follows:

An action to enforce any liability created under this title may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction, not later than the earlier of (1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or (2) 5 years after the date on which the violation that is the basis for such liability occurs.

Storage and Retention of iCORI Reports – iCORI Regulation Obligations

The proposed iCORI Regulations under Section 11.08 state that:

A CRA shall not electronically or physically store CORI results unless the CRA has been authorized by its iCORI registered client to act as the *decision maker*.
[emphasis added]

As currently written, the iCORI proposed regulations relative to storage requirements conflict with CRA's obligations under the FCRA for the vast majority of CRA's that are not and do not want to act as a decision maker for End User's hiring purposes.

Arguably, concerns exist with the potential that a CRA, Furnisher of Information, Reseller or other entity runs an iCORI report on a consumer and stores this information for potential future use.

Recommendation:

CSI recommends that following language relative to storage and use of iCORI reports under Section 11.08 to allow for compliance with FCRA as well as avoid the reuse of any iCORI data run on a consumer:

11.08 Storage of Criminal Offender Record Information (CORI):

- (1) A CRA, or any other entity, who has been authorized by its iCORI registered client to run iCORI reports on its behalf will obtain an iCORI report solely for the purpose stated in the CORI Acknowledgment Form associated with the request, and shall make no further use or re-disclosure of the information contained within the CORI report unless the information is used for consumer reinvestigation purposes related to the initial request;
- (2) A CRA shall not electronically or physically store CORI results unless the CRA has been authorized by its iCORI registered client to run iCORI reports on its behalf or is authorized as a registered client to run iCORI on its own employment applicants or employees.

- (3) CRA and iCORI registered clients shall store hard copies and electronic copies of CORI as provided in 803 CMR 2.12.
- (4) A CRA may transmit CORI results to its iCORI registered client(s) via electronic means, provided any CORI data transmitted electronically shall be encrypted.
- (5) A CRA who has been authorized by its iCORI registered client to run iCORI reports on its behalf may retain CORI for a period of not longer than seven years from the date it was obtained.

Conflict of Law

Criminal Record Reporting

The FCRA offers consumer protections regarding criminal information reported on a consumer. There are also consumer protections available at the state level relative to criminal information reported on a consumer.

The existing regulations and proposed iCORI regulation 11.10(5) states:

- (1) Any CRA that knowingly fails to provide a copy of the CORI results to its iCORI- registered client shall be in violation of 8.03 CMR 2.00
 - a. A CRA may provide a summary of the CORI results in a report to the client. The CRA shall also provide an exact copy of the CORI results received from the DCJIS to the client.

CSI recommends eliminating the requirement for the authorized CRA of an iCORI registered End User to provide an exact copy of the iCORI report to the End User. CSI also recommends further discussion regarding reporting guidelines.

Duplication of Law – Unintended Consequence

Pre-Adverse and Adverse Action Notices

CSI understands, appreciates and supports consumer protection, particularly in consumer reporting. We are individually consumers and seek to enjoy these same protections in our own lives. Understandably, the proposed regulations look to continue consumer protection for those who undergo a criminal background check through the iCORI system.

Under proposed regulation 2.18, End Users have several pre-adverse action notice requirements. For End Users that utilize the service of a CRA, subject to the FCRA, many of these notices are duplicate to the FCRA.

Pre-adverse action notice requirements are similar under 11.12 when the CRA acts as a decision maker. As discussed, above, few, if any, CRA's look to act as a decision maker for End Users. CRA's, however, will often administer pre-adverse action notice requirements on behalf of and only as requested by an End User.

An unintended consequence of adding additional layers of notice requirements is the confusion it causes the consumer. The iCORI regulations, in conjunction with the FCRA, require a number of notices to be sent to the consumer prior to any adverse action being taken.

The following is a list of pre-adverse action notices that must be sent to the subject of an iCORI report:

1. Pre-Adverse Action Notice
2. Consumer Report
3. iCORI Report
4. End User iCORI Policy (if applicable)
5. FCRA Summary of Rights
6. DCJIS Information Regarding the Process for Correcting a Criminal Record

Conservatively, the consumer receives a packet of information which typically includes 10-15 pages consisting of a number of attachments which directs the consumer to take several and sometimes conflicting steps to dispute and/or correct information in their consumer report.

Although the commitment to consumer protection is well-intended, the layers of notice requirements, in effect, causes a great deal of confusion, misunderstanding and stress to the consumer who often finds it difficult to read through and decipher all the information provided.

Recommendation:

CSI recommends removing sections 11.12(1) and 11.12(2) from the proposed regulations as these notice requirements already exist under the FCRA. However, CSI does recommend including a requirement to send the DCJIS Information Regarding the Process for Correcting a Criminal Record notice in cases where information in the iCORI report is the reason for the pre-adverse action notice.

CSI also recommends narrowing section 2.18 of the proposed regulations to only apply in instances where an End User is not utilizing the services of a CRA subject to the FCRA where the notice requirements already exist under the FCRA. However, CSI does recommend including a requirement to send the DCJIS Information Regarding the Process for Correcting a Criminal Record notice in cases where information in the iCORI report is the reason for the pre-adverse action notice.

Additional Recommendations:

iCORI Request Fee Waiver

The proposed regulations state under 2.04(9) that no iCORI request fee shall be assessed for any local, state or federal government entity.

Currently, if any local, state or federal government entity utilizes the services of a CRA as their registered and authorized agent to run iCORI reports on their behalf, there is a standard iCORI request fee assessed to run the iCORI.

Recommendation:

CSI recommends extending the fee waiver to any CRA that is registered and authorized to run iCORI reports on behalf of a local, state or federal government entity.

Definitions

CSI recommends editing the Criminal Offender Record Information (CORI) definition in Section 2.02 as follows:

Replace “a Massachusetts criminal justice agency” with “the Office of the Commissioner of Probation (OCP), a subdivision of the Administrative Office of the Trial Court (AOTC) and available through the Massachusetts Department of Criminal Justice Information Services (DCJIS).”

CSI recommends the following Criminal Offender Record Information (CORI) definition:

Records and data in any communicable form compiled by the Office of the Commissioner of Probation (OCP), a subdivision of the Administrative Office of the Trial Court (AOTC) and available through the Massachusetts Department of Criminal Justice Information Services (DCJIS) which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, previous hearings conducted pursuant to section 58A of chapter 276 where the defendant was detained prior to trial or released with conditions under subsection (2) of section 58A of chapter 276, sentencing, incarceration, rehabilitation, or release. Such information shall be restricted to that recorded as the result of the initiation of criminal proceedings or any consequent proceedings related thereto. Criminal offender record information shall not include evaluative information, statistical and analytical reports and files in which individuals are not directly or indirectly identifiable, or intelligence information. Criminal offender record information shall be limited to information concerning persons who have attained the age of 18 and shall not include any information concerning criminal offenses or acts of delinquency committed by any person before he attained the age of 18; provided, however, that if a person under the age of 18 is adjudicated as an adult, information relating to such criminal offense shall be criminal offender record information. Criminal offender record information shall not include information concerning any offenses which are not punishable by incarceration.

Closing

CSI appreciates the chance to provide these comments through this comment period and welcomes the opportunity to discuss these issues and recommendations as well as any questions in more detail.