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**Written Testimony of Ariel Nelson,  
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**Before the House Economic Matters Committee of the Maryland General  
Assembly,  
2021 Legislative Session**

**February 3, 2021**

Good afternoon. My name is Ariel Nelson and I am a staff attorney at the National Consumer Law Center (NCLC).<sup>1</sup> NCLC has long advocated for stronger laws and regulations to ensure accuracy and fairness in the credit and consumer reporting system. My work focuses on how inaccurate background screening reports result in consumers being denied housing and jobs. I'm testifying in favor of HB0642.

Today, to nail down an apartment or job, you almost always have to pass a background check. About 94% of employers and 90% of landlords run criminal background checks,<sup>2</sup> and about 85% of landlords review eviction information.<sup>3</sup> These checks therefore wield significant influence over people's lives and financial circumstances. Because people of color account for an outsized share of arrested and incarcerated Americans and are also more likely to face eviction, these communities are disproportionately affected by the use of background checks.<sup>4</sup>

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<sup>1</sup> The National Consumer Law Center (NCLC) is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states who represent low-income and elderly individuals on consumer issues. As a result of our daily contact with these advocates, we have seen many examples of the damage wrought by abuses from consumer reporting agencies from every part of the nation. It is from this vantage point that we supply this testimony. *Fair Credit Reporting* (9th ed. 2017) is one of the eighteen practice treatises that NCLC publishes and annually supplements.

<sup>2</sup> CONSUMER FIN. PROT. BUREAU, [MARKET SNAPSHOT: BACKGROUND SCREENING REPORTS](#) 4 (2019) [hereinafter CFPB, MARKET SNAPSHOT]; [TransUnion Independent Landlord Survey Insights](#), TRANSUNION SMARTMOVE (Aug. 7, 2017).

<sup>3</sup> *TransUnion Independent Landlord Survey Insights*, *supra* note 2.

<sup>4</sup> See CMTY. LEGAL SERVS. OF PHILA., [BREAKING THE RECORD: DISMANTLING THE BARRIERS EVICTION RECORDS PLACE ON HOUSING OPPORTUNITIES](#) 2 (Nov. 2020); NAT'L CONSUMER LAW CTR., [SALT IN THE WOUND: HOW EVICTION RECORDS AND BACK RENT HAUNT TENANT SCREENING REPORTS AND CREDIT SCORES](#) (Aug. 2020); ARIEL NELSON, NAT'L CONSUMER LAW CTR., [BROKEN RECORDS REDUX: HOW ERRORS BY](#)

Many landlords and employers rely on reports purchased from specialized background screening companies, which typically generate reports using automated searches of massive records databases.<sup>5</sup> These companies often match applicants with criminal or eviction records based on overly loose criteria, like partial names or incomplete dates of birth. Many deliver reports without verifying the results of an initial search, meaning that no human even looked to see if the results contained any obvious errors.<sup>6</sup>

Shoddy practices like these, along with the use of outdated or imprecise data, lead to mistakes that cost people jobs and housing and harm their reputations.<sup>7</sup> Common errors include the reporting of information about another person and the inclusion of sealed, expunged, or obsolete records.<sup>8</sup>

Take what happened to Glenn Patrick Thompson Sr. and Glenn Patrick Thompson Jr. They said they were left homeless after a screening company told two landlords that they had an eviction record. The record actually belonged to a Patricia Ann Thompson, whom they did not know. Nor had they ever lived at the property in the record.<sup>9</sup>

Nobody should be turned down for an apartment or job because they were erroneously tagged with someone else's criminal record or an expunged record. As people try to recover from the COVID-19 economic crisis, it is more critical than ever that screening companies get it right.

HB642 will help ensure accurate reports, including by requiring regulations establishing stricter standards for matching public records to consumers. That is not asking too much. As one court emphasized, CoreLogic, a major screening company, "is capable of obtaining, from its customers and from its governmental sources, sufficient information to determine the specific consumer to whom a particular record pertains."<sup>10</sup> Another court explained that a screening company could have avoided wrongly identifying one

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[CRIMINAL BACKGROUND CHECK COMPANIES CONTINUE TO HARM CONSUMERS SEEKING JOBS AND HOUSING](#) 7–8 & nn. 30–32. (Dec. 2019) (this report is included as an addendum to this testimony).

<sup>5</sup> These companies are part of the multi-billion-dollar commercial background screening industry. CFPB, MARKET SNAPSHOT, *supra* note 2, at 4.

<sup>6</sup> NELSON, *supra* note 4, at 9–12; Lauren Kirchner & Matthew Goldstein, [How Automated Background Checks Freeze Out Renters](#), N.Y. TIMES (May 28, 2020).

<sup>7</sup> NELSON, *supra* note 4, at 6; *see also* [Dissenting Statement of Commissioner Rohit Chopra Regarding AppFolio](#), Commission File No. 1923016 (Dec. 8, 2020) (“[T]here are too many outfits peddling inaccurate data and reports about prospective tenants . . . .”); Lauren Kirchner, [When Zombie Data Costs You a Home](#), THE MARKUP (Oct. 20, 2020); Kirchner & Goldstein, *supra* note 6.

<sup>8</sup> *See* NELSON, *supra* note 4, at 17–23 (describing the types of mistakes that appear on background screening reports).

<sup>9</sup> Thompson v. On-Site Manager, Inc., No. 2:15-cv-01596-TSZ (W.D. Wash. October 6, 2015), ECF No. 1. These results are consistent with what employees of screening companies have said in lawsuits: that they err on the side of including any possible match. *See* Kirchner & Goldstein, *supra* note 6.

<sup>10</sup> Henderson v. Corelogic Nat'l Background Data, LLC, 161 F. Supp. 3d 389, 403 (E.D. Va. 2016); *see also* Kirchner & Goldstein, *supra* note 6 (one owner of a screening company said, “We can figure out how to match a record . . . . When we are performing any of these reports, it is a fairly monumental moment in someone's life . . . . You just have to give a crap”); NELSON, *supra* 4, at 32–33 (describing why background screening companies can already do more to ensure accurate reports and the impetus should not be on consumers to detect and address errors).

man as a sex offender if it had simply compared his birth date to the birth date in the bulk criminal data it had used *or* reviewed the actual government records.<sup>11</sup>

Moreover, the Big Three nationwide credit bureaus (TransUnion, Equifax, and Experian) already use stricter criteria—either a Social Security Number or a date of birth, similar to what the regulations here would require—to match public records to consumers.<sup>12</sup> Because most civil judgments, including eviction records, do not include such data, the Big Three no longer report them. Screening companies—gatekeepers to jobs and housing—should meet the same standard.

I thank you for considering this important legislation and ask that you vote it favorably out of committee.

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<sup>11</sup> *Dodgson v. First Advantage Background Servs. Corp.*, 2018 WL 1807014, at \*7 (N.D. Ga. Mar. 28, 2018) (“[I]f Defendant searched the actual files maintained by the state of Pennsylvania it could have used Plaintiff’s birth date to determine that the sex offender match it found was for Plaintiff’s biological father and not Plaintiff. Defendant instead took a presumably cost-effective short cut and purchased ‘raw data’ from Experian, which provided only limited information for criminal records.”). The court also found that, in a five-year period, there were 3,726 instances where someone disputed the sex offender finding, and in 3,594 instances, the screening company determined that the sex offender notation should be removed. *Id.* at \*6.

<sup>12</sup> See Chi Chi Wu, [Big Changes for Credit Reports. Improving Accuracy for Millions of Consumers](#), NCLC DIGITAL LIBRARY (July 2017).

# **ADDENDUM**

# BROKEN RECORDS REDUX

HOW ERRORS BY CRIMINAL BACKGROUND CHECK COMPANIES CONTINUE TO HARM CONSUMERS SEEKING JOBS AND HOUSING



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National  
Consumer Law  
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## ABOUT THE AUTHOR

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**National  
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## ABOUT THE NATIONAL CONSUMER LAW CENTER

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services; and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state governments and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

# BROKEN RECORDS REDUX: HOW ERRORS BY CRIMINAL BACKGROUND CHECK COMPANIES CONTINUE TO HARM CONSUMERS SEEKING JOBS AND HOUSING

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## EXECUTIVE SUMMARY

Seven years ago, the National Consumer Law Center (NCLC) issued *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses*, a report detailing the harmful mistakes that criminal background screening companies routinely make. Since then, advocates have litigated many class action and individual lawsuits against these companies for violations of the Fair Credit Reporting Act (FCRA). Both the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB) have brought actions resulting in settlements requiring background screening companies to reform their procedures and practices and pay millions of dollars in civil penalties and in relief to harmed consumers.

Despite these efforts to improve background check reporting, companies continue to generate inaccurate reports that have grave consequences for consumers seeking jobs and housing.

This report provides an update to the 2012 *Broken Records* report. Today, the background screening industry is a multi-billion dollar industry, with about 94% of employers and about 90% of landlords using background checks to evaluate prospective employees and tenants.

Background screening companies now generate reports through largely automated processes. Generally, they run automated searches through giant databases of aggregated criminal record data. Reports may undergo only minimal, if any, manual review or quality control before an employer or landlord receives them. The data included in reports often is purchased in bulk through intermediaries or obtained from websites via web scraping technology. The data often is incomplete, missing key personal identifiers. It also may be infrequently updated.

Practices like these often lead to erroneous background check reports that result in consumers being denied jobs and housing. Even consumers who successfully remove errors from their reports may not get the job or the apartment.

Background screeners continue to generate these inaccurate reports even though the FCRA requires them to maintain procedures to ensure the accuracy of the information they report.

This report uses stories from lawsuits and public enforcement actions to illustrate the types of errors that continue to harm consumers. In particular, background screening companies generate criminal background check reports that:

- Mismatch the subject of the report with another person,
- Include sealed or expunged records,
- Omit information about how the case was disposed of or resolved,
- Contain misleading information, and
- Misclassify the offense reported.

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This report also examines the problems that arise out of relying on automated processes to decide whether to reject or accept a prospective employee or tenant.

Based on the issues identified in the original report and in this one, this report recommends action at the federal and state levels.

## RECOMMENDATIONS

### Congress

Congress should amend the FCRA to:

- Increase protections for prospective tenants. The special protections that apply to the use of background check reports for employment purposes should also encompass reports used for housing purposes.
- Prohibit the reporting of criminal convictions more than seven years old.
- Require consumer reporting agencies to both maintain strict procedures to ensure reported information is complete and up to date and to send a notice to a consumer, which should be sent before delivering the background check report to an employer.
- Give the FTC specific supervisory authority over background screening companies.

### Federal Regulators

The CFPB should use its rulemaking authority under the FCRA to:

- Require mandatory measures to ensure greater accuracy.
- Produce guidelines on matching criteria.
- Define how long an employer has to wait in between sending an initial notice and taking an adverse action (e.g., rejecting an applicant).
- Require registration of consumer reporting agencies.
- Reaffirm and clarify that the FCRA applies to certain companies that own or maintain aggregated criminal record data and to certain software providers that offer access to automated searches or analyses.

The FTC and CFPB should continue to use their FCRA enforcement powers to:

- Investigate commercial background screening companies for common FCRA violations.
- Investigate nationwide employers for compliance with FCRA requirements imposed on users of consumer reports for employment purposes.

## States

State attorneys general should:

- Investigate background screening companies, and any remedies should require the implementation of specific reforms.

As the source of most of the data reported by background screeners, states should ensure that state repositories, counties, courts, and other public records sources:

- Require companies that receive information in bulk to have procedures for ensuring that sealed and expunged records are deleted, that dispositions are promptly reported, and that their customers also properly delete records and report dispositions.
- Audit companies that purchase bulk data to ensure that they are removing sealed and expunged data and undisposed cases.
- Ensure that no criminal history report contains information relating to cases that do not show a final disposition and for which no entry has been made for at least five years.

States should also pass legislation requiring users of background check reports to:

- Review the underlying report produced by the background screening company before making an employment or housing decision.
- Consider whether a consumer has disputed information on the background check report.
- Provide consumers with written notice of the reasons for any denial of a job or housing whether or not based on a consumer report.

Because the use of criminal background checks is pervasive in both the employment and housing contexts, it is more critical than ever for background screening companies to produce accurate and complete reports. The background screening industry must be monitored and held accountable. Otherwise, consumers will continue to pay the price of inaccurate information by forfeiting housing and job opportunities.

## I. INTRODUCTION

Today, passing a criminal background check is a ubiquitous prerequisite to securing a job or housing. As a result, background checks have become a barrier to satisfying the fundamental economic needs of the 70 million to 100 million Americans with some sort of criminal record.<sup>1</sup> Because communities of color account for a disproportionate share of arrested and incarcerated Americans, the use of background checks disproportionately affects these communities.<sup>2</sup>

*Background checks have become a barrier to satisfying the fundamental economic needs of the 70 million to 100 million Americans with some sort of criminal record.*

This report, like NCLC's 2012 *Broken Records* report, will focus on one specific, serious problem with commercial criminal background check reports: errors.<sup>3</sup> Employers and landlords often make decisions based on reports that present inaccurate, incomplete, or out-of-date information. Moreover, many background check products are designed to eliminate the need for users to review criminal history information or make judgment calls about candidates; they are designed instead to outsource decision making to the background check company. It is therefore more critical than ever that background check reports be accurate.

Unfortunately, problems with accuracy in criminal background check reports have not disappeared in the seven years following the publication of NCLC's original *Broken Records* report. Actual accuracy rates remain unknown because no comprehensive, industry-wide study on criminal background check reports has been conducted. However, individual and class action lawsuits, government enforcement actions, and the experiences of advocates who work with consumers dealing with faulty background check reports all indicate that serious accuracy problems persist and remain pervasive.

This report will continue our work in shining a light on the commercial background screening industry and how its practices—including the use of automated processes and bulk data—can lead to inaccurate criminal background check reports that cost consumers jobs and housing.

This report provides:

- An overview of the commercial background screening industry, including an explanation of what background check reports are and how they are generated and an examination of the automated processes often used to make employment and housing decisions;
- A review of the types of errors that continue to appear on background check reports;
- A summary of the laws currently in place to protect consumers from inaccurate background check reports;
- A discussion of tactics used by background screening companies to evade consumer protections; and
- Recommendations for background screening companies and policymakers to promote consumer protections and ensure accurate background check reports.

## II. THE COMMERCIAL BACKGROUND CHECK INDUSTRY

### A. A Multi-Billion Dollar, Largely Unmapped Industry

Today, the commercial background screening industry is a multi-billion dollar industry.<sup>4</sup> Although the industry has consolidated somewhat since the publication of *Broken Records* in 2012,<sup>5</sup> an industry analysis estimated that 1,954 background screening companies existed in 2019.<sup>6</sup> This number is so high in part because technological advancements have made it easier and cheaper for small and midsize companies to perform background checks.<sup>7</sup>

*An industry analysis estimated that 1,954 background screening companies existed in 2019.*

Despite the size of the industry, no licensing or registration requirements exist.<sup>8</sup> The industry remains “virtually unmapped, and a potential employer [or landlord] could buy a background check on a job [or rental] applicant from any one of these [thousands] of companies.”<sup>9</sup> Nonetheless, a list published by the CFPB and a membership directory produced by the Professional Background Screening Association,<sup>10</sup> as well as lawsuits and government enforcement actions, help identify some of the companies providing background screening services. Major industry players currently include First Advantage, Sterling, HireRight, and Checkr. An industry analysis concluded that First Advantage and Sterling alone account for 14% of the industry’s revenue.<sup>11</sup>

Most companies providing background screening services to users assess applicants for employment or tenant screening purposes. An industry analysis for 2019 estimated that about 32% of revenue in the industry will come from prospective tenant reports. The remainder will come mostly from reports that employers and businesses request. The criminal record check services component of background screening accounts for about 36% of industry revenue.<sup>12</sup>

Background screeners complete millions of criminal background checks each year.<sup>13</sup> Three of the largest companies alone – First Advantage, Sterling, and Hire Right – produced 56 million background checks in a recent 12-month period.<sup>14</sup> Checkr, which was founded in 2014, provides background checks for companies in the gig economy such as Uber, and processes 1 million reports each month (about 23 reports per minute).<sup>15</sup>

*Three of the largest background check companies produced 56 million checks in a 12-month period.*

Background screening companies often do not act alone. To the contrary, the entity from whom an employer or landlord requests a background check likely is not the only player involved. The background screener may obtain information from one of the Big Three nationwide consumer reporting agencies (Equifax, Experian, and TransUnion), data wholesale companies, database record suppliers, data resellers, or subcontractors or other intermediaries.<sup>16</sup>

## B. Users of Criminal Background Check Reports

### i. Types of uses

Users procure criminal background checks for many purposes, including employment and tenant screening, professional and occupational licensing, and higher education admissions.<sup>17</sup> This report focuses on background checks procured for employment and tenant screening purposes.

Today, the use of criminal background checks for employment and tenant screening purposes is ubiquitous. About 94% of employers conduct some form of criminal history check,<sup>18</sup> and about 90% of landlords run background checks on prospective tenants.<sup>19</sup> The gig economy is a relatively new sector in which the demand for background checks for employment screening purposes has proliferated.<sup>20</sup>

*About 94% of employers conduct some form of criminal history check, and about 90% of landlords run background checks on prospective tenants.*

### ii. Flawed reasons for relying on criminal background check reports

Employers and landlords often refuse to hire or rent to individuals with criminal records based on concerns about public safety or the perception that individuals with criminal histories are less likely to satisfy their obligations.<sup>21</sup> They also turn to background checks in an attempt to minimize potential liability arising out of doctrines like negligent hiring or “negligent renting.”<sup>22</sup> Background screeners contribute to these concerns by giving warnings, for instance, about landlords “opening themselves up to potential lawsuits by renting to a tenant with a criminal history who may later harm another tenant.”<sup>23</sup>

Research suggests these fears are largely misplaced. Studies have shown that, once a relatively short period of time passes after an offense, criminal history is not a reliable predictor of future criminality.<sup>24</sup> The likelihood of recidivism also “declines sharply over time,”<sup>25</sup> and stable housing and the opportunity for stable employment are associated with a reduced likelihood of recidivism.<sup>26</sup> Giving individuals with criminal records access to housing and employment thus increases public safety. Moreover, research indicates that formerly incarcerated individuals are dependable employees,<sup>27</sup> and that a criminal history does not predict the success of a tenancy.<sup>28</sup> Research also shows that worries about liability for negligent hiring and renting are overblown.<sup>29</sup>

*Studies have found that African Americans are more likely to be stopped by the police, detained pretrial, charged with more serious crimes, and sentenced more harshly than whites.*

It is also important to note that employers’ and landlords’ concerns do not take into account the underlying facts about who is likely to have a criminal record and why. African Americans are more than twice as likely to be arrested as whites, and more than 60% of people in prison are people of color.<sup>30</sup> Bias by decision makers throughout the criminal justice process disadvantages African Americans. Studies have found, for instance, that African Americans are more likely to be stopped by the police, detained pretrial, charged with more serious crimes, and sentenced more harshly than whites.<sup>31</sup> Further, histories “of structural racism and inequality of opportunity” mean that African Americans are more



likely to be living in poverty, and “[l]iving in poor communities exposes people to risk factors for both offending and arrest.”<sup>32</sup>

### *C. Contents of Background Check Reports*

In recent years, employers and landlords have increased the breadth of their investigations of prospective employees and tenants.<sup>33</sup> The requested background check report likely includes much more than criminal history information. For example, a tenant screening report may include the applicant’s credit history, employment status or history, residential history, and public record information, including both criminal and eviction histories.<sup>34</sup> A background check report requested for employment screening purposes may include similar information.<sup>35</sup>

The criminal record component of a background check report that a user may receive generally does not contain much detailed information about any listed offenses. Typically, the report includes “the name associated with the record, the jurisdiction from which the record originated, a date (which could be the date of arrest, date of disposition, date the record was created, or some other date), and a judicial case number or law enforcement number.”<sup>36</sup> The report likely lists the date of birth associated with the record, though not necessarily the full date of birth. Sometimes the record will include additional identifying information, such as height and weight, middle names or initials, and Social Security Numbers.

The report likely will contain some description—often one word or a short phrase, like “poss of marijuana”—of the offense. This description could refer to the crime for which the individual was convicted, but it also could refer to the initial charge. Disposition information might be listed, but almost never will the report contain facts about the offense or related circumstances.<sup>37</sup>

However, as discussed (see pages 12 – 15), landlords and employers may not receive any of this criminal record information. Increasingly, background screeners provide only a determination about whether the applicant should be accepted or rejected.

### *D. Generating Criminal Background Check Reports*

As explained in NCLC’s 2012 *Broken Records* report, the internet has facilitated the emergence of online background screening companies that have instant access to millions of databases containing criminal records information. Criminal records have become more available and are used for non-law enforcement purposes to an unprecedented extent.<sup>38</sup> Nearly all—96%—of the approximately 110 million criminal history records maintained by state criminal history repositories are maintained electronically.<sup>39</sup>

Made possible by these and other technological developments, background screening companies now generate, disseminate, and sell criminal background reports through mostly automated processes.<sup>40</sup> Background screeners often promote their products by pointing to these automated processes. For example, CoreLogic proclaims that its Rental Property Solutions products use “advanced technology models” that provide “rapid turnaround” times.<sup>41</sup> Similarly, Checkr states that it has the first artificial

intelligence-powered background check platform that allows customers to screen candidates faster, “with fewer resources,” and “has the capacity to handle millions of background checks per year without slowing down.”<sup>42</sup> First Advantage highlights that its “National Criminal File is a database search of millions of criminal records,” with 6,000 to 8,000 “new records added daily.”<sup>43</sup>

These statements do not reveal much about how the background screeners’ automated processes and technologies work. This report therefore seeks to explain how background screeners actually conduct searches and generate background check reports. This goal requires some caveats.

*Unlike in the credit reporting industry, no standardized reporting format exists.*

First, unlike in the credit reporting industry,<sup>44</sup> no standardized reporting format exists. There are no standardized criteria, instructions, or definitions governing background checks. Instead, companies “use different levels of identifiers to conduct searches, have individual protocols to update information, and apply varying criteria to determine whether a record in a database being searched matches the individual associated with the request for background information.”<sup>45</sup>

Second, background screeners generally do not provide details about how they generate reports. Although an applicant’s attorney may ultimately gain some insight into a background screener’s matching logic or other technology through a lawsuit, the majority of that information remains inaccessible to the public. When faced with a lawsuit, the background screener likely will argue that such information should be kept confidential and be filed under seal because it is proprietary business information or a confidential trade secret.<sup>46</sup> This lack of transparency makes it difficult to fully understand and evaluate the technologies that background screeners currently use to determine whether individuals are eligible for employment and housing.

Third, new companies that use new technologies have emerged, making it more difficult to generalize about how reports are generated. For example, Checkr, which was founded in 2014, uses artificial intelligence and machine learning.<sup>47</sup> Companies also continue to roll out new products. Some screeners, for instance, now offer ongoing monitoring tools that notify the customer in real-time of any reportable changes to an employee’s or tenant’s criminal record.<sup>48</sup>

These caveats aside, it is possible to describe, at least at a high level, the common practices of background screening companies. In short, background screeners generally generate reports by running automated searches through massive databases of aggregated criminal record data. These searches try to match an applicant’s identifying information (such as name and date of birth) with criminal records in those databases.<sup>49</sup>

Most background screeners obtain their criminal record data from vendors that maintain private databases,<sup>50</sup> though some large background screeners maintain databases for their own use.<sup>51</sup> The data contained in the databases typically comes from many sources. It is often purchased in bulk from public sources—including law enforcement agencies, state courts, corrections offices, and criminal record repositories<sup>52</sup>—or obtained from public websites via web scraping technology.<sup>53</sup> Background screeners and vendors often

do not approach courts directly to obtain criminal records, but rather rely on sources that are not the keepers of official court records.<sup>54</sup>

The data that background screeners and vendors use is frequently incomplete, missing disposition information or key personal identifiers, such as middle names, full dates of birth, and Social Security Numbers. As a blog post on the website for a group of background screeners called “Concerned CRAs” explained, the records contained in background screening companies’ databases often only have offenders’ names or partial dates of birth.<sup>55</sup>

Further, a background screener may or may not verify the results of an initial database search before communicating the results to the user.<sup>56</sup> About 200 reporting agencies have signed on as members of Concerned CRAs and have self-certified that they verify the results of database searches before reporting them.<sup>57</sup> Companies like these tend to view the results of a database search as a starting point requiring verification against the original records. However, many companies, “especially the larger ones,” may not verify the results of such a search before issuing a report.<sup>58</sup> None of the major companies mentioned above – First Advantage, Sterling, HireRight, and Checkr – have signed on as members of Concerned CRAs.

The following examples demonstrate how background screeners may create or access giant databases of aggregated criminal record data to conduct searches and generate reports. They also show how some of the different players in the background check industry fit together.

### **CoreLogic National Background Data, LLC**

CoreLogic National Background Data, LLC (NBD), provides customers with access to a database of criminal record information called “The Multistate Database.” NBD’s customers – including consumer reporting agencies (CRAs) – pay to search the Multistate Database via the internet. The Multistate Database returns results, such as arrest records, that match search criteria that NBD’s customer enters. NBD transmits this data to its customers without change. NBD’s contracts require its customers to independently verify the records returned in response to their search queries before providing reports to their clients.

### **Mismatched Reports: The Case of Tyrone Henderson**

Reliance on incomplete records and the failure to verify the results of an automated search (among other shortcomings) cost Tyrone Henderson a job. An employer gave Mr. Henderson a conditional offer of employment and then requested a background check from a third-party CRA called Verifications, Inc. Verifications searched the Multistate Database owned by SafeRent by inputting Mr. Henderson’s last name, the first three letters of his first name, and his date of birth.

The search results included several felony convictions that belonged to at least one other individual with the same first and last name and date of birth as Mr. Henderson. The background check report provided to the employer ultimately included multiple criminal records that were not Mr. Henderson’s. As a result of the incorrect information, the employer withdrew Mr. Henderson’s conditional offer of employment.

*Source:* Henderson v. CoreLogic National Background Data, LLC, 178 F. Supp. 3d 320, 322–23 (E.D. Va. 2016)

NBD does not own the Multistate Database. Instead, NBD acts as an intermediary between the customer CRAs and another entity, CoreLogic SafeRent, LLC (SafeRent). SafeRent is NBD's "sister company," and owns, manages, maintains, and updates the database. SafeRent acquires most of its criminal record data electronically from governmental sources, but purchases 10% from a third-party vendor. SafeRent buys records in bulk and formats them so they can be incorporated into the database. Because SafeRent buys the records in bulk, the records typically contain limited identifying information. Rarely, if ever, do the records include Social Security Numbers. The records also often lack other identifying information, such as middle names or addresses. These limitations mean that "the portions of the public records [in the database] are not always sufficient to identify the particular consumer to whom the records pertain."<sup>59</sup>

### ***First Advantage LNS Screening Solutions, Inc.***

First Advantage LNS Screening Solutions, Inc. (First Advantage) provides criminal background check reports to employers. Employers specify the scope of the search, identify their specific hiring criteria, and provide identifying information for the prospective employee. This identifying information typically includes first name, last name, and date of birth. First Advantage then runs a search and applies the employer's hiring criteria to indicate whether the consumer is "eligible" or "ineligible" for employment.

The majority of the criminal background searches are run through First Advantage's National Criminal File, which is a self-maintained criminal records database that was created through the acquisition and compilation of bulk criminal records primarily from county courthouses and state offices of court administration. First Advantage runs the consumer's information through an automated search of the National Criminal File, and then the company's Records Adjudication team "adjudicates" the consumer's application by reviewing any "hits" to determine whether they can be matched with the consumer.

According to its policies and procedures, First Advantage will report a criminal record only if it contains two identifiers that match the consumer's. These identifiers could include first and last name, Social Security Number (rare — many courts will not release Social Security Numbers), driver's license number, date of birth, or address. A first name, however, does not have to be a perfect match because First Advantage uses a self-defined "Fuzzy Logic" that permits certain nicknames to return as first-name matches. Only if a consumer disputes the report's accuracy will First Advantage order the underlying records.<sup>60</sup>

### ***E. Automated Decision Making***

Many background screeners do not simply provide criminal records purportedly belonging to the applicant to the landlord or employer. They also offer products that "adjudicate" or "score" the applicant and provide a recommendation about whether to accept them. Adjudication services appear to have become more prevalent in the years following the publication of the original *Broken Records* report in 2012. We refer to the

adjudication process, which typically entails the elimination of human judgment, as “automated decision making.”

The adjudication process generally requires the background screener to compare the retrieved records (and possibly other information, such as a credit report) with the eligibility criteria provided by the user or developed by the background screener and determine whether the applicant is eligible. The background screener then provides its determination about whether to accept the job or housing application to the employer or landlord.<sup>61</sup>

In situations where the background screener provides an eligibility determination, the landlord or employer often does not receive or review the underlying background check report, let alone the underlying records. Instead, the landlord or employer only receives

### Downsides of Automated Decision Making: The Case of Carmen Arroyo

Because of an accident in July of 2015, Carmen Arroyo’s son, Mikhail Arroyo, can no longer speak, walk, or care for himself. Ms. Arroyo is her son’s conservator and primary caregiver. When she learned that her son would be discharged from treatment at a nursing home, she sought to have him move into her apartment.

CoreLogic Rental Property Solutions, LLC (CoreLogic) used its “CrimSAFE” product to screen Mr. Arroyo. CoreLogic markets this product as an “automated tool” that “processes and interprets criminal records and notifies leasing staff when criminal records are found that do not meet the criteria you establish for your community.” After CoreLogic screens a tenant, it gives the landlord a one-page report that indicates whether it located disqualifying records. That report does not provide additional information, such as the underlying records, the nature of the alleged crime, the offense date, or case outcome. CoreLogic does provide a report containing additional information to a high-level coordinator in the landlord’s company. However, neither the leasing agent nor anyone on site at the housing complex has access to the full report.

CoreLogic screened Mr. Arroyo and then notified the apartment complex manager that he was disqualified from tenancy based on unspecified criminal records. The only information the manager had about Mr. Arroyo’s disqualifying records was his

name, date of birth, and a jurisdictional code that read “.000000033501.PA.” The manager had no information about the nature of the underlying record or the reasons for disqualification. In fact, Mr. Arroyo was never convicted of a crime. He was charged with retail theft in 2014, but the charge was withdrawn.

After receiving notice that Mr. Arroyo was disqualified from tenancy, the apartment complex told Ms. Arroyo that her son could not move in. It represented to Ms. Arroyo that it did not know the details of the disqualifying conduct. Put simply, the housing provider adopted CoreLogic’s decision even though it had almost no information about the basis of the decision. And neither CoreLogic nor the landlord took into account any explanatory or mitigating circumstances, such as the nature of the offense, the case outcome, or whether Mr. Arroyo is now even able to commit a crime due to his significant disabilities.

It took about one year of advocacy — including the filing of an administrative fair housing complaint against the manager of the apartment complex — before the apartment complex allowed Mr. Arroyo to move in with his mother.

*Source:* Connecticut Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC, 369 F. Supp. 3d 362, 367–68 (D. Conn. 2019).



a notification—generally in the form of a score, recommendation, pass/fail code, or eligible/ineligible code—about whether the applicant meets the eligibility criteria.<sup>62</sup>

These screening products are designed and marketed to eliminate the need for a landlord or employer to consider an applicant’s specific criminal history or make judgment calls.<sup>63</sup> Background screeners often present algorithmically generated recommendations as a solution for the supposed problem of human decision making. Checkr, for example, contends that decreased reliance on “manual processes” renders an employer’s “hiring process more consistent and leaves less opportunity for human bias and error, so your hiring teams can maintain compliance while saving time.”<sup>64</sup> Similarly, CoreLogic tells customers that its Rental Property Solutions product uses “advanced technology models [that] are statistically validated based on facts, not intuition or rules, ensuring a degree of consistency and reliability unmatched in the industry.” CoreLogic further asserts that “[w]hatever decision or information you use, you’ll find the same simple data entry process, rapid turnaround and clear concise results that eliminate the need for judgment calls by your leasing professionals.”<sup>65</sup>

Many problems arise out of relying on these automated processes to make decisions about whether to accept applicants. First, no common standard or measure exists for predicting whether an individual will be a “good tenant” or a “good employee.” In this sense, background check reporting differs from credit scoring. With respect to credit scores, the implementing regulation of the Equal Credit Opportunity Act requires a credit scoring system to be an “empirically derived, demonstrably and statistically sound, credit scoring system,”<sup>66</sup> and FICO has engaged in research to develop its algorithms and ensure that they are predictive of the probability of default.<sup>67</sup> Further, federal regulators that supervise banks and credit unions review scoring models to ensure they meet the standard of being predictive and statistically sound.<sup>68</sup> Here, there is no equivalent data science research or regulatory supervision to ensure that the score that the background screener provides is similarly predictive or statistically sound.

Second, automated decisions may give applicants or users very little insight into why they were rejected, particularly in the tenant screening context<sup>69</sup> when a landlord receives only a notification about the applicant’s eligibility. This lack of information presents many challenges. It may mask errors in the report. It also may limit a consumer’s ability to explain directly to the landlord why a record is inaccurate or why, if the record is generally correct, it should not be a bar to housing. Finally, the lack of information makes it difficult for attorneys to address problems that currently render their clients ineligible for housing. If, for example, a consumer could see that she was denied housing because of a record that qualifies for expungement, the consumer could get that record expunged and then, theoretically, be eligible for housing.

Third, automated decision making tends to undermine consumers’ rights to see the reports made about them. Consumers who request disclosure of their files from background screeners generally will be provided with the underlying records used to generate the automated decisions. But consumers seldom will receive disclosures showing how an algorithmic scoring system classified those records, aged them, or filtered them through the user’s acceptance criteria. Thus, if a denial resulted from an arrest record being erroneously treated by the algorithm as a conviction, a misdemeanor



being erroneously characterized as a felony, or a 10-year-old crime being mis-aged as a 5-year-old crime, the consumer may have no way to discover this error.

Fourth, although some background screeners frame their products as generating recommendations that users can override,<sup>70</sup> users commonly defer to the background screener's determination. If, for example, a screener determines that an applicant "fails" under the criminal background policy provided by the housing provider, the applicant generally will be denied housing.<sup>71</sup> Especially when the user receives only a notification about the applicant's eligibility, the user may not know the reason the screener is recommending rejection of the applicant. Nor would the user have much of a basis to override the recommendation.

Fifth, automated decision making often eliminates the chance for humans to individually assess applicants or make judgment calls, which in turn may exclude applicants who otherwise would have been accepted. Automated screening tools collapse a consumer's particular complex and nuanced story into machine verified variables and "algorithmically generated pass-fail mechanisms."<sup>72</sup> The landlord or employer no longer needs to consider an individual's extenuating circumstances or attempt to weigh the actual risk of accepting that individual.

Sixth, automated decisions may result in discrimination against certain groups of people.<sup>73</sup> In one Fair Housing Act and FCRA case, the plaintiffs argued that a tenant screening product, which "automatically and without an individualized assessment determines and reports to a housing provider that an applicant is disqualified for rental housing based on the existence of a criminal record," has an adverse disparate impact on African American and Latino applicants.<sup>74</sup> In general, a number of academics and researchers have shown that automated decision making and the use of algorithms is prone to replicating existing racial, gender, and other disparities.<sup>75</sup>

Carmen Arroyo's case (see box on page 13) illustrates that the complete reliance on automated background checks and automated adjudications can lead to illogical results. Especially when a screening product does not allow the user to see any underlying facts, the product does not necessarily even address stated concerns about safety or security. Had the apartment complex individually assessed Mikhail Arroyo's situation, it likely would not have rejected Mr. Arroyo based on an incident – one charge of the lowest level of shoplifting that did not end in conviction – that had occurred before the onset of disabilities that rendered him more or less incapable of engaging in criminal conduct.

### III. PROBLEMS WITH COMMERCIAL BACKGROUND CHECK REPORTING

#### *A. The Prevalence of Errors in Background Check Reports*

Background screeners promote the notion that new technology and increased automation necessarily mean more accurate background check reports. The digitization of records and the advent of new technologies certainly have made obtaining consumer information easier than ever. However, the automation of background check reporting

comes with its own set of problems, and background screeners continue to generate reports containing mistakes.

As an initial matter, no comprehensive, industry-wide study assessing accuracy in commercial criminal background check reporting ever has been conducted, unlike in the credit reporting context.<sup>76</sup> This lack of data makes it difficult to know just how prevalent reporting errors are.

Individual background screeners contend they have very low error rates. However, these statistics can be misleading and fail to tell the full story. First, these statistics may fail to take into account the full universe of errors. Background screeners often assess the accuracy of their products using the raw number of consumer complaints.<sup>77</sup> However, not all consumers who experience adverse actions obtain their reports. Of those consumers who do obtain their reports, not all consumers will dispute an error even if they detect one because it takes time, energy, and the ability to navigate a CRA's systems to do so. Further, a consumer may have errors on their report but still get the job or apartment, meaning that they never receive the adverse action notice that would inform them of their right to request disclosures and initiate the dispute process. As a result, dispute statistics are not an accurate indicator of the error rates in tenant and employment background checks.

Second, raw dispute statistics or overall accuracy rates may not capture the pervasiveness of certain types of errors, like mismatched records, especially for consumers who have common names. In a case where records were wrongly attributed to a consumer with a common name (Richard Williams) on two occasions, the court recognized that First Advantage's allegedly high overall accuracy rate did not excuse it from implementing procedures for consumers with common names. First Advantage argued that its procedures met the FCRA's maximum possible accuracy requirement because it accurately matched criminal records with consumers 99.62 % of the time. The court rejected this argument, finding that the jury could have reasonably found that First Advantage neglected to "implement procedures so that repeat-mismatched consumers could have their record flagged to prevent those consumers from being mismatched with the same similarly named individual."<sup>78</sup> The court also explained why pointing to overall accuracy rates in the case of a common-name consumer did not make sense:

That argument is like the thirteenth chime of a clock. You not only know it is wrong, but it leads you to question everything you heard before it. It isn't First Advantage's accuracy rate as applied to all consumers that matters; it is First Advantage's accuracy rate as applied to common-name consumers. . . . [I]t is far more likely that one would erroneously match a common-name consumer than a unique-name consumer. Common sense thus suggests that many of the 14,346 "not me" errors were for common-name consumers.<sup>79</sup>

In other words, overall accuracy rates "grossly understate[]" error rates for certain types of errors.<sup>80</sup>

Third, percentages tend to obscure the simple fact that inaccurate background check reports continue to affect hundreds of thousands of consumers, if not more.<sup>81</sup> Even if a background screener claims to have a low error rate, the fact remains that significant

numbers of consumers are harmed by inaccurate reports. Exact levels of inaccuracies remain unknown, but private lawsuits, government enforcement actions, and government reports all confirm that errors in background check reports persist and remain pervasive.<sup>82</sup>

## *B. Types of Errors in Criminal Background Check Reports and Their Causes*

The increased use of automation and new technologies has not caused problems with accuracy to evaporate. To the contrary, the same types of errors first identified in the 2012 *Broken Records* report persist. In particular, reports being generated continue to:

- Contain information about a different person (e.g., a “mismatch” or a false positive);
- Include sealed, expunged, or obsolete records;
- Report incomplete information (e.g., omit disposition data);
- Display data in misleading ways (e.g., report a single arrest or incident multiple times); and
- Misclassify the type of offense.

Many of these errors can be attributed to common practices by background screeners, such as:

- Using over-inclusive or unsophisticated matching criteria;
- Failing to verify information obtained through vendors or other faulty sources;
- Using incomplete data (e.g., missing personal identifiers or disposition information);
- Retrieving data in bulk and then failing to routinely update the database;
- Failing to utilize all available information to prevent a false positive match; and
- Misunderstanding state-specific criminal justice procedures and laws.

The following subsections describe these errors and how they affect consumers. The examples, largely taken from private lawsuits, reveal that errors often occur as a result of more than one of these common practices.

### *i. Mismatched reports*

As a result of settlements with attorneys general in 32 states, CFPB supervision, and private class action lawsuits, the Big Three nationwide CRAs now use stricter criteria—either a Social Security Number or a date of birth—to match public records to a consumer’s credit file.<sup>83</sup> Because most civil judgments and many tax liens do not include such data, the nationwide CRAs no longer include these records in credit reports.<sup>84</sup> In contrast, some background screeners continue to disseminate reports that include criminal records “matched” with consumers based on the same type of overly loose matching criteria that the nationwide CRAs used to use.

### **Mismatched Reports: The Case of Diane D. Jones**

Diane D. Jones was denied housing because her background check report contained criminal records that did not belong to her. RealPage reported that Ms. Jones, a life-long resident of Ohio, “matched” with the narcotics offenses of someone named Toni Taylor. The only data that matched Ms. Jones’ information was the last name “Jones,” which was used in two aliases listed on the Toni Taylor records, and the birth year “1961.” Still, RealPage included the Toni Taylor records on Ms. Jones’ report.

Information concerning RealPage’s matching logic and algorithm is sealed and unavailable to the public. However, based on the information available in court filings, it appears that RealPage used loose matching criteria to attribute the Toni Taylor records to Ms. Jones.

RealPage also relied on abbreviated records from a private vendor. The records used to match Ms. Jones with Toni Taylor’s offense did not include an address, Social Security Number, or full date of birth. The publicly available court records, in contrast, contained more information, including a name, address, Social Security Number, and date of birth for Toni Taylor. None of the information in the actual court records matched with Ms. Jones except for the birth year 1961. Although additional information was available, RealPage chose to rely on limited information to attribute criminal records to Ms. Jones.

Source: Pl.’s Motion for Class Cert. at 6, *Jones v. RealPage*, No. 1:190-cv-000501-JG (N.D. Ohio Aug. 26, 2019), Dkt. 38.

The use of unsophisticated or over-inclusive matching criteria, along with the use of incomplete data and the failure to use all available information, leads to mismatched reports — reports that contain the criminal history of a person other than the subject of the report.<sup>85</sup>

Background screeners typically match information in criminal records databases by relying solely on first name, last name, and date of birth. Some rely on name-only matches.<sup>86</sup> These practices are particularly likely to harm consumers with common names. Even where the name and date of birth match, false positives are common. A search of a website called *howmanyofme.com* estimated that 45,878 people in the United States have the name “Robert Smith.” Researchers estimated that, for every 325 instances of Robert Smith, five of them will share the same full date of birth.<sup>87</sup> “Fuzzy logic” algorithms, which background screeners often use, would increase the number of matches by including people with similar names to Robert (e.g., Roberto, Roberta, Rob, Bob), or even people whose middle name is Robert.

The cases of Ms. Jones (see sidebar) and Mr. Williams (see page 19) illustrate one particularly troubling practice. Background screeners typically have or can access information necessary to make a better match. However, some companies choose not to design their products to use this information. Apparently, these companies have concluded that making reports available to users quickly and using less costly methods are higher priorities than ensuring accurate information for those who may lose housing or a job as a result of mismatched records. As the court explained in Mr. Williams’ case, “First Advantage made a business decision to shift the burden to more than 14,000 innocent consumers to ensure the quick turnaround and low price that earned it a large market share. What is so pernicious is that First Advantage will continue shifting that burden — and, by extension, strip thousands of low-wage, hourly employees of job opportunities — so long as it makes good business sense to do so.”<sup>88</sup>

## Mismatched Reports: The Case of Richard Williams

Richard Williams was denied employment twice because of background check reports that matched another person's records to him based on his name and date of birth.

An automated search of First Advantage's National Criminal File "matched" Mr. Williams with "Ricky" Williams' 2009 conviction for selling cocaine. Mr. Williams lived in Chiefland, Florida, but the conviction was from Palm Beach County, approximately 300 miles away. Worse, First Advantage mistakenly put Mr. Williams' Social Security Number on the report even though it was not used to match him to the record. Only after Mr. Williams disputed the record did First Advantage obtain hard copies of the court records. Ultimately, the dispute was resolved in Mr. Williams' favor based on the difference in height listed on "Ricky" Williams' court records and the height listed on Mr. Williams' driver's license. However, it was too late — the employer already had hired someone else.

Mr. Williams then lost another job opportunity after a second erroneous report from First Advantage. Unlike the credit bureaus, First Advantage did not have "cross-blocking" or "flagging" procedures in place to block erroneous records from one individual from being mismatched with another for a second time. The National Criminal File search therefore matched Mr. Williams with "Ricky" Williams' records for burglary and aggravated battery on a pregnant woman from Broward County, Florida. After Mr. Williams disputed the report and First Advantage obtained copies of the underlying court records, First Advantage discovered that "Ricky" Williams' Social Security Number did not match Mr. Williams'. Again it was too late — the employer had already hired someone else.

*Source: Williams v. First Advantage LNS Screening Sols., Inc., 238 F. Supp. 3d 1333, 1339–41, 1348 (N.D. Fla. 2017).*

### ii. Reporting expunged, sealed, or obsolete records

Background screeners commonly report expunged or sealed records.<sup>89</sup> Reporting such records after they are removed from the public record is seriously damaging on two levels. First, it "threatens to undermine the whole strategy of broadening expungement

as a remedy for the harm of collateral consequences."<sup>90</sup> Second, revealing these records deprives consumers of their legal right to a fresh start. Once an employer or landlord is aware of someone's past — even a past that has been legally erased — it is virtually impossible to unring the bell.

As no industry-wide standard practice exists, companies vary in their processes for removing expunged records from private databases.<sup>91</sup> The reporting of expunged records often occurs due to the bulk dissemination of records and the subsequent failure to update those records to remove those that no longer legally exist.<sup>92</sup>

#### What are "expunged" and "sealed" records?

"Expunged" and "sealed" are terms defined by state law. "Expungement" could mean the actual destruction of records or the sealing of records. "Sealing" an underlying record could mean that a record is only partially sealed (i.e., still accessible to law enforcement or for certain purposes), or it could mean actual deletion of records.



Consider what happened to Abdullah James George Wilson. In 2009, Mr. Wilson had a conviction vacated and sealed pursuant to state law. When he tried to rent an apartment in 2012, the conviction appeared on his background check. As a result, Mr. Wilson was denied the apartment.

The apartment complex had requested a report from CoreLogic SafeRent, which then searched its “Multistate Database.” The information in the database comes from many sources, including the New York Department of Corrections (NYDOC). NYDOC does not maintain complete data on underlying convictions. Moreover, it might update its records only every six months. Despite these shortcomings, CoreLogic did not consult the original source of the record – the county court – before reporting the conviction.<sup>93</sup>

Another related, harmful mistake is the reporting of out-of-date or legally prohibited information.<sup>94</sup> For example, background screeners sometimes report arrests older than seven years, even though the FCRA generally prohibits the reporting of such information.<sup>95</sup>

### iii. Reporting incomplete records

Background screeners sometimes include incomplete records in their reports. They may omit final disposition data.<sup>96</sup> A screener may report, for example, the fact that a person was arrested or that charges were filed, but not that a dismissal ultimately occurred instead of a conviction. Consumers therefore may wrongly appear to have pending criminal complaints against them.

Reporting disposition data is critical. Even a consumer who has been convicted may not have been convicted of all charges. Overcharging is common, and charges are often dropped. Indeed, *all* charges may eventually be dropped or dismissed, a consumer may be exonerated, or a conviction may be reversed on appeal. Moreover, employers often are reluctant to hire someone who appears to have an ongoing legal problem.<sup>97</sup>

As with sealed or expunged records, background screeners often fail to report final disposition data because they buy records in bulk and then fail to properly update their data. The omission of final disposition data also occurs because screeners continue to rely on sources known to provide inaccurate and incomplete records, including certain government-operated repositories.<sup>98</sup> Because of these practices, individuals who had pending charges when the background screener first obtained the records may appear to have those pending charges indefinitely.

#### **What does it mean to disseminate data in bulk?**

Bulk data dissemination is the practice in which public sources, often courts or court systems, sell their data on a wholesale basis. The records pertain to many individuals rather than just one. Problems often arise when background screening companies fail to update these records properly.



#### iv. Misleading reporting

Background screeners also engage in misleading reporting. Some background screeners, for example, report single arrests or incidents multiple times. Such duplicative reporting gives the impression that the individual has committed multiple offenses.<sup>99</sup> This type of prejudicial formatting could be the result of poor practices by background screeners, such as the failure to recognize that multiple sources are reporting the same case. Or it could even be an example of background screeners padding a report to make it seem more consequential.

#### v. Misclassifying offenses

Background screeners – or their vendors or sub-contractors – sometimes miscategorize retrieved records. Generally, when a landlord or employer requests a criminal background check, an automated search attempts to match criminal records to the applicant based on identifying information (i.e., name and date of birth). After retrieving records based on this matching logic, the background screener then must sort the records into categories.<sup>100</sup> At this point, background screeners sometimes inaccurately categorize the records, reporting, for example, a misdemeanor as a felony. They also make mistakes when trying to categorize non-criminal offenses (i.e., certain traffic tickets) or offenses less serious than a misdemeanor. State criminal justice systems all work differently, and these mistakes often happen due to a fundamental misunderstanding of how a particular state reports and classifies information.

Consider Gregory Harris' experience. In 2010, he was charged with two misdemeanors. He ultimately pleaded guilty to one summary offense, the lowest grade of offense in Pennsylvania. The Administrative Office of Pennsylvania Courts (AOPC) database, which provides electronic information about Pennsylvania criminal cases to the public, accurately reported that the charge to which Mr. Harris pleaded guilty was a summary offense.

When he applied to work at Lowe's in 2017, Mr. Harris truthfully stated that he had no previous felony or misdemeanor convictions. However, the background check report that Lowe's received from First Advantage identified Mr. Harris' summary offense as a misdemeanor. This error was particularly detrimental to Mr. Harris because, under Pennsylvania law, Pennsylvania employers are not permitted to consider summary

#### **Incomplete Dispositions: The Case of Brandon Sanders**

In 2018, background screening company Checkr failed to report the final dispositions of criminal charges against Brandon Sanders, even though that information was publicly available.

Checkr reported to a potential employer that Mr. Sanders had three open criminal charges for rape and sexual assault. In reality, several of the charges had been dismissed before trial, and in 2016, Mr. Sanders was acquitted of all the remaining charges.

Mr. Sanders got Checkr to correct the report and told his potential employer about Checkr's mistake, explaining that his background check was clean. Still, Mr. Sanders was denied the job.

Mr. Sanders had avoided multiple plea deals and gone to trial to avoid this. He believed he had cleared his name. However, the omission of final disposition information stripped him of the clean record he had fought to preserve.

*Source:* Complaint ¶¶ 31–71, Sanders v. Checkr, Inc., No. 1:18-cv-10741 (S.D.N.Y. Nov. 16, 2018), ECF No. 1.

offenses when making hiring decisions.<sup>101</sup> The inaccurate report also gave Lowe's the false impression that Mr. Harris had lied about his criminal history.<sup>102</sup> Ultimately, Lowe's denied Mr. Harris' application based on the inaccurate report.<sup>103</sup>

#### vi. Failing to verify information from vendors or other third parties

It is worth highlighting that the misclassification of offenses, along with other types of errors, may result from the background screener's failure to exercise quality control over information provided by vendors or other third parties. These vendors sometimes subcontract their work out to other vendors or researchers, further increasing the likelihood of inaccurate reports.

Consider T. Jason Noye's case. In 2015, Mr. Noye was tentatively offered a job. His application stated he had a criminal conviction due to a 2009 guilty plea to a misdemeanor charge and related summary offenses. After reviewing the application, the employer told Mr. Noye that it needed more information about his criminal history, but that his conviction would not necessarily bar him from employment. Ultimately, the employer told Mr. Noye they would not hire him, basing the decision on a report from Yale Associates, Inc. (Yale).

It turned out that Yale inaccurately inflated Mr. Noye's criminal history. In particular, Yale misclassified Mr. Noye's offenses, reporting him as having five misdemeanors instead of one. This error occurred in large part because Yale takes essentially no steps to verify the accuracy of the information provided by its third-party vendors before reporting it.

Yale does not give its vendors guidance on how to conduct searches or provide examples of reliable documents. Nor was Yale aware of exactly how its vendors conduct searches. The vendor Yale used in Mr. Noye's case conducts criminal records searches over the telephone and relies on handwritten notes. He calls the court clerk and asks if there are any records for a particular person. He asks about the nature of the offenses without inquiring as to their grade level. Further, because Yale's ordinary practice is not to obtain actual court records in preparing reports, the owner of the vendor Yale used does not usually ask the court to fax him documents. Only if a question arises following the initial report does Yale request that the vendor obtain actual court records.<sup>104</sup>

In another case, RealPage erroneously attributed someone else's criminal records to Diane D. Jones. This error occurred in large part because RealPage relied on incomplete records from a vendor. RealPage's main corporate representative testified that she did not know the exact means her company's vendor uses to collect criminal records data, nor whether the vendor gathers all of the publicly available information about any given crime. In this case, the vendor had obtained abbreviated records from the Georgia Department of Corrections that did not contain the perpetrator's Social Security Number, street address, or complete date of birth. The actual records from the superior court, in contrast, did identify the perpetrator by name, street address, full Social Security Number, and full date of birth. Because of RealPage's faulty background check report, Ms. Jones' housing application was denied.<sup>105</sup>

Given the vast number of public records sources in different jurisdictions, it is understandable that background screening companies turn to vendors. However, the background screener should ensure that its vendors are adequately trained, supervised, and audited, and that information submitted is reviewed for accuracy. Moreover, reliance on vendors should not shield background check screeners from accountability (see pages 30 – 31).

#### vii. Failing to follow government directives or internal policies

Some government entities require background screening companies to abide by certain policies designed to prevent errors. These governmental directives are welcome, but they will be ineffective if background screeners do not follow them.

For example, the Administrative Office of Pennsylvania Courts (AOPC) has adopted the “LifeCycle file” approach to help address the problem of expunged records reporting. The AOPC frequently produces lists of expunged cases to be removed from private databases. When entities (subscribers) enter into contracts to purchase bulk data from the AOPC, they agree to retrieve and access the LifeCycle file and to remove expunged cases from their databases. Any and all downstream users also must use the LifeCycle file.<sup>106</sup>

Even this contractual obligation does not always prevent background screeners from reporting expunged cases. John Giddiens was denied a holiday seasonal job after LexisNexis (now First Advantage) reported an expunged record on his background check report. Mr. Giddiens’ case was removed from the Pennsylvania Courts’ public website within days of the expungement order – approximately 20 months before the case appeared in the report. After Mr. Giddiens filed a lawsuit, the background screener admitted that it had not properly applied the LifeCycle file to its data. Only then did the company begin applying the file to eliminate the cases that the Pennsylvania Courts had expunged from its databases.<sup>107</sup>

Unfortunately, LexisNexis’s failure to properly apply the LifeCycle file is not unique. Helen Stokes’ application for a residential lease at a senior housing facility was denied when RealPage included expunged charges in her background check report. RealPage reported these charges even though more than six months had passed since the cases had been hidden from public view, eliminated from AOPC’s database, and reported for deletion in a LifeCycle file.<sup>108</sup>

Background screeners also sometimes fail to follow their own policies designed to avoid inaccurate reporting. For instance, in the case of Richard Williams, (see page 19), First Advantage attributed another person’s criminal history to Mr. Williams even though it had specific policies and procedures in place to mitigate the risk of mismatched reports when a consumer has a common name. Pursuant to those policies, First Advantage is supposed to include a criminal record in a report only if the record either contains three matching identifiers (instead of two) or if a supervisor approves the record and notes that further attempts were made to find a third matching identifier. Additionally, if a common-named consumer, such as Mr. Williams, matches with a record for an

individual with a different address, First Advantage is supposed to use Experian to develop some address history information. In Mr. Williams' case, First Advantage simply ignored its common-name procedures.<sup>109</sup>

#### IV. PUBLIC ENFORCEMENT ACTIONS AGAINST BACKGROUND SCREENING COMPANIES FOR ACCURACY-RELATED FCRA VIOLATIONS

Although private enforcement has long been the primary method of ensuring FCRA compliance, public enforcement also plays an important role. Actions by the FTC and the CFPB can include requests for injunctive relief. Since the publication of NCLC's *Broken Records* report in 2012, both the FTC and the CFPB have taken action against some of the largest background screeners for FCRA violations.<sup>110</sup> The following cases are examples of some of these actions. They each involve more than one type of accuracy issue (e.g. mismatched records, the reporting of expunged records, *and* the reporting of a single offense multiple times) and include findings of repeated mistakes resulting from deficient policies and procedures.

##### **U.S. v. HireRight Solutions, Inc. (2012)**<sup>111</sup>

The FTC's enforcement against HireRight Solutions was the first time that the agency charged an employment background screener with violating the FCRA. The FTC charged HireRight with numerous violations, including:

1. failing to take reasonable steps to ensure that the information in the reports was current and reflected updates, such as the expungement of criminal records;
2. failing to follow reasonable procedures to prevent the same criminal offense information from being included in a report multiple times;
3. failing to follow reasonable procedures to prevent obviously inaccurate consumer report information from being provided to employers; and,
4. in numerous cases, including the records of the wrong person.

The settlement imposed a \$2.6 million civil penalty and prohibited HireRight from failing to maintain reasonable procedures to ensure that its report information is as accurate as possible.

##### **In re General Information Services (2015)**<sup>112</sup>

The CFPB found that both General Information Services and e-Backgroundchecks.com constituted CRAs and committed the following FCRA violations:

1. failure to employ reasonable procedures to assure maximum possible accuracy of information in their reports;
2. failure to maintain strict procedures to ensure that public record information that is likely to have adverse effect on ability to obtain employment is complete and up to date; and

3. failure to exclude obsolete, non-reportable information from background reports.

The CFPB made various findings, including that the companies lacked written procedures for researching public records for consumers with common names or nicknames and permitting employees to use discretion in determining record matches, which resulted in mismatched criminal record reports; and engaged in insufficient quality control practices. The consent order provided for up to \$10.5 million in restitution to affected consumers (approximately \$1,000 each), a combined civil penalty of \$2.5 million, and sets forth a detailed compliance plan.

**Federal Trade Commission v. RealPage, Inc. (2018)**<sup>113</sup>

The FTC alleged that RealPage:

1. failed to follow reasonable procedures to assure that criminal records information in its screening reports concerned the actual applicant for housing;
2. used overly broad matching criteria;
3. failed to have policies or procedures in place to access the accuracy of its broad matching criteria; and
4. failed to change its practices and procedures after receiving disputes about its reporting of inaccurate information.

These practices led to the matching of criminal records that did not belong to the applicant and the inclusion of this inaccurate information in screening reports. The order assessed a civil penalty of \$3 million, injunctive relief, and a comprehensive recordkeeping and compliance plan.

**Bureau of Consumer Financial Protection v. Sterling Infosystems, Inc. (2019)**<sup>114</sup>

The CFPB charged Sterling with numerous violations of the FCRA, including:

1. failing to employ reasonable procedures to assure maximum possible accuracy by having procedures that created a heightened risk that its consumer reports would include criminal records belonging to another individual with the same name as the applicant;
2. failing to maintain strict procedures to ensure that public record information included in its reports was complete and up to date; and
3. reporting criminal history information and other adverse information that was more than seven years older than the report.

Under the stipulated judgment, Sterling is required to pay \$6 million in monetary relief to affected consumers and a \$2.5 civil money penalty to the CFPB. The stipulated judgment also includes injunctive relief designed to prevent Sterling from engaging in its allegedly illegal conduct again.

## V. CONSUMER RIGHTS UNDER THE FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act (FCRA) generally governs the use and dissemination of criminal background checks. State laws also may apply.

As set out in more detail in NCLC's *Fair Credit Reporting*, the FCRA's definitions of "consumer report" and "consumer reporting agency" apply not only to the Big Three credit bureaus, but also to background check and tenant screening agencies.<sup>115</sup> Further, screening companies that act as resellers of consumer information are subject to the FCRA even though they do not "maintain a database" of consumer information but instead generate reports by compiling data from various sources.<sup>116</sup> As the CFPB recently clarified, "[c]ompanies that have private databases, maintain national databases, and third-party companies or other companies that provide services may also be background screening companies or may provide services and products such that they are subject to the requirements of the FCRA."<sup>117</sup>

### A. Duties of Background Screening Companies as CRAs

#### i. No reporting of certain outdated information

The FCRA imposes time limits on the reporting of certain types of criminal history information. No time limit exists with respect to criminal *convictions*,<sup>118</sup> but other criminal records, including those reflecting arrests or charges, may only be reported for seven years or until the statute of limitations expires, whichever is longer.<sup>119</sup> Some state laws also impose a time limit on reporting convictions, although the FCRA preempts those adopted after 1996.<sup>120</sup> After non-conviction criminal record data becomes obsolete, a screener may not even disclose the existence of the information or use it to determine an applicant's suitability for a job or housing.<sup>121</sup>

#### ii. "Reasonable procedures" to ensure "maximum possible accuracy"

As with all CRAs, background screeners must maintain procedures to ensure the accuracy of the information they report about consumers. The FCRA does not require error-free reports, but it does require CRAs to have "reasonable procedures to assure maximum possible accuracy."<sup>122</sup>

Although courts generally have permitted background screeners to assume that court records are correct,<sup>123</sup> background screeners do not have blanket immunity if they rely on such records. In one case, the court determined that reliance on court records did not relieve the CRA of the duty to correctly determine which public records belonged to which individual consumers.<sup>124</sup> Another court similarly rejected a CRA's argument that it should not be liable because the inaccuracies in the plaintiff's report originated with a state agency. That court emphasized that the CRA did not rely on information "obtained directly from the source of information regarding criminal convictions" and that the CRA did not review the actual court documents for the reported convictions or contend that there were any errors in the court documents themselves.<sup>125</sup>



### iii. Reinvestigation responsibilities

Under the FCRA, consumers have a right to dispute any inaccurate or incomplete information contained in their file at a CRA.<sup>126</sup> If a consumer disputes inaccurate or incomplete information, the CRA must “conduct a reasonable reinvestigation” of the disputed item within 30 days, and forward all relevant information to the entity that furnished the information.<sup>127</sup> If the CRA finds that the disputed information is inaccurate or incomplete or cannot be verified, then it must delete or correct that information.<sup>128</sup>

### iv. Additional duties when reports are used for employment purposes

CRAs have additional duties when consumer reports are used for employment purposes. When a CRA reports public record information “likely to have an adverse effect upon a consumer’s ability to obtain employment” to an employer, the CRA must do one of two things:

1. At the time that it provides the information to its customers, send the consumer a notice with the following information:
  - a. that the CRA is reporting criminal record information, and
  - b. to whom the report is being sent (including name and address); OR
2. Maintain “strict procedures” designed to ensure that criminal record information is complete and up to date.<sup>129</sup>

## *B. Duties of Users of Consumer Reports*

### i. General duties

The FCRA requires the user of a consumer report, such as an employer or a housing provider, to provide notice to consumers if it takes adverse action based on that report.<sup>130</sup> A report does not need to be the only grounds for the user’s determination, or even the major grounds. It need only be one of the grounds for the determination.<sup>131</sup>

This “adverse action” notice must include:

- The name, address, and phone number of the background checking agency that supplied the report;
- A statement that the background checking agency that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and
- A notice of the individual’s right to dispute the accuracy or completeness of any information the agency furnished, and his or her right to an additional free consumer report from the agency upon request within 60 days.<sup>132</sup>

As discussed next, unless the report was used for employment purposes, the FCRA does not require the user to provide a copy of the actual report used in taking the

adverse action. Instead, the consumer must independently request a report from the CRA. The report obtained directly from the CRA after an adverse action might be very different than the one provided to the user.

## ii. Employer-specific duties

The FCRA imposes specific duties on employers who use consumer reports for employment purposes. In particular, employers must provide a series of notices if they reject someone based on any information found in a background check report.<sup>133</sup>

First, the employer must clearly and conspicuously disclose to the applicant or employee that it will be requesting a consumer report and must obtain the employee's consent in writing to access the report. It must also certify to the CRA that it has done so, and that it will make certain disclosures if adverse action is taken based in any part on the report.<sup>134</sup>

Second, before rejecting a candidate, an employer must give the candidate a "pre-adverse action" notice that includes:

1. A copy of the actual background check report, and
2. A copy of "A Summary of Your Rights Under the Fair Credit Reporting Act."<sup>135</sup>

Third, if an employer does reject a candidate based in whole or in part on a background check, it must provide the candidate with the "adverse action" notice described in the previous section.

## VI. TACTICS TO EVADE THE FAIR CREDIT REPORTING ACT

One continuing trend among background screeners is their attempts to circumvent the FCRA. This section discusses some of ways these companies and others that share data on consumers have sought to escape liability.

### A. Attempting to Evade FCRA Coverage

#### i. Disclaiming FCRA duties

NCLC's 2012 *Broken Records* report highlighted background screening companies' efforts to evade FCRA duties through disclaimers and clever contracting. That report focused on how background screeners sometimes tell users that they need to work with the background screener or re-verify any retrieved records to ensure FCRA compliance. It also discussed how companies attempt to pass the buck by claiming that they are not liable for providing inaccurate information as long as they warn users that the information they provide may not pertain to the person about whom the user requested information.<sup>136</sup>

Companies continue to engage in these tactics. For example, a background report by First Advantage Background Services Corporation that wrongly identified Keith William Dodgson, Jr. as a registered sex offender stated: "This [sex offender] Record is matched by First Name, Last Name ONLY and may not belong to your subject. Your further review of the State Sex Offender Website is required in order to determine if this

is your subject.”<sup>137</sup> Similarly, CoreLogic National Background Data, LLC obligates “customers to independently verify the records returned in response to their search queries before providing consumer reports to their clients.”<sup>138</sup>

Some courts have rebuffed such efforts to evade the FCRA. One court, for example, rejected the background screener’s attempt to disclaim any warranty of completeness and its argument that “a consumer report can be ‘complete’ when it includes adverse public record items that pertain to consumers other than the subject consumer.”<sup>139</sup> The court explained that “[i]t is simply not complete under the FCRA to say that ‘someone named Bill Jones has a conviction record, but whether this is the Bill Jones you are inquiring about, I do not know.’”<sup>140</sup>

Unfortunately, other courts have allowed background screeners to engage in legal sidestepping. One court held that First Advantage had not willfully violated the FCRA because a report was “technically accurate” because it did not state that the record *belonged* to the plaintiff, but rather that the record included matched plaintiff’s name and that it may not belong to the plaintiff.<sup>141</sup> This finding meant that punitive damages were unavailable to the plaintiff.

As NCLC’s 2012 *Broken Records* report explained, there are various problems with this kind of reasoning as well as practical problems with allowing screeners to circumvent the FCRA through disclaimers.

First, the notion that users need to work with the background screener or verify the retrieved records is both unrealistic and harmful to the individual who is the subject of the background check. An employer or landlord may not read the background screener’s disclaimers, and instead may believe that the report stands on its own and is accurate.

Second, the consumer cannot enforce the background screener’s requirements on the user. If an employer or landlord chooses not to take the necessary steps to ensure the accuracy of the report, the applicant may be helpless. Even though users may have some contractual duty to the background screener, users do not have a duty – either contractually or under the FCRA – to the applicant who is the subject of the report. Moreover, it may not be practical for users to verify the accuracy of records – that is why they use screening companies in the first place.

## ii. Denying that the FCRA even applies

Some companies that share data on consumers contend the FCRA does not apply to them. They argue they are not CRAs or that they do not produce consumer reports. Some companies attempt to use their automated products as a shield, asserting that they merely provide technological resources to others. In *Zabriskie v. Federal National Mortgage Association*, a divided panel of the U.S. Court of Appeals for the Ninth Circuit initially accepted this argument with respect to Fannie Mae, which licenses a software program called Desktop Underwriter (DU) to lenders.<sup>142</sup> Although the Ninth Circuit amended its *Zabriskie* opinion to delete the section that had accepted this argument, companies likely will continue to contend that the FCRA does not apply to them because they use automated tools or provide automated tools to end users.<sup>143</sup>

Moreover, even the amended version of *Zabriskie* contains a troubling holding that provides support to companies seeking to evade the FCRA: that Fannie Mae is not a CRA. The Ninth Circuit reasoned that, even if Fannie Mae assembles or evaluates consumer information through the DU, it does not do so with the specific intent to furnish consumer reports to third parties.<sup>144</sup>

A decision by the U.S. Court of Appeals for the Second Circuit, *Kidd v. Thomson Reuters*, also has adopted a specific intent requirement. The plaintiff in *Kidd* argued that the Thomson Reuters' Consolidated Lead Evaluation and Reporting (CLEAR) product was a consumer report because a potential employer, the Georgia Department of Health, had used it to conduct an employment background check that erroneously flagged the plaintiff as having a conviction for theft. However, the Second Circuit rejected this argument and concluded that the report produced by CLEAR was not a consumer report because—even though the state agency had used the report for employment purposes—Thomson Reuters had collected the information and intended it to be used only for law enforcement, fraud prevention, and identity verification (non-FCRA) purposes. Thomson Reuters had also expressly prohibited its sale or use for any FCRA-related purpose, required subscribers to make non-FCRA use certifications, and actively monitored compliance through investigations and suspensions.<sup>145</sup>

Courts accepting these and similar arguments improperly limit the scope of the FCRA and undermine its consumer protection purposes. Even though *Kidd* noted that an entity may not escape regulation as a CRA by merely disclaiming the intent to furnish consumer reports,<sup>146</sup> such decisions likely will embolden companies to use disclaimers and other measures that purportedly prevent the use of reports for FCRA-covered purposes. Such evasions will harm consumers by denying them employment or housing based on erroneous or misleading reports “not intended” to be used for FCRA purposes.

### *B. Attempting to Blame Third Parties for Mistakes*

Some background screening companies argue they are not liable under the FCRA because errors in their reports are attributable to another entity. Some courts have accepted this argument. In one case, General Information Solutions LLC (GIS) assigned Thomas Black's background check to a vendor. The researcher who completed the report for the vendor misread or misinterpreted the information contained in municipal court filings and, as a result, recorded a conviction for Mr. Black where none existed. The court rejected Mr. Black's claim that GIS willfully failed to maintain strict procedures to assure maximum possible accuracy of the information in the report. The court noted that other courts had found it reasonable for a CRA to rely on outside research vendors and emphasized that GIS had chosen a reputable vendor that had in place reasonable procedures, “which if followed, would have insured the accuracy of the reports.”<sup>147</sup>

On the other hand, some courts have rejected arguments that background screeners should escape liability for errors originating with third parties.<sup>148</sup> In one case, a search of First Advantage's national criminal file database erroneously attributed four criminal convictions to Christopher Taylor. First Advantage contended that Mr. Taylor's FCRA claim should fail because the factual inaccuracies in the report originated with the

Minnesota Department of Public Safety (MDPS). The court rejected this argument, explaining that First Advantage had obtained records from Experian Public Records, which in turn had received data in bulk from MDPS. Because Experian and MDPS both include warnings about their data, it was not presumptively reasonable for a CRA to rely on the accuracy of that data. The court also found that the evidence did not show that the inaccuracies originated with MDPS, emphasizing that First Advantage “did not review the face of the court documents for the four reported convictions, and does not contend that there were any errors in the documents themselves.”<sup>149</sup>

Background screeners should not be permitted to escape FCRA liability merely by relying on data or research from vendors or other third parties, particularly where the background screener lacks procedures to verify that the information provided by its vendors is accurate.

### *C. Selling “Safer” Adverse Action Notices to Employers*

As NCLC’s *Broken Records* report noted in 2012, the first breakdown of consumer protection laws often occurs because employers fail to comply with the FCRA’s notice requirements. When employers fail to comply with these requirements, those seeking employment have no way of knowing that their rights have been violated, and thus may never seek to enforce those rights. Even when employers do provide the required pre-adverse action notice, they often fail to give the applicant adequate time to dispute any mistakes. This means that even applicants who successfully remove errors from their background check reports still may not get the job.<sup>150</sup>

Some background screeners now offer additional automated products purportedly designed to “improve compliance” with the pre-adverse notice requirement.<sup>151</sup> For example, Checkr specifically advertises tools for “Safer Adverse Actions.” According to Checkr, its tools “help you save time and improve compliance by generating adverse action notices and automatically setting appropriate waiting periods and reminders.”<sup>152</sup> Checkr’s website states that the default waiting period is seven calendar days, though the system will alter the default if applicable law requires a longer period. If a candidate does not respond within that period of time, Checkr will automatically send a post-adverse action notification.<sup>153</sup>

One key question raised by such automated pre-adverse action products is whether the default waiting period provides an opportunity for real disputes.

The FCRA does not specify the amount of time that must elapse between the pre-adverse action notice and the adverse action itself.<sup>154</sup> The FTC confirmed in its July 2011 Staff Summary that there is no specific period of time that an employer must wait, noting that time period must be “reasonable” and will vary according to the particular circumstances involved.<sup>155</sup> However, the reason for the prior disclosure of the report is clear: to provide the consumer with an opportunity to clear up any misstatements in the report, and to address any misunderstandings the report may have engendered in the mind of the employer. The fact that the employer must provide “A Summary of Your Rights Under the Fair Credit Reporting Act” to the consumer further indicates that the period should be long enough for the consumer to exercise the right to correct errors.<sup>156</sup>



Thus, any time period that does not allow for an actual opportunity to correct inaccuracies in the report is inconsistent with the statutory purpose and should not constitute FCRA compliance.<sup>157</sup>

Advocates reported in 2012 that, on average, it takes at least two weeks to correct a consumer report.<sup>158</sup> This suggests that applicants cannot reasonably correct their reports in the default time allotted by some background screeners or arguably permitted under the FTC Staff Summary. As the CFPB recently emphasized, “it may be difficult for an individual to get an inaccuracy corrected before the employer takes an action, such as the decision not to hire.”<sup>159</sup>

Even assuming that an applicant could correct their report in a few days,<sup>160</sup> they still may not have a meaningful opportunity to dispute the report or get the job. As described on page 12, some employers now rely on automated determinations from the background screener to make their hiring decisions. If the background screener does not send the pre-adverse action notice to the consumer until after it has used the employer’s criteria to determine whether the applicant is eligible for employment and communicated those results to the employer, an applicant likely cannot unring the bell.<sup>161</sup> This is especially true when a report includes expunged records or incomplete disposition information. In this way, employment is unlike a denial of credit, where a consumer can simply apply for another loan or credit card if wrongly denied based upon a credit report. A denial based on a faulty background check report means the denial of a livelihood. As NCLC’s 2012 *Broken Records* reported, some advocates said they have never seen an applicant get the job even after correcting the report.<sup>162</sup>

To avoid the reporting of inaccurate information to employers, background screeners should give the consumer notice that they intend to report negative information *before* sending the information to the prospective employer. That way, the consumer can address the problem prior to dissemination and have a real opportunity to get the job.

## VII. RECOMMENDATIONS

As this update to NCLC’s 2012 *Broken Records* report shows, background screening companies continue to harm consumers by including inaccurate, incomplete, and misleading information on background check reports used for employment and tenant screening purposes. This section focuses in particular on how background screeners and government actors can address ongoing problems with accuracy in criminal background check reports.

At the outset, we make two overarching points about how to address inaccurate reports. First, relying solely or primarily on consumers to detect reporting errors is not an effective strategy in the background screening context. Unlike in the credit reporting context, too many background screeners exist for consumers to regularly order their own reports to review for errors. There also is no central source from which to request a copy of the report. Moreover, a consumer may not be able to identify which background screener a particular employer or housing provider uses in advance of seeking employment or housing. And even if a consumer

*Relying solely or primarily on consumers to detect reporting errors is not an effective strategy in the background screening context.*



could identify the background screener in advance, “the company may or may not have information on the individual or the information that they may provide to an individual in advance of the application process may not be the same as the information provided as part of a request by an employer.”<sup>163</sup>

*Background screening companies already have the ability to do more to ensure that their data is complete and up to date and that they make fewer mistakes.*

Screeners that rely on consumer disputes as the way to ensure accuracy may run afoul of the FCRA in that they are ignoring the requirement “to follow reasonable procedures to assure maximum possible accuracy.” Taking steps “after the fact to fix inaccurate results is not the same as assuring accurate results in the first place before the dissemination.”<sup>164</sup> If CRAs “could simply disseminate inaccurate information and then apologize to escape their obligations, the purpose of the FCRA would be rendered moot” because, at that point, “once a person is already labeled a criminal, it is too late for fairness and confidentiality.”<sup>165</sup> Additionally,

automated processes for categorizing, sorting, and filtering records and determining scores or recommendations may contain errors that are invisible to consumers.

Second, background screening companies already have the ability to do more to ensure that their data is complete and up to date and that they make fewer mistakes. As one court succinctly stated, “[CoreLogic] is capable of obtaining, from its customers and from its governmental sources, sufficient information to determine the specific consumer to whom a particular record pertains.”<sup>166</sup> In reaching this conclusion, the court emphasized that, in response to a complaint from one of the plaintiffs, CoreLogic contacted the clerk of the court and confirmed by reference to the plaintiff’s Social Security Number that a charge was attributed to him.<sup>167</sup>

In another case, the background screener sent a researcher to a county courthouse to gather additional information about the consumer. It then simply failed to use what it had learned to verify the information it erroneously reported based on a search of its own database.<sup>168</sup>

In short, background screening companies can and must do more to ensure the fidelity of criminal background checks. And federal and state actors should step in to clarify the law and hold background screening companies accountable.

### *A. Practices That Background Screening Companies Should Adopt*

That fact that background screeners often take insufficient steps to ensure accurate reports highlights an important issue: as in the credit reporting context, consumers are the commodity of the background screeners, not the customers.<sup>169</sup> And some background screeners appear to believe that their customers – employers and landlords – would rather have a consumer tagged with false or incomplete criminal history information than have negative information missing.<sup>170</sup>

Contrary to the beliefs of at least some companies, furnishing accurate reports that do not over-report criminal history information may be in the best interest of both background screeners and their customers. As ConcernedCRAs has recognized, background screeners have incentives to improve their practices because errors that

result in avoidable harm to consumers increase the risk of litigation and public relations problems.<sup>171</sup> Errors also may be detrimental to users; errors may wrongfully narrow the applicant pool by eliminating strong candidates for jobs or housing.

NCLC's 2012 *Broken Records* report suggested some specific practices that background screeners should adopt to improve the accuracy of their reports. Given that problems with accuracy persist, it is worth reiterating and expanding upon some of those suggestions here.

### i. Avoiding mismatched data

Background screeners should use all available criteria to match a consumer with a criminal record. The criteria should include a combination of name, date of birth, Social Security Number, former residences, gender, race, and physical description. Not all of these criteria will be available in every public database. However, background screeners should obtain all that are available, and should match as many as possible to the subject of the report. Further, background screeners should view the non-match of certain criteria, at a minimum, as a red flag that a record should be more extensively reviewed or verified before it is included as a match.

Because not all matching criteria serve the same function, the criteria should be split into the three levels shown below.

LEVEL 1: CRITERIA THAT CAN MATCH A SPECIFIC INDIVIDUAL	LEVEL 2: CRITERIA THAT CAN DISQUALIFY A POTENTIAL MATCH	LEVEL 3: CRITERIA THAT SHOULD RAISE A RED FLAG
Full name	Gender	Address/state does not match any former residence of the consumer
Date of birth	Race/ethnicity	Middle initial or suffix do not match
Full Social Security Number (nine digits)	Physical description (e.g. height and/or weight)	Consumer has a common name

**A user should obtain information all of the above criteria from the consumer when seeking permission for the background check.** Moreover, background screening companies should not ignore information that the customer or consumer provides, but rather should seek to use it to determine whether a match exists or whether certain records should be disqualified. This will permit maximum possible accuracy in matching by the background screening companies.

**A background screening company must match either the full Social Security Number or at least the two other Level 1 criteria plus a Level 2 criterion.** Social Security Numbers are the only unique identifiers (and even they can be misrecorded, stolen, or falsified). In many cases, a name and date of birth match will be inadequate because of coincidence matches. This is especially true when a consumer has a common name and when a screener conducts a 50-state background check. Thus, a criminal record should not be attributed to an individual based on a name and date of birth unless at least one Level 2 criterion bolsters the accuracy of the match.

**A background screening company should *never* use name-only matches.** A name-only match is never sufficient, especially because tens of thousands of people share names.

**If any Level 2 criteria are available but do not match, then the background screener should exclude that record from any criminal background check report.** For example, a background screener should not include an arrest record that matches a consumer's name and date of birth, but lists a female when the consumer is a male.

**If any Level 3 criteria are available and do not support a match, then the background screener should raise a red flag as to the accuracy of a match between consumer and the record.** For example, there could be an arrest record that matches the consumer's name and date of birth, but the consumer has a common name, John Smith, and has never lived in California, the source of the arrest record. In such a situation, the background screener should scrutinize the record and only include it if a totality of the other factors weighs towards its inclusion. This process requires more than just automated database matching – it requires human involvement.

ii. Ensuring that records are complete and up to date, and no sealed or expunged information is provided

Background screeners should not rely solely on automated searches of giant databases, but rather should verify criminal record data with the *original* sources of the information prior to reporting that information.

Additionally, background screeners and vendors that rely on bulk data should use synchronization software that permits the synching of data. This will ensure that previously reported cases that have been sealed or expunged are identified and removed from the background screener's or vendor's database.

In the alternative, background screeners should request that their public sources of criminal data produce lists of expunged cases that the companies can use to update their databases. At least two state court systems that sell bulk data already produce such lists. Under this "LifeCycle files" approach, the court system frequently produces lists of expunged cases for the companies that subscribe to bulk distributions of criminal case data. Bulk subscribers can then use (and, under their contracts with the court system, must use) this information to reflect expungement and other record events to ensure accuracy "on a near real-time basis."<sup>172</sup>

Further, all arrest data over one year old and lacking final disposition data should be verified with the official information source to determine whether there is a final disposition. Cases that do not show a final disposition and for which no entry has been made for at least five years should be deemed “undisposed cases” and should not be included on a criminal background check report.

Finally, companies should notify the consumer that they intend to report negative information *before* sending it to a prospective employer or landlord. There could be a role for automated decision making in this situation, but only when combined with an opportunity for the consumer to review the decision and a meaningful right to dispute errors. In particular, a screener could: (1) use an automated system to determine whether an applicant has potentially disqualifying records, (2) send a pre-adverse action notice to the applicant if potentially disqualifying records are found, (3) give the applicant a real and meaningful opportunity to review the background check report and dispute any expunged, sealed, or obsolete records, and (4) issue a final report to the landlord or employer that has been reviewed or compiled by a human.

### iii. Avoiding duplicative reporting of a single case

Background screeners should develop matching criteria that reliably prevent the reporting of a single case multiple times. Specifically, this matching logic, algorithm, or software should search for indications that two records are, in fact, the same case. Such matching criteria should include:

- |  |  |
|--|--|
| 1. Arrest date                               | 6. Offense type – felony, misdemeanor, other |
| 2. Disposition date                          | 7. Case number                               |
| 3. Jurisdiction – state; court and/or county | 8. Name of charges                           |
| 4. Convicted – yes/no                        | 9. Disposition                               |
| 5. Number of charges                         | 10. Sentence                                 |

In many cases, not all ten data fields will match or be available. However, all ten criteria should not need to match for the background screener to reliably determine that the cases are the same.

## *B. Policy Recommendations*

Despite the enforcement efforts of the CFPB and the FTC, background screening companies still include inaccurate, misleading, and incorrect history information in criminal background check reports. Great need therefore exists for improved practices in the background screening industry. Both federal and state governments, as well as court systems, have a role to play in compelling background screeners to ensure that their reports are accurate and complete.

### *i. Federal recommendations*

#### **Proposed Statutory Amendments**

Congress should amend the FCRA in several ways to ensure that background screening companies generate accurate and complete reports.

First, because passing a criminal background check often is a prerequisite to obtaining rental housing, Congress should amend the FCRA to broaden protections for prospective tenants. In particular, the provisions that currently apply only to the use of background check reports for employment purposes should be amended to encompass reports used for housing purposes.<sup>173</sup>

Second, Congress should prohibit the reporting of criminal convictions older than seven years.

Third, Congress should amend § 1681k to require consumer reporting agencies *both* to maintain strict procedures to ensure reported information is complete and up to date and to send a notice to a consumer. The notice should be required to be sent *before* delivering the background check report to the user.

Fourth, Congress should give the FTC specific supervisory authority over background screening companies. The FTC should be permitted to use this authority to examine background screeners' policies and practices, including the matching logic and record verification procedures they utilize. Further, the FTC should be required to conduct an analysis of the scoring models used to adjudicate consumers' eligibility for jobs and housing. Finally, the FTC should be required to conduct a study on accuracy in criminal background check reporting.<sup>174</sup>

#### **Proposed Regulatory Action**

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) established the CFPB and also transferred to that agency the bulk of the rulemaking authority under the FCRA.<sup>175</sup> Among other provisions, the Dodd-Frank Act authorizes the CFPB to "prescribe such regulations as are necessary to carry out the purposes of this title," and "as may be necessary or appropriate to administer and carry out the purposes and objectives of this title, and to prevent evasions thereof or to facilitate compliance therewith."<sup>176</sup>

NCLC's 2012 *Broken Records* report offered recommendations as to how the CFPB should use its FCRA rulemaking ability to ensure the accuracy of criminal background check reports. The CFPB has not yet promulgated such regulations. Thus, this report reiterates and expands upon those recommendations here.

The CFPB should use its FCRA rulemaking powers to:

1. Define “reasonable procedures to assure maximum possible accuracy” under § 1681e(b) of the FCRA to include:
  - a. Requiring verification of records retrieved through an automated search of a criminal records database using the records’ original source.
  - b. Clarifying that consumer reporting agencies may not use consumer disputes of inaccurate and incomplete reports as the sole procedure for verifying the results of an automated search of a criminal records database.
  - c. Requiring verification and updating of criminal records that lack disposition data for records more than one year old.
  - d. Prohibiting the reporting of “undisposed cases” —cases that do not show a final disposition and for which no entry has been made for at least five years.
  - e. Requiring all consumer reporting agencies to use all available data to determine matches.
  - f. Prohibiting name-only based matches.
  - g. Prohibiting multiple reports of the same case regardless of source.
  - h. Clarifying what information can be included with convictions and arrests in order to prevent concurrent charges from being treated as additional convictions.
  - i. Requiring all consumer reporting agencies to develop a comprehensive audit program to test the accuracy and completeness of background check reports.
2. Define “strict procedures” under § 1681k to require verification of all criminal records that lack disposition data.
3. Produce guidelines on matching criteria, especially for consumers with common names.
4. Define how long an employer has to wait between sending a pre-adverse action notice under § 1681b(b)(3) and taking adverse action. The period should allow adequate time to dispute and correct the record, such as 35 days.
5. Require registration of consumer reporting agencies.
6. Reaffirm and clarify that the FCRA applies to certain companies (including data vendors or brokers) that own or maintain databases of aggregated criminal record data and to certain software providers that offer access to automated searches or analyses.



## Proposed Enforcement Action

The FTC and the CFPB have enforcement powers they can use to ensure compliance with the FCRA.<sup>177</sup> As discussed (see page 24), both agencies have used this authority to bring actions against background screening companies for FCRA violations, including the failure to employ reasonable procedures to assure maximum possible accuracy of the information contained in reports provided to employers and housing providers.<sup>178</sup>

The FTC and the CFPB should continue to aggressively use their FCRA enforcement powers to:

1. Investigate background screening companies for common FCRA violations. Remedies for any violations should provide not only monetary relief, but also require the background screener to implement specific policies and practices to improve accuracy and compliance.
2. Investigate nationwide employers for compliance with FCRA requirements imposed on users of consumer reports for employment purposes.

### ii. State-level recommendations

As a source of most of the data reported by background screening companies, states and state court systems have a huge role to play in ensuring the accuracy of background check reports.

At least two state court systems – in Pennsylvania and Minnesota – that permit bulk data purchasing have taken steps to address one major accuracy problem: the reporting of expunged records. Generally, when a subscriber enters into a contract for bulk data with these state entities, the subscriber agrees to update its files with updated court records and to permit court audits of its databases.<sup>179</sup> Other state court systems and state entities should use similar contractual agreements to prevent the reporting of sealed, expunged, out-of-date, or incomplete records.

States also should ensure that state repositories, counties, courts, and other public record sources:

1. Require companies that have subscriptions to receive information in bulk have a procedure for ensuring that sealed and expunged records are deleted, that dispositions are promptly reported, and that their customers or other third party recipients also properly delete records and report dispositions.
2. Regularly audit companies that purchase bulk data to ensure that they are removing sealed and expunged data and undisposed cases. Companies that fail such audits should have their privilege to receive bulk data revoked.
3. Ensure that no criminal history report contains information relating to “undisposed cases” – cases for which no entry has been made for at least five years.<sup>180</sup>

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Further, state lawmakers should pass legislation aimed at users of background check reports.<sup>181</sup> In particular, users, such as employers and housing providers, should be required to review the underlying report produced by the criminal background check company before making an employment or housing decision so they do not adopt the background screener's score or eligibility determination without further review. Further, if a consumer has disputed information on a background check report, users should be required to consider that fact. States should require users who deny employment or housing, whether or not based on a consumer report, to provide the consumer with a written notice stating the reason(s), in plain English, for the denial.

Finally, as they have in the credit reporting context,<sup>182</sup> state attorneys general should play a role in reforming the practices of the background screening companies. Attorneys general should investigate background screening companies, and any remedies should require background screening companies to implement specific reforms.

## VIII. CONCLUSION

The use of criminal background checks is ubiquitous in the employment and housing contexts. Thus, it is more critical than ever to compel background screeners to produce accurate reports. If the background screening industry is not monitored and held accountable for its problematic practices, consumers will pay the price by forfeiting housing and job opportunities.

## ENDNOTES

1. REBECCA VALLAS & SHARON DIETRICH, CENTER FOR AMERICAN PROGRESS, [ONE STRIKE AND YOU'RE OUT, HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS](#) 1 (2014).
2. *See id.*; ELIZABETH HINTON, ET AL., [AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM](#) 2 (2018).
3. *See* PERSIS YU & SHARON M. DIETRICH, NAT'L CONSUMER LAW CTR., [BROKEN RECORDS: HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES](#) 7 (2012).
4. Sharon M. Dietrich, *Ants Under the Refrigerator? Removing Expunged Cases from Commercial Background Checks*, CRIM. JUST., Winter 2016, at 27 [hereinafter, Dietrich, *Ants Under the Refrigerator?*]; CONSUMER FINANCIAL PROTECTION BUREAU, MARKET SNAPSHOT: BACKGROUND SCREENING REPORTS 4 (2019) [hereinafter CFPB, MARKET SNAPSHOT].
5. *See* Thomas Ahern, *Background Check Industry Will Continue to Both Expand and Consolidate Simultaneously in 2016*, ESR, (Dec. 23, 2015).
6. CFPB, MARKET SNAPSHOT, *supra* note 4, at 4 (citing EVAN HOFFMAN, BACKGROUND CHECK SERVICES IN THE US, IBISWORLD INDUSTRY REPORT OD6058 10-11 (2019)). Note that background screening companies typically provide other services, including education and employment verification and credit checks. *Id.* at 5.
7. *See* Max Mihelich, *Special Report: More 'Background' Noise*, WORKFORCE (Sept. 5, 2014); *see also* SEARCH, THE NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 29 (2005) [hereinafter SEARCH, REPORT ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION] (citing automation as a major factor in growth of commercial vendor industry along with the technology revolution).
8. *Cf.* US GOV'T ACCOUNTABILITY OFFICE, GAO 15-162, CRIMINAL HISTORY RECORDS: ADDITIONAL CITATIONS COULD ENHANCE THE COMPLETENESS OF RECORDS USED FOR EMPLOYMENT-RELATED BACKGROUND CHECKS 35 (2015) [hereinafter GAO] ("FTC officials stated that the FCRA does not require private criminal background check companies to submit to federal audits or provide disclosure statements on their activities.").
9. Dietrich, *Ants Under the Refrigerator?*, *supra* note 4, at 27; *see also* GAO, *supra* note 8, at 33 (exact number of private companies that conduct criminal record checks, number of checks conducted each year, and number of employer and industries requesting checks are generally unknown, but appear to be increasing).
10. *Membership Directory*, PROFESSIONAL BACKGROUND SCREENING ASSOCIATION; CONSUMER FINANCIAL PROTECTION BUREAU, [LIST OF CONSUMER REPORTING AGENCIES](#) (2019).
11. CFPB, MARKET SNAPSHOT, *supra* note 4, at 4.
12. *Id.* at 5. Credit and reference check services account for about 46 and 17% of industry revenue, respectively.
13. Abigail E. Horn, *Wrongful Collateral Consequences*, 87 Geo. Wash. L. Rev. 315, 330 (2019).
14. VALLAS & DIETRICH, *supra* note 1, at 14.

15. Todd Feathers, *Lawsuits allege gig-economy workers fall victim to Checkr's artificial intelligence*, NEW HAMPSHIRE UNION LEADER (Mar. 2, 2019).
16. See, e.g., NAT'L HOUSING LAW PROJECT, *AN AFFORDABLE HOME ON REENTRY – FEDERALLY ASSISTED HOUSING AND PREVIOUSLY INCARCERATED INDIVIDUALS* 34 (2018) [hereinafter NHP, REENTRY]; CFPB, MARKET SNAPSHOT, *supra* note 4, at 5–6.
17. See, e.g., BETH AVERY, ET AL., NAT'L EMPLOYMENT LAW PROJECT, *FAIR CHANCE LICENSING REFORM: OPENING PATHWAYS FOR PEOPLE WITH RECORDS TO JOIN LICENSED PROFESSIONS* 17 (2018); CENTER FOR COMMUNITY ALTERNATIVES, *THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS RECONSIDERED* 12 (2010).
18. See CFPB, MARKET SNAPSHOT, *supra* note 4, at 3–4 (2018 survey found that 95% of employers surveyed conduct at least one type of background screening and that 94% of those employers include some form of criminal history check); See also Claire Ashley Saba, *A Roadmap for Comprehensive Criminal Justice Reform to Employ Ex-Offenders: Beyond Title VII and Ban the Box*, 56 AM. CRIM. L. REV. 547, 552 (2019) (about 92% of employers subject all or some candidates to criminal background checks); HR.COM & NATIONAL ASSOCIATION OF PROFESSION BACKGROUND CHECK SCREENERS, *NATIONAL SURVEY: EMPLOYERS UNIVERSALLY USING BACKGROUND CHECKS TO PROTECT EMPLOYEES, CUSTOMERS, AND THE PUBLIC* 3, 7–8 (2017), (survey of 1,528 HR professionals; 96% of employers surveyed said organization conducts one or more types of background screening; 97% of respondents reported including some form of criminal history check).
19. *Low Turnover and Higher Rental Prices in 2017 Driving Profitable and Attractive Market for Landlords*, TRANSUNION BUSINESS (Apr. 19, 2017) (2017 survey by TransUnion SmartMove that included responses from 689 landlords found that 90% of landlords reported that they conduct criminal background checks on all potential renters); See also Sharon Dietrich, *Preventing Background Screeners from Reporting Expunged Criminal Cases*, SARGENT SHRIVER NAT'L CTR. ON POVERTY L. (Apr. 2015) [hereinafter Dietrich, *Preventing Reporting of Expunged Records*], (80% of landlords screen for criminal records).
20. Feathers, *supra* note 15.
21. VALLAS & DIETRICH, *supra* note 1, at 19; SOCIETY FOR HUMAN RESOURCES MANAGEMENT (SHRM), *SHRM SURVEY FINDINGS: BACKGROUND CHECKING—THE USE OF CRIMINAL BACKGROUND CHECKS IN HIRING DECISIONS* (2012).
22. SEARCH, *REPORT ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION*, *supra* note 7, at 35–36 (also citing additional reasons for background checks, including the “bandwagon” effect – the perception that everyone else is conducting them and that a company “will somehow be at a disadvantage or failing to ‘do their part’ to make their community a safer place by not conducting some form of a criminal background check”).
23. VALLAS & DIETRICH, *supra* note 1, at 19; Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 55 n.237 (2016) (doctrine of negligent hiring liability “helped fuel the criminal history background check industry and risk aversion in hiring practices.”); see also *Resident Screening*, REALPAGE;; *Why Order Criminal Background Checks*, HIRERIGHT.

24. See Alice Perez, Chancellor's Office, California Community Colleges, *Education Services and Support Division Policy Guidance*, at 5–6 (Feb. 8, 2019) [hereinafter California Community Colleges, *Policy Guidance*], (discussing research on how employees with criminal records perform; leading study found that 3 to 7 years after offending, “nearly all” people who have been convicted of a felony are at no more risk of being arrested for a new offense than anyone in general population); see also Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 336–37 & n.95 (2015); Rebecca Oyama, *Do Not (Re)enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 213–14 & n.183 (2009).
25. VALLAS & DIETRICH, *supra* note 1, at 19.
26. See *id.*; MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMMELM, THE NAT'L EMPLOYMENT LAW PROJECT, *65 MILLION NEED NOT APPLY, THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT* 3 (2011).
27. See California Community Colleges, *Policy Guidance*, *supra* note 24, at 5 (growing body of research documents favorable experience of employers who hired people with criminal records; recent survey indicates quality of hires of people with criminal records equal to or better than quality of individuals without records).
28. VALLAS & DIETRICH, *supra* note 1, at 19; MERF EHMANN, *FAIR HOUSING DISPARATE IMPACT CLAIMS BASED ON THE USE OF CRIMINAL AND EVICTION RECORDS IN TENANT SCREENING POLICIES* 28 (2015).
29. See *id.* at 19; SEARCH, REPORT ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION, *supra* note 7, at 68 (incentive to review criminal background “can be overstated;” “most employers are unlikely to ever be confronted with negligent hiring lawsuit”).
30. AVERY, ET AL., *supra* note 17, at 18.
31. Hinton, et al., *supra* note 2, at 1, 7–10.
32. *Id.* at 1; see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2011).
33. Mihelich, *supra* note 7.
34. NHLP, REENTRY, *supra* note 16, at 34; Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. FOR SOC. JUST. 319, 323 (2010).
35. CFPB, MARKET SNAPSHOT, *supra* note 4, at 2.
36. NHLP, REENTRY, *supra* note 16, at 34.
37. *Id.*
38. YU & DIETRICH, *supra* note 3, at 10–11.
39. SEARCH, THE NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, *SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2016: A CRIMINAL JUSTICE INFORMATION POLICY REPORT* 3 & tbl.2 (2018).
40. See Brief of Amici Curiae Nat'l Consumer Law Center, et al. in Support of Petition for Rehearing or Rehearing En Banc at 10, *Zabriskie v. Fed. Nat'l Mortg. Ass'n*, 940 F.3d 1022 (9th Cir. 2019).
41. *Resident Screening – Rental Property Solutions*, CORELOGIC.

42. [The First AI-Powered Background Check Platform](#), CHECKR; *see also* Yoav Vilner, [These Companies Leverage AI to Disrupt Background Checks: Yes, AI is a Big Part of It](#), INC. (Feb. 21, 2018).
43. [Background Checks](#), FIRST ADVANTAGE, (advertising that 90% of background reports are returned within 24 hours).
44. The credit reporting industry uses a standard electronic data reporting format issued by a trade association, the Consumer Data Industry Association. This format is called Metro 2 and consists of multiple fields and shorthand codes. Metro 2 has been painstakingly designed so that information vital to the preparation of accurate consumer reports is identified and defined to facilitate the routine provision of accurate and complete information. *See* Nat'l Consumer Law Center, [Fair Credit Reporting](#) §§ 6.3.2.1, 6.4.2.5 (9th ed. 2017).
45. CFPB, MARKET SNAPSHOT, *supra* note 4, at 8.
46. *See, e.g.*, Def. CoreLogic Rental Property Solutions, LLC's Motion to Seal Documents Filed in Support of Pl.'s Motion to Compel, Connecticut Fair Housing Ctr. v. CoreLogic Rental Property Sols., LLC, No. 3:18-cv-00705 (D. Conn. Aug. 30, 2019), ECF No. 83.
47. CHECKR.
48. *See, e.g.*, [New Criminal Charges As They Happen with Continuous Background Checks](#), CHECKR; [Criminal Records Watch](#), FIRST ADVANTAGE, (describing "ongoing monitoring tool that will allow employers to monitor criminal record activity of existing employees and contractors in near real-time"); [Rental Property Solutions – Criminal Screening](#), CORELOGIC, ("Registry CrimWATCH is a recurring criminal records search service . . . Criminal Alert regularly scans nationwide criminal databases and notifies you when new information is returned for your residents on your Criminal Alert enrollment list.").
49. Brief of Amici Curiae Nat'l Consumer Law Center, et al. in Support of Petition for Rehearing or Rehearing En Banc at 11, *Zabriskie v. Fed. Nat'l Mortg. Ass'n*, 940 F.3d 1022 (9th Cir. 2019); *see* CFPB, MARKET SNAPSHOT, *supra* note 4, at 16 (some companies rely on "algorithmically driven database searches").
50. NHLP, REENTRY, *supra* note 16, at 34; *see also* Dietrich, [Ants Under the Refrigerator?](#), *supra* note 4, at 27.
51. CFPB, MARKET SNAPSHOT, *supra* note 4, at 5–6.
52. *See id.* at 5, 10.
53. *See* [Record Clearing \(Expungement\)](#), ACCESS TO JUSTICE LAB; Compl. ¶ 18, *Spendlove v. Checkr, Inc.*, No. 3:18-cv-00610-REP (E.D. Va. Sept. 4, 2018), Dkt. 1 (Checkr obtains public-record information using webscrape technology, in which a computer program accesses court or county websites across the country and retrieves criminal-history information).
54. *See* Dietrich, [Ants Under the Refrigerator?](#), *supra* note 4, at 27; NHLP, REENTRY, *supra* note 16, at 34; Plaintiff's Motion for Class Cert. at 4–5, *Jones v. RealPage*, No. 1:190-cv-000501-JG (N.D. Ohio Aug. 26, 2019), ECF No. 38.
55. Mike Coffey, [Why Background Screeners are Getting Pilloried](#), CONCERNEDCRAS.COM (Nov. 13, 2012).
56. *See* CFPB, MARKET SNAPSHOT, *supra* note 4, at 8.
57. [CONCERNEDCRAS.COM; Self-Certification Application Agreement](#), CONCERNEDCRAS.COM.
58. Dietrich, [Ants Under the Refrigerator?](#), *supra* note 4, at 28; Dietrich, [Preventing Reporting of Expunged Records](#), *supra* note 19.



59. Taken from *Henderson v. CoreLogic National Background Data, LLC*, 178 F. Supp. 3d 320, 322–23 (E.D. Va. 2016).
60. *Williams v. First Advantage LNS Screening Solutions, Inc.*, 238 F. Supp. 3d 1333, 1339–40 & n.3 (N.D. Fla. 2017); Trial Tr. vol. 4, 464, Oct. 27, 2016. This case is discussed further below. See Section III.B.i, *infra*.
61. See NHLP, REENTRY, *supra* note 16, at 35; EHMAN, *supra* note 28, at 2; see also *Positive Adjudication Matrix: Reduce bias and increase efficiency*, CHECKR, (“Adjudication is a process in which a company reviews background check results against a company’s standards to make an assessment on whether to hire the candidate. . . . Checkr’s Positive Adjudication Matrix (‘PAM’) automates much of the adjudication process. . . .”); Class Action Complaint ¶ 10, *Harris v. First Advantage Background Servs. Corp.*, No. 2:19-cv-00677 (E.D. Pa. Feb. 15, 2019), ECF No. 1 (“Defendant will . . . review the background reports it generates and create a ‘score’ based on criteria provided in advance by the employer ordering the background report, and inform the employer whether the subject of the background report is eligible for hire based on those criteria.”).
62. See NHLP, REENTRY, *supra* note 16, at 35; Brief of Amici Curiae Nat’l Consumer Law Center, et al. in Support of Petition for Rehearing or Rehearing En Banc at 14, *Zabriskie v. Fed. Nat’l Mortg. Ass’n*, 940 F.3d 1022 (9th Cir. 2019).
63. See *Oyama*, *supra* note 24, at 189–90 (“[M]any commercial screening services are designed precisely so that landlords do not have to spend time considering the individual’s specific criminal history.”); Colin Lecher, *Automated Background Checks Are Deciding Who’s Fit for a Home*, THE VERGE (Feb. 1, 2019).
64. CHECKR.
65. *Resident Screening*, CORELOGIC.
66. Reg. B., 12 C.F.R. pt. 1002.2(p)(1); see also Nat’l Consumer Law Center, *Fair Credit Reporting* § 16.2.3.2 (9th ed. 2017).
67. Nat’l Consumer Law Center, *Fair Credit Reporting* § 16.5.2 (9th ed. 2017).
68. *Id.* § 16.2.3.2.
69. Landlords, unlike employers, do not have to provide candidates with a pre-adverse action notice before rejecting them. See Section V, *infra*.
70. See, e.g., Def. CoreLogic Rental Property Solutions, LLC’s Mem. in Support of Its Mot. to Dismiss at 1, *Connecticut Fair Housing Ctr. v. CoreLogic Rental Property Solutions, LLC*, No. 3:18-cv-00705-VLB (D. Conn. Aug. 23, 2018), ECF No. 19-1 (“[Defendant] is a vendor providing criminal background screening services, which helps to ensure that housing applications are processed in a timely manner for consumers, but also in a way that ensures the safety and security of housing communities. . . . [Defendant] does not make housing decisions or set the criteria by which housing applications are judged. Instead, . . . it is the *landlord* that controls how it receives and uses [defendant’s] services, *not* [Defendant] that controls the landlord’s decisions.”).
71. NHLP, REENTRY, *supra* note 16, at 35.
72. *Oyama*, *supra* note 24, at 189–90 (“[M]any commercial screening services are designed precisely so that landlords do not have to spend time considering the individual’s specific criminal history.”); Lecher, *supra* note 63.

73. NHLP, REENTRY, *supra* note 16, at 35 (providing only pass/fail determination may increase fair housing liability because report lacking underlying information on which denial is based does not allow housing provider to meaningfully conduct individualized assessment of applicant’s criminal history).
74. See Compl. ¶ 194, Connecticut Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC, No. 3:18-cv-00705-VLB (D. Conn. April 24, 2018).
75. See Nat’l Consumer Law Center, et al., [Comments to the U.S. Dep’t of Hous. and Urban Dev. on HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard](#), 84 Fed. Reg. 42,854 (Aug. 19, 2019), Dkt. No. FR-6111-P-02, at 11, 13; Ifeoma Ajunwa, *Beware of Automated Hiring*, NY TIMES (Oct. 8, 2019).
76. See FED. TRADE COMM’N REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003 (Dec. 2012); CHI CHI WU, ET AL., NAT’L CONSUMER LAW CTR., AUTOMATED INJUSTICE REDUX 4 (2019) (landmark FTC study found that one in five consumers have verified errors in their credit reports, and one in twenty consumers have errors so serious they would be denied credit or need to pay more for it).
77. Ongoing litigation suggests that at least one company is assessing accuracy rates using other metrics, however. See Pl.’s Motion to Compel Production of Docs. in Response to RFP 30 at 1–2, Connecticut Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC, No. 3:18-cv-00705 (D. Conn. Sept. 24, 2019), ECF No. 97 (“[CoreLogic] acknowledged . . . it had extensively studied the accuracy of its matching logic through at least three studies over four years.”).
78. Williams v. First Advantage LNS Screening Sols., Inc., 238 F. Supp. 3d 1333, 1344 (N.D. Fla. 2017).
79. *Id.*
80. *Id.* at 1340 n.6.
81. See, e.g., Noam Weiss, Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act, 78 BROOK. L. REV. 271, 280–81 (2012) (large number of plaintiffs in a single class action – 665,391 – suggests deficiencies in criminal background checks are pervasive); NHLP, REENTRY, *supra* note 16, at 35 n.25 (error rate for credit reports is 25% to 30%; error rate for criminal background checks likely is far higher); Williams v. First Advantage LNS Screening Sols., Inc., 238 F. Supp. 3d 1333, 1340 (N.D. Fla. 2017) (of 3.5 million reports prepared between 2010 and 2013, 17,431 were disputed, 14,346 resulted in a revised background report, and 13,346 of those revised reports were based on disputes where the consumer complained that a public record in their report belonged to another individual); Dodgson v. First Advantage Background Servs. Corp., 2018 WL 18 07014, at \*6 (N.D. Ga. Mar. 28, 2018) (in five-year period, there were 3,726 instances where someone disputed the sex offender finding; in 3,594 instances, defendant determined that the sex offender notation should be removed); Plaintiff’s Motion for Class Cert. at 4–5, Jones v. RealPage, No. 1:190-cv-000501-JG (N.D. Ohio Aug. 26, 2019), ECF No. 38 (stating that discovery revealed over 11,000 inaccurate background reports, many thousands more likely exist).
82. See, e.g., CFPB, MARKET SNAPSHOT, *supra* note 4, at 14; Feathers, *supra* note 15 (over 40 FCRA lawsuits have been filed against Checkr alone); Dietrich, *Preventing Reporting of Expunged Records*, *supra* note 19; Lecher, *supra* note 63 (quoting NHLP’s director of litigation as saying, “I’ve looked at more criminal records reports than I could count, and I would say that well over half the ones I’ve looked at had some kind of inaccuracy”).

83. See Assurance of Voluntary Compliance, In the Matter of Equifax Info. Serv. L.L.C., Experian Info. Solutions, Inc., and TransUnion L.L.C. (May 20, 2015); Settlement Agreement, In the Matter of the Investigation by the Attorney General of the State of New York, of Experian Info. Sol., Inc., Equifax Info. Serv. L.L.C., and TransUnion L.L.C. (Mar. 8, 2015); CFPB, [SUPERVISORY HIGHLIGHTS CONSUMER REPORTING SPECIAL EDITION 5–6](#) (2017). For information about the settlements reached as a result of the class action lawsuits, see the following websites: <https://www.tupublicrecordsettlement.com/>, <http://www.experianpublicrecordsettlement.com/>, <https://www.equifaxpublicrecordsettlement.com/>.
84. Chi Chi Wu, *Big Changes for Credit Reports, Improving Accuracy for Millions of Consumers*, NCLC DIGITAL LIBRARY (July 2017).
85. See CFPB, MARKET SNAPSHOT, *supra* note 4, at 14; see also Megan Cerullo, *What everyone should know about employer background checks*, CBS NEWS (June 28, 2019).
86. See, e.g., GAO, *supra* note 8, at 38 (private companies generally conduct name-based checks, which can decrease the accuracy of the information the check produces); Stipulated Order for Permanent Injunction and Civil Penalty Judgment, Fed. Trade Comm’n v. RealPage, Inc., No. 3:18-cv-02737-N (N.D. TX Oct. 16, 2018) (FTC alleged that RealPage used matching criteria requiring only an exact match of an applicant’s last name and a non-exact match of a first name, middle name, or date of birth and lacked policies or procedures to assess the accuracy of those results).
87. Michael P. McDonald and Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 ELECTION L.J. 111, 112, 119 (2008); cf. Sharad Goel et al., *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections* at 2 (Jan. 17, 2019), (estimating that, in study concerning voter fraud and double voting in particular, “[i]n the national voter file, . . . 97% of the votes cast with the same first name, last name, and date of birth were cast by two distinct individuals”).
88. *Williams v. First Advantage LNS Screening Sols., Inc.*, 238 F. Supp. 3d 1333, 1357 (N.D. Fla. 2017); see also *id.* at 1356 (“First Advantage, had to strike a balance between accuracy and profit. It arguably chose the later – First Advantage seems to have padded its wallet rather than providing each adjudicator with access to a credit-reporting bureau like Experian. And in doing so, First Advantage – a multi-million dollar corporation – shifted its costs to defenseless, vulnerable consumers”); see also *Dodgson v. First Advantage Background Servs. Corp.*, 2018 WL 1807014, at \*7 (N.D. Ga. Mar. 28, 2018) (“[I]f Defendant searched the actual files maintained by the state of Pennsylvania it could have used Plaintiff’s birth date to determine that the sex offender match it found was for Plaintiff’s biological father and not Plaintiff. Defendant instead took a presumably cost-effective short cut and purchased ‘raw data’ from Experian, which provided only limited information for criminal records.”).
89. See CFPB, MARKET SNAPSHOT, *supra* note 4, at 15; Dietrich, *Preventing Reporting of Expunged Records*, *supra* note 19 (listing class action lawsuits); see also Section III.B.vii., *infra* (discussing additional cases where background screeners reported expunged cases); Section IV., *infra* (discussing FTC enforcement action against HireRight).
90. Dietrich, *Preventing Reporting of Expunged Records*, *supra* note 19.
91. See CFPB, MARKET SNAPSHOT, *supra* note 4, at 15.

92. *See id.* at 12 (“If a background company’s external or internal databases do not align with the frequency of a court’s record update, it could lead to incomplete reporting or reporting of expunged or dropped cases.”); Roberts, *supra* note 24, at 341. For a discussion of whether background screeners may lawfully report expunged records, see Collateral Consequences Resource Center Staff, *May Background Screeners Lawfully Report Expunged Records?* (Feb. 6, 2018).
93. Wilson v. CoreLogic SafeRent, LLC, 2017 WL 4357568, at \*1–5 (S.D.N.Y. Sept. 29, 2017).
94. CFPB, MARKET SNAPSHOT, *supra* note 4, at 15.
95. *See* Consent Order 8, In re General Information Services, File No. 2015-CFPB-0028 (C.F.P.B. Oct. 29, 2015).
96. CFPB, MARKET SNAPSHOT, *supra* note 4, at 11, 15.
97. YU & DIETRICH, *supra* note 3, at 24.
98. *Id.* at 25–26; *see also* CFPB, MARKET SNAPSHOT, *supra* note 4, at 11–12 (discussing disparities in accuracy and reporting of dispositions to repositories); Horn, *supra* note 13, at 330.
99. CFPB, MARKET SNAPSHOT, *supra* note 4, at 14; *see also* GAO, *supra* note 8, at 35 (discussing FTC complaint alleging that background screener failed to follow reasonable procedures to prevent the company from including the same criminal offense information in a consumer report multiple times).
100. *See, e.g., Resident Screening – Criminal History*, REALPAGE, (“Our criminal classification is a premium feature that automatically classifies offenses into 34 categories based on their nature/type and severity.”).
101. *Summary Offenses in Pennsylvania*, COMMUNITY LEGAL SERVICES OF PHILADELPHIA (April 22, 2014); *see also* 18 P.S. § 9125; Cisco v. United Parcel Servs., Inc., 476 A.2d 1340, 1343 (Pa. Super. 1984).
102. *Cf.* Roberts, *supra* note 24, at 341–42 (individual who denies the fact of an expunged conviction or arrest is considered to have lied if the criminal record later appears).
103. *See* Class Action Compl. ¶¶ 42–52, Harris v. First Advantage Background Servs. Corp., No. 2:19-cv-00677 (E.D. Pa. Feb. 15, 2019), ECF No. 1; *see also* *See* Mem. of Law in Support of Pl.’s Motion for Class Cert. at 3–4, Noye v. Yale Assoc., Inc., No. 1:15-cv-02253-YK (M.D. Pa. April 28, 2017), ECF No. 63.
104. *See* Mem. of Law in Support of Pl.’s Motion for Class Cert. at 2–8, Noye v. Yale Assoc., Inc., No. 1:15-cv-02253-YK (M.D. Pa. April 28, 2017), ECF No. 63; Decl. of James A. Francis in Support of Pl.’s Motion for Class Cert. Exs. E (16:17–24, 35:4–24, 101:19–22, 129:17–24), G (52:1–10, 53:18–24, 84:6–24, 85:1–10), Noye v. Yale Assoc., Inc., No. 1:15-cv-02253-YK (M.D. Pa. April 28, 2017), ECF No. 62.
105. *See* Plaintiff’s Motion for Class Cert. at 6, Jones v. RealPage, No. 1:190-cv-000501-JG (N.D. Ohio Aug. 26, 2019), Dkt. 38; Decl. of John Soumilas in Support of Pl.’s Motion for Class Cert. Exs. 3 (24:6–13), 7, 9, Jones v. RealPage, No. 1:190-cv-000501-JG (N.D. Ohio Aug. 26, 2019), ECF No. 38.
106. CFPB, MARKET SNAPSHOT, *supra* note 4, at 16.
107. Dietrich, *Preventing Reporting of Expunged Records*, *supra* note 19; Compl., Giddiens v. First Advantage LNS Screening Solutions, Inc., No. 2:12-cv-02624-LDD (E.D. Pa. May 14, 2012), ECF No. 1.
108. Compl. ¶¶ 37–43, Stokes v. RealPage, Inc., No. 2:15-cv-01520 (E.D. Pa. Mar. 25, 2015), ECF No. 1.

109. *Williams v. First Advantage LNS Screening Sols., Inc.*, 238 F. Supp. 3d 1333, 1339, 1344–45 (N.D. Fla. 2017). The court also determined that First Advantage’s procedures were “woefully insufficient to mitigate” the risk of harm to common-name consumers. *Id.* at 1343.
110. See National Consumer Law Center, *Fair Credit Reporting*, Appendix L.6 (9th ed. 2017).
111. Stipulated Final Judgment and Order for Civil Penalties, Permanent Injunction, and Other Equitable Relief, *U.S. v. HireRight Solutions, Inc.*, Case No. 1:12-cv-01313 (D.C. Cir. Aug. 8, 2012), ECF No. 2-1; see also Press Release, Fed. Trade Comm’n, [Employment Background Screening Company to Pay \\$2.6 Million Penalty for Multiple Violations of the Fair Credit Reporting Act](#) (Aug. 8, 2012).
112. Consent Order, *In re General Information Services*, File No. 2015-CFPB-0028 (C.F.P.B. Oct. 29, 2015); see also Press Release, Consumer Financial Protection Bureau, [CFPB Takes Action Against Two of the Largest Employment Background Screening Report Providers for Serious Inaccuracies](#) (Oct. 29, 2015).
113. Compl., *Fed. Trade Comm’n v. RealPage, Inc.*, No. 3:18-cv-02727-N (N.D. Tex. Oct. 16, 2018), ECF No. 1; Stipulated Order for Permanent Injunction and Civil Penalty Judgment, *Fed. Trade Comm’n v. RealPage, Inc.*, No. 3:18-cv-02727-N (N.D. Tex. Oct. 16, 2018), ECF. No. 3-1; see also Press Release, Fed. Trade Comm’n, [Texas Company Will Pay \\$3 Million to Settle FTC Charges That It Failed to Meet Accuracy Requirements for its Tenant Screening Reports](#) (Oct. 16, 2018).
114. Compl., *Bureau of Consumer Fin. Prot. v. Sterling InfoSystems, Inc.*, No: 1:19-cv-10824-AJN (S.D.N.Y Nov. 22, 2019), ECF. No. 1; Proposed Stipulated Final Judgment and Order, *Bureau of Consumer Fin. Prot. v. Sterling InfoSystems, Inc.*, No: 1:19-cv-10824-AJN (S.D.N.Y Nov. 22, 2019); see also Press Release, [Consumer Financial Protection Bureau Settles with Employment Background Screening Company](#) (Nov. 22, 2019).
115. See 15 U.S.C. §§ 1681a(f), 1681b; see also Nat’l Consumer Law Center, *Fair Credit Reporting* §§ 2.3, 7 (9th ed. 2017).
116. See 15 U.S.C. § 1681a(u).
117. CFPB, MARKET SNAPSHOT, *supra* note 4, at 6 n.24.
118. 15 U.S.C. § 1681c(a)(5).
119. 15 U.S.C. § 1691c(a)(2); see also Nat’l Consumer Law Center, *Fair Credit Reporting* § 5.2.3.7.2 (9th ed. 2017).
120. Nat’l Consumer Law Center, *Fair Credit Reporting* §§ 5.2.6, 5.8.1, 10.7.3.3 (9th ed. 2017).
121. NHLP, REENTRY, *supra* note 16, at 36; see also *Serrano v. Sterling Testing Sys., Inc.*, 557 F. Supp. 2d 688, 690–93 (E.D. Pa. 2008).
122. 15 U.S.C. § 1681e(b).
123. See *Henson v. CSC Credit Servs.* 29 F.3d 280, 286 (7th Cir. 1994).
124. *Adams v. Nat’l Eng’g Serv. Corp.*, 620 F. Supp. 2d 319, 334 (D. Conn. 2009).
125. *Taylor v. First Advantage Background Servs. Corp.*, 207 F. Supp. 3d 1095, 1109–10 (N.D. Cal. 2016).
126. 15 U.S.C. § 1681i(a)(1)(A).
127. 15 U.S.C. § 1681i(a)(1)(A), (a)(2).
128. 15 U.S.C. § 1681i(a)(5).



129. 15 U.S.C. § 1681k.
130. 15 U.S.C. § 1681m; Nat'l Consumer Law Center, *Fair Credit Reporting* § 8.5.4.1.1 (9th ed. 2017).
131. Nat'l Consumer Law Center, *Fair Credit Reporting* § 8.5.4.1.1 (9th ed. 2017).
132. 15 U.S.C. § 1681m. Unfortunately, various courts have concluded that the 2003 FACTA amendments to the FCRA eliminated the ability of consumers to privately enforce the adverse action notice requirements of the FCRA. *See* Nat'l Consumer Law Center, *Fair Credit Reporting* § 8.5.5 (9th ed. 2017).
133. *See generally* Nat'l Consumer Law Center, *Fair Credit Reporting* §§ 7.2.4, 8. (9th ed. 2017), (discussing requirements for employer use of consumer reports).
134. 15 U.S.C. § 1681b(b)(2).
135. 15 U.S.C. § 1681b(b)(3).
136. YU & DIETRICH, *supra* note 3, at 29–31.
137. *Dodgson v. First Advantage Background Servs. Corp.*, 2019 WL 2306131, at \*2 (N.D. Ga. Mar. 7, 2019).
138. *Henderson v. CoreLogic Nat'l Background Data, LLC*, 178 F. Supp. 3d 320, 323 (E.D. Va. 2016); *see also* Decl. of Timothy St. George in Support of Motion for Summary Judgment Ex. F, *Wilson v. CoreLogic SafeRent, LLC*, 2017 WL 4357568 (S.D.N.Y. Feb. 9, 2017), ECF No. 106-6 (background check report recited: “Due to the nature of public records and/or the nature of the query, (I) listings above may not pertain to the individual applicant in question or (II) there will be instances where no criminal record information is reported with regard to persons in fact have criminal records. . . . [T]here will be instances in which information may not pertain to the applicant. You shall take independent verification of the information contained in this report to ensure that it pertains to the applicant before you take any adverse action against the applicant.”).
139. *Henderson v. CoreLogic Nat'l Background Data, LLC*, 178 F. Supp. 3d 320, 323, 333 (E.D. Va. 2016).
140. *Id.* at 323; *see also* *Philpot v. Microbilt Corp.*, 2018 WL 834619, at \*6 (W.D. Ky. Feb. 12, 2018) (finding genuine dispute as to whether information in report was complete and up to date where report included disclaimer).
141. *Dodgson v. First Advantage Background Servs. Corp.*, 2019 WL 2306131, at \*4 (N.D. Ga. Mar. 7, 2019); *see also* YU & DIETRICH, *supra* note 3, at 30 & n.144 (citing cases).
142. *See Zabriskie v. Fed. Nat'l Mortg. Ass'n*, 912 F.3d 1192, 1197–98 (9th Cir. 2019).
143. *See Henderson v. Corelogic Nat'l Background Data, LLC*, 161 F. Supp. 3d 389, 393–94 (E.D. Va. 2016) (emphasis and internal quotation marks omitted) (rejecting background screener’s argument, in pre-*Zabriskie* case, that its reports are not consumer reports because the company “merely provides data in its raw form, which is not descriptive of any one person, but rather is simply a movement of data in response to search queries provided by its customers”); *Wilson v. Source for Pub. Data, L.P.*, 2013 WL 12106128, at \*3 (S.D. Tex. Apr. 30, 2013) (dismissing FCRA claim because information obtained through search was not “information concerning” plaintiff; employment agency did not purchase consumer report, but instead purchased access to website to conduct its own search).
144. *Zabriskie v. Fed. Nat'l Mortg. Ass'n*, 940 F.3d 1022, 1030 (9th Cir. 2019).
145. *Kidd v. Thomson Reuters Corp.*, 925 F.3d 99, 102–08 (2d Cir. 2019).



146. *Id.* at 106–07. The FTC also has attempted to stop efforts to evade liability by denying CRA status. See Tony Rodriguez & Jessica Lyon, *Background Screening Reports and the FCRA: Just Saying You’re Not a Consumer Reporting Agency Isn’t Enough*, FED. TRADE COMM’N BUS. BLOG (Jan. 10, 2013).
147. Black v. Gen. Info. Sols. LLC, 2018 WL 1070868, at \*6, 8 (N.D. Ohio Feb. 26, 2018), *appeal dismissed pursuant to agreement of the parties sub nom.* Black v. Gen. Info. Servs., Inc., 2018 WL 3426207 (6th Cir. May 18, 2018).
148. See Henderson v. Corelogic Nat’l Background Data, LLC, 178 F. Supp. 3d 320, 336 (E.D. Va. 2016) (“Several district courts have held that the inaccurate attribution of criminal records constitutes sufficient evidence to permit the question of ‘reasonable procedures’ to go to a jury, even where, as here, the defendant attempted to avoid liability by pointing to a disclaimer or other contractual delegation of responsibility.”).
149. Taylor v. First Advantage Background Servs. Corp., 207 F. Supp. 3d 1095, 1108–1110 (N.D. Cal. 2016).
150. YU & DIETRICH, *supra* note 3, at 13–14; see also Cerullo, *supra* note 85. As discussed in Section V, pre-adverse action notices only apply in the employment context. See Nat’l Consumer Law Center, *Fair Credit Reporting* § 8.11.1.1.2 (9th ed. 2017).
151. See, e.g., *Smart Technology to Make Your Hiring More Compliant*, CHECKR, <https://checkr.com/helping-you-hire/compliance-tools>; see also *Simplify the Adverse Action Process*, HIRE RIGHT.
152. *Smart Technology to Make Your Hiring More Compliant*, CHECKR.
153. *The Adverse Action Process: deciding not to move forward with a candidate*, CHECKR.
154. See Nat’l Consumer Law Center, *Fair Credit Reporting* § 8.11.3.2 (9th ed. 2017).
155. FTC Staff Summary § 604(b)(3) item 5; see also Nat’l Consumer Law Center, *Fair Credit Reporting* § 8.11.3.2 (9th ed. 2017).
156. Nat’l Consumer Law Center, *Fair Credit Reporting* § 8.11.3.2 (9th ed. 2017).
157. See Magallon v. Robert Half Int’l, Inc., 311 F.R.D. 625, 633–34 (D. Or. 2015) (“[A]n employer who intends to take an adverse action must give the applicant an opportunity to change the employer’s mind. This opportunity must be real; a *pro forma* period between the preliminary and final decision does not satisfy the statute.”).
158. YU & DIETRICH, *supra* note 3, at 14; see also Lecher, *supra* note 63.
159. CFPB, MARKET SNAPSHOT, *supra* note 4, at 13.
160. See, e.g., Compl. ¶¶ 62–63, Sanders v. Checkr, Inc., No. 1:18-cv-10741 (S.D.N.Y. Nov. 16, 2018), ECF No. 1 (after plaintiff disputed inaccurate report, Checkr was able to correct it “[i]n only a few days”).
161. It is unclear whether a background screener’s adjudication and communication of the results to an employer constitute an adverse action improperly taken before the pre-adverse action notice has been sent. Compare Dahy v. FedEx Ground Package Sys., Inc., 2018 WL 4328003, at \*5 (W.D. Pa. Aug. 3, 2018), *report and recommendation adopted*, 2018 WL 4323808 (W.D. Pa. Sept. 10, 2018) (communication of results of adjudication to employer is akin to internal decision and not adverse action), with Branch v. Gov’t Employees Ins. Co., 286 F. Supp. 3d 771, 785 (E.D. Va. 2017) (assignment of “Fail” grade could be considered final decision rather than internal one such that it could not be reversed following dispute); Compl. ¶ 28, Sanders v. Checkr, Inc., No. 1:18-cv-10741 (S.D.N.Y. Nov. 16, 2018), ECF No. 1 (arguing that such a practice constitutes an adverse action).

162. YU & DIETRICH, *supra* note 3, at 14.
163. CFPB, MARKET SNAPSHOT, *supra* note 4, at 14.
164. Dodgson v. First Advantage Background Servs. Corp., 2018 WL 1807014, at \*6 (N.D. Ga. Mar. 28, 2018).
165. *Id.*
166. Henderson v. Corelogic Nat'l Background Data, LLC, 161 F. Supp. 3d 389, 403 (E.D. Va. 2016).
167. *Id.*; *see also* Williams v. First Advantage LNS Screening Sols., Inc., 238 F. Supp. 3d 1333, 1342 n.10 (N.D. Fla. 2017) (noting that a First Advantage executive testified that hard copies of underlying court reports could have been obtained prior to plaintiff's dispute, "but [First Advantage] did not do so").
168. Taylor v. First Advantage Background Servs. Corp, 207 F. Supp. 3d 1095, 1099, 1110 (N.D. Cal. 2016).
169. *See* WU, ET AL., *supra* note 76, at 4.
170. *See, e.g.*, Plaintiff's Motion for Class Cert. at 9, *Jones v. RealPage*, No. 1:190-cv-000501-JG (N.D. Ohio Aug. 26, 2019), ECF No. 38 (stating that Rule 30(b)(6) witness for RealPage expressed concerns (in largely redacted deposition) about "under-reporting" crime to its landlord customers).
171. *See Our Positions*, CONCERNEDCRAS.COM.
172. CFPB, MARKET SNAPSHOT, *supra* note 4, at 16.
173. *See* Section V, *supra* (discussing employer-specific duties).
174. The FTC conducted a study of accuracy and completeness of consumer credit reports. *See* FED. TRADE COMM'N, [REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003](#) (2012).
175. Pub. L. No. 111-203, § 1088 (2010); 75 Fed. Reg. 57,252 (Sept. 20, 2010).
176. 15 U.S.C. § 1681s(e).
177. *See* 15 U.S.C. § 1681s(a), (d); 12 U.S.C. §§ 15561–67; *see also* Mem. of Understanding between the Consumer Fin. Prot. Bureau and the Fed. Trade Comm'n (Feb. 2019).
178. *See* Section IV, *supra*.
179. CFPB, MARKET SNAPSHOT, *supra* note 4, at 16; *see also* Section III.B.vii., *supra* (discussing the use of the LifeCycle approach in Pennsylvania).
180. New York has adopted a rule, effective on April 11, 2020, along these lines. NY Judiciary Law § 212(2)(x).
181. This report focuses on recommendations pertaining to improving accuracy. Note that states have passed laws addressing when, how, and what criminal history information may be considered by employers and others. *See, e.g.*, CFPB, MARKET SNAPSHOT, *supra* note 4, at 17; [CLEAN SLATE CLEARINGHOUSE](#); AVERY, ET AL., *supra* note 17.
182. WU, ET AL., *supra* note 76, at 4.



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