



**Statement of the
Professional Background Screening Association
(PBSA)**

Before the U.S House of Representatives Committee on
Financial Services Subcommittee on Diversity and Inclusion

September 28, 2021

Access Denied:

Eliminating Barriers and Increasing Economic Opportunity
for Justice-Involved Individuals

Introduction

Chairwoman Beatty, Ranking Member Wagner, and Members of the U.S. House Financial Services Subcommittee on Diversity and Inclusion:

Thank you for the opportunity to testify before the Subcommittee today and for holding this important hearing. My name is Melissa Sorenson, and I am the Executive Director of the Professional Background Screening Association (PBSA). PBSA is pleased to testify in today's hearing.

PBSA shares the same goals as the public, industry partners, and Congress in terms of promoting pathways for individuals re-entering society to secure employment and housing opportunities that help reduce recidivism and the costs borne by our society and individual's families when we fail to provide a path for successful reintegration. At the same time, we also recognize the importance of ensuring employers have the ability to hire the most qualified candidates and that property managers have the knowledge to keep our communities as safe as possible.

Background of the Professional Background Screening Association (PBSA)

PBSA is the trusted global authority in the screening industry. In pursuit of our mission to advance excellence in the screening profession, PBSA promotes and advocates for ethical business practices and fosters awareness of privacy rights and consumer protection issues. PBSA is an international trade association of over 700 member companies. Its members provide employment and tenant background screening and related services to virtually every industry around the globe. The reports prepared by PBSA's background screening members are used by employers, volunteer organizations, and property managers every day to help make communities safe for all to use, work, or reside in them.

PBSA members range from large background screening companies to individually owned businesses, each of which must comply with applicable law, including when and how they obtain, handle, or use public record and private data. PBSA members also include suppliers of background screening information such as court-record retrieval services and companies that provide background screeners with access to public record data.

Background Screening Is Subject to Robust Regulation

PBSA's members, as with all consumer reporting agencies, are subject to strict regulations under the Fair Credit Reporting Act (FCRA) at every stage of the background screening process. Additionally, under the Obama Administration, both the Equal Employment Opportunity Commission (EEOC) in 2012 and the Department for Housing and Urban Development (HUD) in 2016 issued regulatory guidance for employers and property managers regarding the use of background checks. If you will indulge me, I would like to share a little about the requirements under the law. First, employers must certify compliance with the FCRA's requirements, they must disclose to the employment applicant that they may obtain a background check and obtain the

applicant's authorization to conduct a background check.¹ The FCRA further protects consumers, employees, and tenants by requiring consumer reporting agencies use reasonable procedures to assure maximum possible accuracy.

Of particular relevance to the hearing today, I would like to discuss how criminal records are used in employment and tenant screening (see attached infographics outlining the regulatory requirements and consumer protections under the FCRA). First, Consumer Reporting Agencies (CRAs) generally are not able to report non-conviction data older than seven years² – and some states and cities impose additional limitations. Additionally, the FCRA provides consumers strong protections and rights in cases where an employer is considering taking adverse action based in whole or in part on the background check. Under the law, an employer must first send notice to the applicant stating that they are considering adverse action and include a copy of the report and summary of the consumer's rights.³ The applicant may dispute any aspect of the report and the CRA must reinvestigate at no cost to the applicant.⁴ Then, if the user of the report moves forward with the adverse decision they must notify the applicant of the decision and of certain rights.⁵

In addition to strict regulations throughout the screening process, the Consumer Financial Protection Bureau and Federal Trade Commission are vested with expansive regulatory, investigative, and enforcement authorities. These agencies regularly issue guidance and the CFPB has supervisory authority over the credit bureaus. Beyond the regulations imposed on the background screening industry, the Equal Employment Opportunity Commission's 2012 guidance and HUD's 2016 guidance added additional authority figures to the industry, and the agencies can and will audit organizations they believe are non-compliant with their guidance.

Again, I appreciate your willingness to indulge me as I think it is important to provide this overview of the main statutory and regulatory obligations that govern the background screening process.

I would now like to share with members of the Subcommittee our perspective on several policies that could be employed to promote successful reintegration into society. While I will discuss them in greater detail below, PBSA would encourage Congress to take the following actions:

1. Adopt a uniform ban-the-box standard for private employers with preemption for state and local legislation.
2. Adopt carefully tailored employer negligent hiring liability protections that make it easier for employers to hire justice-involved individuals.
3. Expand the application of employer incentives such as the Work Opportunity Tax Credit to employers who hire justice-involved individuals.

¹ Under Section 604(b) and Section 604(b)(2).

² Section 605(a)(2).

³ Section 604(b)(3).

⁴ Section 611.

⁵ Section 615.

Fair Chance Hiring/ Ban the Box (BTB)

According to the National Employment Law Project (NELP) in October 2020, 36 states and over 150 counties and local governments have adopted “ban the box” (BTB) policies.⁶ At the federal level, in 2015, President Barack Obama endorsed BTB by directing federal agencies to delay inquiries into job applicants’ records until later in the hiring process. In 2019, the “Fair Chance to Compete for Jobs Act of 2019” became law as part of the National Defense Authorization Act. This law, which will go into effect in December of this year, will prohibit most federal agencies and contractors from requesting information on a job applicant’s arrest and convictions records until after a conditional offer has been made. PBSA supports the original intent of BTB policies: to provide those with criminal histories a fair chance at employment by removing questions about criminal history from the initial employment application. However, there are challenges posed by varying state and local BTB policies that PBSA would like to bring to the Subcommittee’s attention.

As noted by the aforementioned regulations that govern the background screening industry under the FCRA, every stage of the screening process is highly regulated and scrutinized. In many states, counties, and localities, ban the box laws include varied requirements such as specific wait times for adverse action or specific language be used in adverse action letters. While we understand and support the intent of these laws, the current patchwork of state, county, and locality BTB laws have created a burdensome environment for employers. Furthermore, this legal patchwork treats otherwise qualified applicants differently depending on where they reside on a state-by-state basis. For example, Ohio, Massachusetts, Tennessee, Pennsylvania, Oklahoma, Michigan, Missouri, and Georgia have adopted laws or policies at the state level, while states such as Texas, South Carolina, and North Carolina have not adopted such regulations. Taken at its most basic level, two applicants who are both equally qualified will be treated differently during the hiring process in the state of Oklahoma and Texas. Taken further, the provisions included in jurisdictions that have adopted BTB laws or policies are varied. For example, according to October 2020 NELP report, the BTB law in Massachusetts applies to private employers, public employers, and vendors, while the BTB law in Ohio only applies to public employers. This varied patchwork of interstate regulations is not only unfair for applicants but also places undue strain on employers, particularly those operating in more than one state. Based on the existing patchwork of state and localized BTB rules, it is clear that employers are faced with unnecessary and burdensome compliance regulations while qualified employees are treated differently depending on the jurisdiction they reside in.

One provision of several BTB laws and policies is the requirement for an employer to provide a conditional offer or name position finalists prior to conducting a background check. This requirement, found in states such as California and Hawaii as well as certain metropolitan cities such as Los Angeles, Austin, Philadelphia, and New York City, requires employers to conduct background checks on applicants one-by-one (after each conditional offer is made), rather than permitting the employer to conduct checks on multiple applicants at the same time and then selecting the most qualified applicant for the job. The delay caused by this requirement can prove costly should an employer make a conditional offer to an applicant who subsequently may not qualify for employment due to their criminal history. The employer would then have to begin the

⁶ https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/#Chart_of_Local_Fair_Chance_Policies

employment hiring and screening process all over again with a new applicant, leaving the position unfilled for a longer period of time. In addition, applicants who receive a conditional offer may defer accepting other positions which they have applied for and may be offered (in the hopes that the conditional offer will be granted), only to find out that the conditional offer must be rescinded following the results of the background check. This would have the unintended effect of delaying justice-involved individuals (as well as other applicants) re-entry into the workforce. This requirement is particularly difficult in certain sectors, like staffing, where the agency loses the opportunity to screen earlier and have a candidate ready for multiple positions as they become available. Furthermore, this is an issue for employers looking to hire quickly, but even more so currently, in a period of an extreme labor shortage. Again, permitting employers to conduct background checks earlier in the employment process, as currently codified, preserves the ability of an applicant to build rapport with an employer while avoiding unnecessary delays in the hiring process.

As stakeholders who helped previous presidential administrations with the policy that would ultimately result in the 2019 federal “First Step Act”, PBSA understands and supports the intent of the BTB policies, to provide those with criminal histories the fairest chance possible for reintegration into society through employment and housing by reducing the emphasis on prior criminal history in the employment and housing application process.

PBSA and its members are concerned with the existing patchwork of BTB laws and insufficient federal negligent hiring protections for employers. However, we believe there is a balance to be struck between the reintegration and equal treatment of rehabilitated individuals regardless of where they reside and over-burdensome compliance and legal standards for employers. It is clear that the current patchwork and provisions found in laws across the United States inhibit employers from operating efficiently and from hiring the most qualified candidates while disadvantaging the most qualified candidates from being hired. Congress should move to adopt a uniform BTB standard that allows for background checks to be conducted after the employment application is completed.

Employer Liability for Negligent Hiring

With the inconsistent patchwork of BTB policies at varying jurisdiction levels, PBSA and its members have concerns about employer liability as it relates to negligent hiring. Employers are held liable for negligent hiring when the employer hires a job applicant and ignores the applicant’s lack of qualifications or criminal record; the employer can be held liable for any subsequent injuries caused by that employee. For example, in *Denton v. Universal Am-Can, Ltd.*,⁷ plaintiffs were awarded over \$54 million in damages due in part to negligent hiring following a vehicular accident with David Johnson, a truck driver for Universal Am-Can Ltd (UACL). During the hiring process, Nicole Perttunen a safety coordinator for UACL reviewed Johnson’s driver qualification file (including a background check) which revealed a “checkered driving record”⁸ and a felony conviction for “misdemeanor assault and battery of high and aggravated nature.” While Perttunen rejected Johnson’s application, the file was then sent to Doug Moat, the UACL’s safety director. Based on his application Moat considered Johnson to be a “marginal driver” and that UACL was

⁷ <https://www.illinoiscourts.gov/Resources/7e539ce3-f828-4be2-9f7c-f4ecda3c723d/1181525.pdf>

⁸ <https://www.mnlawoffice.com/54m-verdict-semi-crash-sets-auto-injury-record/>

forced to accept marginal drivers in order to make a profit. As such, Johnson was hired by UACL. The jury found in favor of plaintiffs on their claim for negligent hiring and retention against UACL. In addition, the jury found that UACL's conduct was willful and wanton related to its hiring and retention of Johnson and awarded James \$35 million in punitive damages.

Some states, such as Arizona, Colorado, Connecticut, Minnesota, New York, and Texas have passed laws to protect employers from liability when hiring ex-offenders. Specifically, Arizona adopted H.B. 2311 (Chapter 137) which provides protections for employers that hire individuals who have minor or irrelevant criminal histories. Under the law, if an employer is sued for negligent hiring, the plaintiff is not allowed to introduce evidence that an employee had a conviction, unless it was a violent or sexual offense, before the hire date.⁹ Furthermore, Kansas, Louisiana, Massachusetts, North Carolina, and Ohio have adopted policies that provide employers with qualified immunity from lawsuits when a criminal record is the only evidence of negligence.¹⁰ For example, in Kansas an employer who discloses information about a current or former employee to a prospective employer of the employee receives qualified immunity from civil liability.¹¹ Louisiana has a similar "shield law,"¹² but goes a step further by giving qualified immunity to an employer who "reasonably relied" on the information given by a former employer.¹³ We would encourage Congress to consider a similar approach at the federal level that would provide important protections for employers hiring justice-involved individuals. In essence, we would recommend immunity for employers based on the *Green* factors¹⁴ – a process by which the employer considers the nature of the crime, the time elapsed, and the nature of the job when conducting background checks as outlined in the EEOC's 2012 guidance to evaluate whether an applicant's criminal history has a close enough relationship to the job duties to justify a decision not to hire the applicant.

Promote and Improve Incentives

A proven and effective incentive related to the hiring of justice-involved individuals has been the Work Opportunity Tax Credit (WOTC).¹⁵ The original purpose of this credit was focused on moving people off government assistance programs and into private-sector work. While data is somewhat elusive, as precise data on WOTC-related hiring is not available from the Internal Revenue Service (IRS), studies have shown that workers in the temporary-hire space who are WOTC-certified have higher earnings in the short-term than WOTC-eligible but non-certified workers. This indicates some success in raising short-term incomes above the baseline for the groups targeted by the program. Furthermore, studies show that the "churn" of WOTC-certified workers is not any greater than workers who do not fall within the targeted groups. This indicates that employers are not merely hiring employees for the immediate tax benefits made available by the program, but rather keeping them on after the benefits expire because they provide real value

⁹ <https://apps.azleg.gov/BillStatus/BillOverview/70091>

¹⁰ <https://cookcountyrecord.com/stories/511129459-bill-that-would-limit-liability-in-employing-ex-offenders-stalls-in-illinois-house-of-representatives>

¹¹ http://www.ksrevisor.org/statutes/chapters/ch44/044_001_0019a.html

¹² <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5737&context=lalrev>

¹³ <https://law.justia.com/codes/louisiana/2015/code-revisedstatutes/title-23/rs-23-291/>

¹⁴ *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)

¹⁵ <https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit>.

to the hiring employer. Given the data that is available, there is evidence the credit has been effective in helping justice-involved individuals obtain and maintain meaningful employment.

Since its implementation, the WOTC has been expanded to other groups with difficulty transitioning into work, such as disabled veterans and the long-term unemployed. While we are supportive of these expansions, we do not have the metrics to measure exactly how many additional people have been hired in each new area.

The WOTC continues to achieve its original purpose. Whether it achieves its expanded purposes is much more difficult to determine. It is clear that it does not with respect to one targeted population: persons with criminal history re-entering the workforce. The provision providing a credit to employers who employ an ex-felon within one year of release should be comprehensively revisited. While encouraging employment of ex-felons is a positive goal, broadening the scope of the provision to include persons whose criminal history is otherwise a barrier to re-entry would go even further in breaking the cycle of unemployment and recidivism.

Another option would be to expand the Bonds for Jobs program.¹⁶ Currently, that program provides a bond at a cost of \$100 per employee to employers who hire justice-involved individuals. The bonds last six months and cover the first \$5,000 of losses with no deductible. However, they only apply to employee dishonesty such as employee theft. It does not cover the risk that really keeps employers up a night – the risk of workplace violence. To effectively apply to workplace violence, Congress would have to not only change the definition of what the bond covers, but also the value of the bond to correspond with the coverage costs of a responsible deductible on commercial insurance that covers negligent hiring.

Finally, Congress could consider implementing certificates of rehabilitation. A program lead by an appropriate governmental agency that includes individualized assessments and the issuance of a certificate of rehabilitation outlining that the risk of re-offense is negligible would be a helpful tool for justice-involved individuals and employers alike. Employment extended to a certificate holder should be accompanied by liability protections for the employer. PBSA recommends Congress consider and implement several options that would promote and incentivize employers who hire justice-involved individuals while ensuring the final hire decision is left to the employer.

If any member is interested in exploring legislative language for any of these approaches, PBSA stands ready to help.

Conclusion

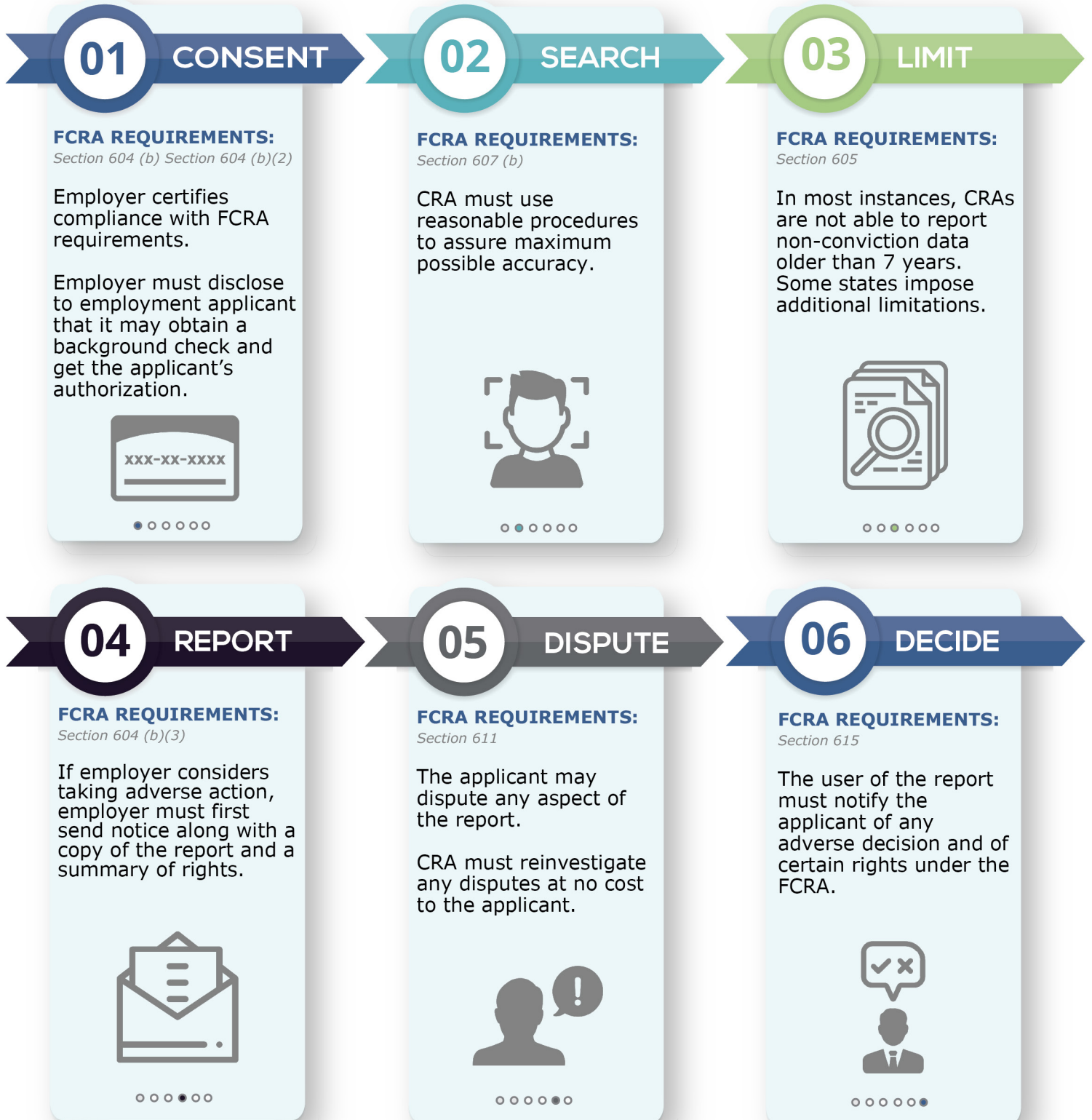
PBSA and its members' goals align with that of the public, other stakeholders, and Congress: to ensure that employers, across all industries of the economy, and property managers are able to make the best placement decisions possible by ensuring they have the information and data they need to place individuals in a fair manner. In doing so, PBSA and its members work to keep our communities as safe as possible. There is a job for every person, though every job is not right for every person, and we support the policy aims of BTB. However, the current patchwork of BTB policies at varying jurisdictional levels make it more difficult for justice-involved individuals to

¹⁶ <https://nicic.gov/federal-bonding-program-us-department-labor-initiative>

be hired and can increase the number of negligent hiring lawsuits against employers. Towards promoting racial justice and increasing re-entry into the workforce among justice-involved individuals, Congress can act today by promoting and improving incentives like the Work Opportunity Tax Credit and Bonds for Jobs program. PBSA supports expanding, promoting, and educating employers on incentives to hire justice-involved individuals, while also ensuring employers should and have the right to make the final hiring decision. PBSA thanks you for the opportunity to testify before the Subcommittee today and I am more than happy to answer any questions you have.

A HIGHLY REGULATED INDUSTRY:

AT EVERY STAGE IN THE PROCESS, CONSUMER REPORTING AGENCIES (CRAs) MUST FOLLOW STRICT REGULATIONS UNDER THE FAIR CREDIT REPORTING ACT.



THREE PILLARS OF THE FAIR CREDIT REPORTING ACT

Originally enacted in 1970, the FCRA was the first federal privacy law. It is the primary federal regulation of consumer reports. It provides expansive regulatory and enforcement authority to the Consumer Financial Protection Bureau and the Federal Trade Commission.



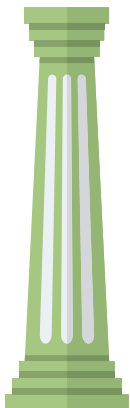
EMPOWERING CONSUMERS

- The FCRA defines permissible purposes of consumer reports.
- Consumer reports for employment purposes are permitted only with disclosure to and authorization from the consumer.
- Consumers are provided transparent notification of any adverse action; consumers get a copy of employment-purpose reports before a decision.
- Consumers can request a copy of everything the CRA holds on them – in many cases for free.
- Consumers dispute incomplete or inaccurate information which must be re-investigated at no cost to the consumer.
- Consumers are repeatedly notified of their rights under the FCRA during the consumer report process.



PROMOTING ACCURACY

- The FCRA requires consumer reporting agencies to use reasonable procedure to assure maximum possible accuracy in reports.
- FTC enforcement and extensive case law over five decades has further clarified the standard.
- Employment cases have higher threshold to follow “strict procedures” to ensure that consumer reports are complete and up-to-date.
- Users of consumer reports demand accuracy, so the regulatory requirements and market incentives complement each other.



ENSURING ACCOUNTABILITY

- Consumers have a statutory private right of action to economic and statutory damages.
- The CFPB and FTC are vested with expansive regulatory, investigative and enforcement authorities. The agencies regularly issue guidance and the CFPB has supervisory authority over national consumer reporting agencies.
- Accountability and accuracy are required both both legally and due to market forces. Re-investigation of incomplete or inaccurate information, litigation, and loss of market share ensure and promote accuracy and accountability.