

April 3, 2017

Joint Committee on Labor and Workforce Development  
24 Beacon Street  
Boston, MA 02133

**RE: Oppose Legislation (H. 3153 and S. 985) Intending to prohibiting the use of credit reports for employment purposes**

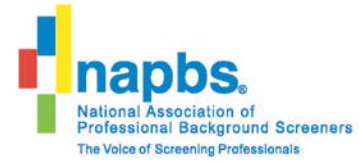
To Members of the Joint Committee on Labor and Public Employees:

We understand that the Committee is considering legislation to prohibit the use of credit reports for the purposes of employment screening. This legislation has two issues. First, the bill as written uses the term “consumer report” throughout, the state of Massachusetts has defined “consumer report” different from federal law, causing significant confusion. Because of the varying definitions, the legislation could easily be misinterpreted to mean that employers are prohibited from utilizing not only credit information in a consumer report, but any information in a consumer report (i.e. employment history, references, criminal history, education verification, driving record history, and more) - consumer report as defined under federal law can encompass any of these items. Additionally, to the extent that this bill intends to limit the use of credit information for employment purposes the limitation is significantly more broad than appropriate. We urge the Committee not to take up this bill and reject legislation that would conflict with federal law and undermine fraud prevention and the safety of the workplace.

The National Association of Professional Background Screeners (NAPBS), representing over 750 providers of professional screening services, is writing to express our opposition to this legislation, which would, in effect, prohibit the use of credit in employment background checks in all but an extremely limited number of circumstances.

**The use of “Consumer Report” should be changed to “Credit Report” or “credit information in a consumer report”.**

The definition of consumer reports is well defined under federal law. Under 15 U.S. Code § 1681a(d), “consumer reports” mean any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under section 1681b of this title. Therefore, use of “consumer report” when referring to “credit reports” or credit information in a consumer report will lead to significant confusion for consumers and employers alike.



In order to eliminate this confusion, NAPBS recommends that the legislation should be amended to 1) replace “consumer report” with “credit report” or “credit information in a consumer report;” and 2) adopt the following definition of “credit report”:

Any written, oral or other communication of information by a consumer reporting agency about or derived from any one or more of the following: (i) the employee’s or prospective employee’s credit score or other numerical quantification of creditworthiness; (ii) account balances of any credit account (including, but not limited to consumer loans, credit cards, education loans, medical debt, an mortgages); (iii) balances and numbers for debit accounts (including, but not limited to, savings and checking accounts); and (iv) past borrowing, repayment, discharge, and delinquency behavior (including, but not limited to, paying bills on time and the management, accumulation, payment, discharge, and ability to repay any debt or other financial obligation).

**Credit checks, when requested by employers, are done responsibly.**

NAPBS also opposes limiting employers’ use of credit reports to very narrow circumstances, as proposed under the legislation. Employers may check credit history as part of background screening to help them determine whether a prospective employee is a possible risk to the financial health of a business or to their customers. Employers use credit checks as part of a background check very responsibly and prohibiting their use in assessing employees makes employers, other employees, and customers more vulnerable to fraud and identity theft. Employers are in the best position to determine whether to request a credit report to protect their customers and their businesses from fraud, theft and other abuse.

**Credit checks are not in and of themselves a barrier to employment.**

Credit checks are only used in about 15% of all background checks, and when they are used they are used primarily for executive positions, positions that have fiduciary and financial responsibility, or for positions that have access to confidential or proprietary information. When examining credit history, employers look for lawsuits, judgments, and accounts in collection. Employers do NOT take into consideration late payments when making hiring decisions.<sup>1</sup>

Furthermore, the vast majority of employers do not view credit information as a “yes or no” determining factor, but rather use this information to provide prospective employees with the opportunity to explain their circumstances.

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<sup>1</sup> A 2010 study performed by the Society for Human Resource Management (SHRM) did not even include late payments among its list of employer considerations. The study is available at: <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundChecking.aspx>.

### **Employers review several years of credit history, not a “snap-shot” of an individual’s current financial situation.**

When looking at credit history as part of a background check, employers do not limit their examination to a recent “snap-shot” of a person’s credit profile.

- Employers do not have access to credit scores.
- Employers do not use credit scores when evaluating credit history for employment.
- Credit scores are not sold for employment purposes.
- Employers do not use credit scores for hiring decisions.

Most employers look at credit history across a 6-year window or longer.<sup>2</sup> This holistic review of a person’s credit history enables employers to see beyond possible short-term problems and gives potential employees the ability to demonstrate a long-term, stable payment history. Any difficulties associated with a person’s current financial condition can be offset by many years of prior positive credit history.

### **Personal financial health can be an indicator of potential employee fraud.**

The Association of Certified Fraud Examiners (ACFE) reviewed occupational fraud between 2006 and 2008, and found that the top two red flag warnings exhibited by perpetrators leading up to engaging in fraudulent activity were (1) living beyond his or her financial means (present in 39% of all cases, with a median loss of \$250,000) and (2) experiencing financial difficulties (present in 34% of all cases with a median loss of \$111,000).<sup>3</sup>

Not all financial difficulties will or could lead to fraud, but state law should not tie the hands of employers and undercut fraud prevention measures by outlawing the use of information that shows a correlation between past / current behavior and future fraud.

### **Credit checks can help protect companies, particularly small businesses, from fraud.**

According to the ACFE, the typical organization loses 5% of its revenues to fraud each year.<sup>4</sup> Small businesses are particularly vulnerable to financial fraud. As the ACFE 2012 report shows, the smallest organizations in the study suffered the largest median losses.

Small businesses implement fewer anti-fraud controls than their larger counterparts, which increases their vulnerability to fraud. Because small businesses do not have the resources to establish internal controls to monitor for fraud, it is especially important that these companies be allowed to incorporate credit checks into the hiring process.

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<sup>2</sup> <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundChecking.aspx>

<sup>3</sup> <http://www.acfe.com/press-release.aspx?id=1677>

<sup>4</sup> <http://www.acfe.com/rtn-highlights.aspx>

**Significant consumer protections already exist when employers use credit information as part of the hiring process.**

Existing law tightly regulates the use of consumer reports in employment situations. Under current law:

- Prior to requesting a consumer credit report, an employer must provide to the prospective employee a written notice stating the source of the information and how it will be used.
- The employer must also provide a copy of the consumer credit report to the consumer upon request, and prior to taking an adverse action.
- If an adverse employment action is taken against a prospective employee due to the information contained in a consumer credit report, the employer must provide to the consumer the name and contact information for the reporting agency as well as an explanation of the reasons for the action.
- Any employer who willfully fails to comply with these consumer protections is liable to that consumer in an amount equal to the sum of (1) any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000; or (2) such amount of punitive damages as the court may allow; and (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

**The legislation imposes additional burdens on employers that will delay the hiring process.**

In addition to limiting the use of consumer reports, the legislation requires employers to obtain written consent of the employee or applicant in a document that consists solely of the consent and to do so each time that the person seeks to obtain the consumer report of an employee or applicant. This requirement goes beyond current requirements under the federal Fair Credit Reporting Act and imposes additional paperwork burdens of the employer.

The bill contains a series of requirements that would prevent the employer from quickly concluding the hiring process or promoting existing employees. It imposes a 14-day waiting period before the employer can take an adverse employment action and requires the employer to provide written notice to disclose of the reason for the action, rather than referring the employee or applicant to the credit reporting agency to address any inaccuracies in the credit report. It establishes a right for the employee or applicant to be given the opportunity to dispute the

relevance of the information in a private discussion with the employer, in addition to the written notification. The legislation also requires the employer to consider the dispute before making a final decision, delaying the hiring process until all discussion is concluded.

Sincerely,



Melissa L. Sorenson, Esq.  
NAPBS Executive Director