

Attachment 3

FAIR CREDIT REPORTING ACT

I Purpose of Paper

To propose and support an amendment to the Fair Credit Reporting Act, 15 U.S.C. Section 1681, et. seq. (“FCRA”) relieving employers who utilize outside investigation organizations of the administrative and other burdens of complying with the Act, as they relate to employment-related investigations.

II Summary of the Issue

Whether certain employment-related investigations should be exempt from the definition of a “consumer report” under Section 603 of the Act subject to specific reasonable safeguards, or whether such employment-related investigations should be subject to the full range of the FCRA’s obligations and liabilities, with only certain limited exceptions.

III Recommended Amendment

It is recommended that Section 603 be amended by excluding from the definition of a “consumer report” certain employment-related misconduct investigations as follows:

Adding at the end of Section 603(d)(2):

- (D) A communication described in either subsection (o) or (q).

Adding at the end of Section 603 the following new subsection as 603(q):

- (q) Partially Excluded Communications Used For Employment Purposes. A communication is described in this subsection if it is a communication:
 - (1) that, but for subsection (d)(2)(D) would be a consumer report;
 - (2) that is made to an employer for the purpose of conducting a good faith investigation of alleged misconduct relating to employment or compliance with federal, state or local laws and regulations;
 - (3) that is not made for the purpose of investigating a consumer’s credit worthiness, credit standing, or credit capacity;

- (4) that is not provided to any person except the employer or prospective employer of the consumer, or as required by law, or pursuant to Section 608;
- (5) with respect to which, if adverse action is taken based in whole or in part on the communication, the employer will disclose to the consumer a summary containing the nature and substance of the communication upon which the adverse action is based.

By way of explanation, subparagraph 2 is to allay any fears that an investigation might be done in bad faith simply to cause difficulty for an alleged wrongdoer. Thus, the employer must conduct the investigation in good faith, the alleged misconduct must relate to employment (as opposed to some other subject), and/or the investigation must be conducted to insure compliance with federal, state or local laws and regulations.

Subparagraph 3 makes clear that if an employer obtains a report dealing with credit worthiness, credit standing or credit capacity in connection with an investigation, then the exclusion does not apply and the provisions of the Act must be followed. It is unlikely that employers will need to obtain credit-related reports in connection with an employment misconduct investigation (i.e., with the possible exception of a fraud investigation to ascertain the spending habits of the alleged wrongdoer). Again, if reports dealing with credit worthiness, credit standing or credit capacity are obtained, the obligations and liabilities of the Act apply.

Subparagraph 4 is to ensure that the information is used solely for the benefit of the employer or prospective employer of the consumer, and to ensure protection of the privacy interests of the accused as well as other consumers involved in the investigation.

Subparagraph 5 provides due process protections to employees and prospective employees. Under this obligation, when an employer takes adverse action, a summary of the

report stating the nature and substance of the investigation will be communicated to the alleged wrongdoer. This subparagraph also addresses the important issue that investigations, and the privacy rights of employees who provide information, will be compromised if individuals who supply information are named in a report. Hence, the use of a summary report.

The proposed amendment to Section 603 is preferred and recommended because: 1) it creates certainty in the law by setting forth a specific exclusion while including necessary protections for all consumers (witnesses, complaining employees, and the accused); 2) avoids the unintended consequences of claims regarding whether or not certain FCRA provisions govern employment-related investigations; 3) is less costly and administratively burdensome to employers and outside investigation organizations; 4) avoids chilling efficient and effective workplace misconduct investigations; and 5) provides clarity and consistency without having to seek additional exclusions to future amendments to the Act. An amendment to Section 603 is the most efficient and straightforward approach to achieving these ends.

IV Summary of Reasons Why The FCRA Should Not Apply to Certain Employment-Related Misconduct Investigations

As is clear from the legislative history and the provisions of the Act itself, the FCRA was not designed to apply to employment-related misconduct investigations. Instead, the protections were drafted to protect consumers from credit-related information transmitted between banks, credit bureaus, other financial institutions, and background investigators. The Act as presently interpreted by the FTC deters employers from using skilled and experienced outside consultants to conduct employment-related misconduct investigations because any misstep in compliance

with the many detailed/technical provisions of the Act can easily result in an increased threat of litigation.

Additionally, the Act as presently interpreted chills co-workers from coming forth with necessary information for fear of having their identity disclosed; tips off wrongdoers of the possibility of an investigation into their conduct; requires (without regard to need) invasive and repetitive investigative techniques; and restricts the use of potential relevant information. Moreover, application of the Act adds unnecessary cost and time to the investigation process because of potential reinvestigations.

The Act's application to employment-related misconduct investigations will also inevitably heighten the risk of litigation for failure to comply with the many provisions containing vague/subjective requirements. When employment-related misconduct proceeds to actual litigation, plaintiffs' attorneys will simply add boilerplate FCRA counts to a complaint in the hopes of finding an inadvertent misstep which will open the door to unlimited actual and punitive damages. The courts are already overburdened with employment-related litigation. According to published statistics of the United States District Courts, employment litigation cases grew from 8,413 in 1990 to 23,755 in 1998. The addition of FCRA compliance issues will only increase this burden.

A case in point. In November, 1999 Shane Salazar sued his former employer, the Golden State Warriors, in a United States District Court in San Francisco, under the FCRA seeking over \$1,000,000 in damages. Salazar, a former equipment manager, was terminated from his employment as a result of an investigation initiated by his employer that observed him using cocaine. Salazar takes no issue that while under surveillance he used cocaine, but complains that

before the investigator followed him to observe his cocaine use, he should have been “tipped off” to the surveillance, and it should not have been done absent his consent. The FCRA simply should not apply to such an investigation into uncontested illegal activity.

Set forth below is a point-by-point summary of specific FCRA provisions and the unreasonable burdens imposed by the application of such provisions in connection with employment-related misconduct investigations.

V Unreasonable Burdens of Existing FCRA Provisions

FCRA PROVISIONS	UNREASONABLE BURDENS IMPOSED BY APPLICATION OF FCRA TO WORKPLACE INVESTIGATIONS
<p><u>Section 604 – Permissible Purposes</u></p> <p>Conditions for furnishing and using consumer reports for employment purposes including those containing medical information.</p>	<p>The notice and authorization requirements of this section require an employer (“user”) to tip-off employees (“consumers”) that an investigation will be undertaken. In many situations, employees will immediately cease any inappropriate and/or illegal behavior, eliminating any chance of catching them “red-handed.” Where violence is a concern, the notice could trigger a reaction in an employee already prone to violence. It is not sound public policy to give advance notice to employees alleged to be engaged in misconduct or unlawful activity that their employer is investigating.</p> <p>State and federal law already protects employees from improper disclosure of medical records (<i>e.g.</i>, doctor/patient privilege, state privacy laws, etc.).</p>

FCRA PROVISIONS	UNREASONABLE BURDENS IMPOSED BY APPLICATION OF FCRA TO WORKPLACE INVESTIGATIONS
<p><u>Section 605 – Obsolescence</u></p> <p>Individuals are entitled to a "fresh start" if their problems occurred more than seven years before a consumer report is prepared. Key exceptions: no time limit on reporting criminal convictions; does not apply if the report is to be used "in connection with" the employment of an individual at a salary of \$75,000 or more.</p>	<p>The seven-year time limit unreasonably limits an employer's right to take employment action on the basis of valid and relevant information. For example, progressive discipline stemming from acts which occurred over seven years previous to the date of the report should be available to employers making employment decisions, especially if the progressive discipline culminated in a "last chance agreement." Where permissible, employment decisions may be appropriately based, in part, on information obtained or leads derived from arrest records, civil judgments and civil suits relating to the employment position sought or held, regardless of the amount of time that has passed since the problem occurred.</p>

FCRA PROVISIONS	UNREASONABLE BURDENS IMPOSED BY APPLICATION OF FCRA TO WORKPLACE INVESTIGATIONS
<p><u>Section 606 – Best Evidence</u></p> <p>Information in investigative consumer reports based on personal interviews must either be confirmed from sources with independent and direct knowledge or the person interviewed must have been the best possible source.</p>	<p>The terms “reasonable procedures” and “best possible source” are vaguely defined and will promote an onslaught of litigation. Already overburdened courts will face FCRA-based complaints and/or an FCRA count in every employment-related complaint. In the context of employment-related investigations, the requirement of confirmation and/or best possible source will translate to more invasive investigations prying unnecessarily into the background of witnesses. The subsequent invasive investigations will chill victims’ willingness to come forward and witnesses’ interest in participating in the investigation. Further, the alleged wrongdoer (“consumer”) may control the best possible source of information and/or those with direct knowledge of events, further chilling victims’ and witnesses’ willingness to come forward. In addition, the best possible source of information may not be willing to cooperate in the investigation. This section is a particularly vivid example of how the FCRA encourages employers to utilize inexperienced and/or internal investigators who are not subject to vaguely defined “best evidence” requirements.</p> <p>Section 606 also requires advance consent prior to investigation. For the reasons stated in response to Section 604, it is not sound public policy to require employers to give advance notice of investigations into allegations of misconduct or unlawful activity. Such notice will “tip off” alleged wrongdoers, eliminating any chance of catching them “red-handed” (e.g., an employee accused of embezzlement will immediately cease all unlawful activity upon notice of an ongoing investigation).</p>

FCRA PROVISIONS	UNREASONABLE BURDENS IMPOSED BY APPLICATION OF FCRA TO WORKPLACE INVESTIGATIONS
<p><u>Section 607 – Reasonable Procedures</u></p> <p>Reports must be prepared using reasonable procedures to assure maximum possible accuracy.</p>	<p>As noted above, the term “reasonable procedures” is vaguely defined and will promote an onslaught of litigation (<i>i.e.</i>, every employment-related lawsuit will allege procedures were not “reasonable” and that “maximum possible accuracy” was not achieved). In response, investigations will become unnecessarily burdensome and invasive, chilling participation by victims and witnesses. This section is another vivid example of how the FCRA encourages employers to utilize inexperienced and/or internal investigators who are not subject to vaguely defined “reasonable procedures” requirements.</p> <p>In addition, it will place the FTC in the position of monitoring employer-initiated investigations over areas that are already subject to the jurisdiction of other agencies (such as the EEOC, U.S. Department of Labor, and OSHA). For example, under the EEOC Guidelines, 29 C.F.R. Part 1604.11(d), employers have a duty to take “immediate and appropriate corrective action” in response to sexual harassment allegations”, and yet the EEOC cautions that the techniques used to evaluate testimony, the scope of the investigation itself, and the weight given to evidence must be determined on a case-by-case basis. EEOC Policy Guidance on Sexual Harassment Issues (March 19, 1990).</p>

FCRA PROVISIONS	UNREASONABLE BURDENS IMPOSED BY APPLICATION OF FCRA TO WORKPLACE INVESTIGATIONS
<p><u>Section 609 – Accountability</u></p> <p>Consumer reporting agencies (CRAs) must disclose to individuals the identity of anyone obtaining an employment report on them in the prior two years.</p>	<p>Results of employment-related misconduct investigations are subject to privilege and privacy concerns, and are not generally shared between employers. Since the information is not generally in the public domain, the need for disclosure to the consumer is obviated. Furthermore, information often comes to light during an investigation that is not relevant and not considered by the employer in making a final determination. It serves no purpose to provide that information to the consumer. In addition, CRAs engaged in such investigations do not maintain files on individuals. Rather, the files address the particular incident that prompted the investigation. Thus, disclosures relating to individuals impose an undue burden on CRAs functioning in the employment context.</p> <p>CRAs conducting employment-related investigations do not have access to information about what reports have been generated about an individual over the prior two years. Further, a report previously obtained by an employer who complied with FCRA notice and authorization requirements should not be subject to additional disclosures (risks tipping off wrongdoers of reports legally obtained where no adverse action was taken). Many of the concerns set forth under Section 615, below, are also applicable to Section 609.</p>
<p><u>Section 610 – Disclosure to Consumers</u></p> <p>CRAs are required to obtain proper identification from consumers before disclosure of a report and must have trained personnel to explain any information furnished about the consumer.</p>	<p>CRAs conducting employment-related investigations rarely have direct contact with consumers regarding the results of the investigation. The type of information reported pursuant to a workplace investigation is not the type that requires special explanation, and should not be distributed to others. Many of the concerns set forth under Section 615, below, are also applicable to this Section.</p>

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<p><u>Section 611 – Accuracy Disputes</u></p> <p>Individuals have the right to dispute, at no charge, information in their consumer report. Disputes must generally be resolved within thirty days.</p>	<p>First, this requirement is clearly meant to apply to situations in which there is a dispute over a consumer's credit history, not to an investigation of an allegation of employee misconduct. In the employment context, resolution of disputes would almost always require reinvestigation of the incident giving rise to the original investigation (including reinterviewing complaining witnesses and co-workers). These interviews will often require reinterviewing witnesses about sensitive subjects. Commonly this requirement would put the CRA in the position of requesting from employers the right to engage in a reinvestigation of employees (usually during work time and on work premises). Ultimately, the risk of reinvestigation will chill victim/witness incentive to participate in such investigations and provides disincentive for employers to utilize experienced outside organizations where inexperienced and/or internal investigators are not subject to reinvestigation requirements. This provision will also add significantly to the cost of an investigation. If a CRA is used, this section will promote an onslaught of litigation (<i>i.e.</i>, every employment-related lawsuit will allege insufficient reinvestigations).</p>

FCRA PROVISIONS	UNREASONABLE BURDENS IMPOSED BY APPLICATION OF FCRA TO WORKPLACE INVESTIGATIONS
<p><u>Section 612 – Free Disclosure</u></p> <p>Individuals are entitled to a free copy of their report if requested within 60 days of the adverse employment action.</p>	<p>Results of employment-related misconduct investigations are subject to privilege and privacy concerns. Sharing such reports in their entirety with consumers violates such concerns, and will ultimately chill victims' willingness to come forward and witnesses' interest in participating in the investigation. Since the information is not generally in the public domain, the need for complete disclosure to the consumer is obviated. Further, CRAs engaged in such investigations do not maintain files on individuals. Rather, the files address the particular incident that prompted the investigation. Thus, disclosures relating to individuals impose an undue burden on CRAs functioning in the employment context. Disclosure of complainants names may be in conflict with other federal laws as well as the EEOC Guidelines on Harassment in the workplace. Such disclosures increase the likelihood of workplace violence, retaliation, and/or disruption of working relationships.</p>
<p><u>Section 613 – Public Record Accuracy</u></p> <p>Special procedures must be employed to insure the accuracy of public record information reported for employment purposes or the public record information must be provided to the individual so that they can dispute its accuracy.</p>	<p>Provision of public record information to consumer will tip-off consumer to ongoing investigation. CRAs conducting employment-related misconduct investigations have no power to verify accuracy of public information. Vaguely defined "special procedures" and "public record" leave provisions open to interpretation leading to increased litigation.</p>
<p><u>Section 614 – Current Information</u></p> <p>Information in investigative consumer reports must be reverified if more than three months old.</p>	<p>Employment-related misconduct investigations are too broad in scope to be reverified if over three months old. Victims/witnesses would have to be reinterviewed on sensitive subjects, thus infringing upon their privacy interests on oftentimes sensitive subjects. Reliable or "best" sources of information may not be available for reverification. See Section 611.</p>

FCRA PROVISIONS	UNREASONABLE BURDENS IMPOSED BY APPLICATION OF FCRA TO WORKPLACE INVESTIGATIONS
<p><u>Section 615 – Adverse Action Notices</u></p> <p>Individuals must be told that an adverse action has been taken against them based in whole or in part on a consumer report along with a statement of their rights and contact information for the CRA.</p>	<p>Results of employment-related misconduct investigations are subject to privilege and privacy concerns. Sharing such reports in their entirety with consumers violates such concerns, and will ultimately chill victims' willingness to come forward and witnesses' interest in participating in the investigation. Since the information is not generally in the public domain, the need for complete disclosure to the consumer is obviated. Further, CRAs engaged in such investigations do not maintain files on individuals. Rather, the files address the particular incident that prompted the investigation. Thus, disclosures relating to individuals impose an undue burden on CRAs functioning in the employment context. Disclosure of complainants names may be in conflict with other federal laws as well as the EEOC Guidelines on Harassment in the workplace. Such disclosures increase the likelihood of workplace violence, retaliation, and/or disruption of working relationships.</p>
<p><u>Sections 616 & 617 – Civil Liability</u></p> <p>Aggrieved individuals have a civil cause of action against those who have violated the FCRA with no limit on actual damages.</p>	<p>This section is a particularly vivid example of how the FCRA encourages employers to utilize inexperienced and/or internal investigators because, although they may not provide the best investigative techniques and greatest privacy protections for all involved, at least they will not expose the employer to liability for punitive damages under the FCRA. This approach is directly contrary to that taken by virtually every other federal employment law (such as Title VII of the Civil Rights Act which cap damages at \$300,000).</p>
<p><u>Sections 619, 620 & 621 – Gov. Enforcement</u></p> <p>Civil and criminal governmental remedies for FCRA violations.</p>	<p>All of the same comments noted under Sections 616 & 617 are applicable here. Criminal penalties generally are not available in comparable state and federal employment laws.</p>

FCRA PROVISIONS	UNREASONABLE BURDENS IMPOSED BY APPLICATION OF FCRA TO WORKPLACE INVESTIGATIONS
<p><u>Section 623 – Furnisher Liability</u></p> <p>Information should not be provided to a CRA that is known to be inaccurate.</p>	<p>Protections are currently in place to insure against inaccurate information (e.g., defamation tort). In employment context, furnishers of information rarely “regularly and in the ordinary course of business” furnish information about individuals. As to reinvestigation requirement, <i>see</i> Sections 611 & 614.</p>

VI Workplace Investigations Are Necessary, And Existing Protections Obviate The Need For Additional Burdensome Regulation

The primary purpose of the Fair Credit Reporting Act is to provide reasonable procedures for the assembly and evaluation of information about consumers with regard to confidentiality, accuracy, relevancy, and proper utilization of information. Toward this goal, the Act imposes significant notice and authorization requirements on employers who are required by numerous sources to investigate allegations of misconduct and compliance with employment laws. As it relates to such workplace investigations, an amendment to the Act simplifying those notice and authorization requirements is appropriate because safeguards already exist to insure fairness with regard to confidentiality, accuracy, relevancy, and proper utilization of information.

A. Sources of Employers’ Legal Duty to Investigate Alleged Misconduct and Compliance with Employment Laws

The duty to investigate workplace misconduct and compliance with employment laws is directly or indirectly imposed on employers by a variety of federal, state and local statutes, constitutions, regulations and/or common law (court-made law).

The Federal Civil Rights Acts of 1964 and 1991 and similar state laws impose an affirmative obligation on employers to investigate complaints of harassment. Under those laws, employers risk liability for the acts of employees, and even customers, who harass employees on the basis of race, religion, color, national origin, ancestry, physical disability, medical condition, marital status, sex or age. The Supreme Court has recently affirmed the duty to investigate complaints of harassment, establishing an affirmative defense to liability only where the employer has exercised reasonable care to “correct promptly any ... harassing behavior.” Further, the Equal Employment Opportunity Commission had developed guidelines such as the 1990 Policy Guidance on Current Sexual Harassment Issues, that detail procedures to be followed in an investigation of alleged sexual harassment, including the content of the investigation, and the evaluation of evidence. Even those Guidelines caution that every investigation is by its nature different, and the scope and nature of the investigation must be determined on a “case-by-case basis.”

State and federal laws regulating health and safety in the workplace impose an affirmative duty on employers to provide a safe workplace and to investigate potential hazards including exposure to workplace violence. Thorough investigations in the area of safety and health not only reduce the risk of exposure under these statutes, but they may also reduce the risk of workers' compensation claims and personal injury lawsuits from employees and members of the public.

The Federal Drug-Free Workplace Act and individual department regulations, such as Department of Defense regulations, require employers with government contracts to provide drug-free work environments. A duty is imposed on employers to investigate and eliminate drug

use in the workplace as well as to establish drug-free awareness programs, employee assistance programs, drug counseling, and procedures for notifying the employer of convictions under criminal drug statutes.

Investigations of applicants and employees are increasingly important in avoiding liability for the torts of negligent hiring, supervision and retention. For example, a Colorado jury awarded damages of \$210,000 in a sexual assault case where, the jury found, the employer would have learned of the employee's prior child molestation conviction if it had conducted a thorough reference check.

Several state and federal courts have ruled that an employer cannot be liable for wrongful termination if the firing followed a good-faith investigation that found reasonable grounds for believing the misconduct occurred. The same holds true in cases alleging breach of the implied covenant of good faith and fair dealing. As a result, employers are compelled to conduct good-faith investigations to determine whether reasonable grounds for termination exist.

Numerous other state and federal statutes explicitly or implicitly require employers to conduct workplace investigations. For example, federal securities laws impose affirmative obligations upon broker-dealers to establish, maintain and enforce procedures designed to prevent and detect violations by employees. Similarly, in many instances employers investigate Medicare fraud and abuse on their own initiative or in response to reports from individual employees. The FCRA unreasonably interferes with employers' numerous investigation requirements.

B. Existing Safeguards Insure Fairness**1. Confidentiality, Accuracy, Relevancy, and Proper Utilization of Information**

In addition to requiring investigations, federal, state and local statutes, constitutions, regulations and/or common law require investigators to be fair with regard to confidentiality, accuracy, relevancy, and proper utilization of information. To illustrate, there are four theories of recovery for the tort of invasion of privacy under common law. Of the four, three are directly relevant to investigations: (1) public disclosure of private facts; (2) placing in a false light; and (3) intrusion into another's seclusion. In addition, the constitutions of Alaska, Arizona, California, Florida, Massachusetts, Montana and Rhode Island have specific provisions protecting the right of privacy.

Additional safeguards exist in common law. For example, an employer who divulges information gained in an investigation to anyone without a "need to know" (*e.g.*, third parties, including co-workers, office staff and personal friends) risks liability for defamation. Furthermore, as mentioned above, courts have ruled that an employer cannot be liable for wrongful termination if the firing followed a good-faith investigation. Thus, many plaintiffs' attorneys are attacking the quality of an employer's investigation (negligent investigation) rather than disproving the misconduct occurred. The risk of such attacks insure that investigatory procedures are fair and comprehensive. Another example involves false imprisonment. Investigations, and particularly witness interviews, create a risk of liability for false imprisonment involving allegations that the employer intentionally confined or restrained an

individual's physical liberty. Likewise, investigations conducted in extreme and outrageous ways raise a risk of liability for intentional infliction of emotional distress.

Even criminal law provides protections for abuse of proper investigatory procedure. To illustrate, an employer who institutes unsuccessful criminal or civil proceedings against an employee without probable cause and for an improper purpose may be charged with malicious prosecution. Employers also face liability for the wrongful actions of its agents (*e.g.*, police or private security guards).

State and federal laws also govern the proper collection of information that may be included in a workplace investigation. Such laws prohibit the interception of electronic and oral communications of others on cellular phones, in electronic mail and in computer transmissions. Similar laws limit the use of polygraph examinations by employers, prohibiting the use of such examinations for either pre-employment screening or to test current employees. In addition to the Federal Employee Polygraph Protection Act, approximately 20 states have prohibited or severely restricted the use of polygraphs.

In a union environment, employees are afforded additional protections. For example, the National Labor Relations Act ("NLRA") requires employers to bargain over the implementation of investigative procedures. In addition, an employee can insist upon union representation at an employer's investigatory interview that might reasonably result in disciplinary action. Further, disciplinary actions against employees are governed by a just cause standard, and an alternative dispute resolution procedure is utilized to resolve differences of opinion. Similarly, government employees who are disciplined can assert violations of "procedural due process," *i.e.*, that they did not get notice of the charge(s) or a fair chance to tell their side of the story. Federal

employees subject to civil service protection can challenge discipline through the Merit Systems Protection Board.

Finally, many state and federal laws prohibit retaliation against employees who participate in a legitimate complaint involving the workplace. To avoid liability, therefore, employers may not use workplace investigation reports to retaliate against such employees.

2. Access to Reports

Several authorities also grant employees access to workplace investigation reports. Many state and federal laws require employers to retain personnel records (including workplace investigation reports) for extended periods of time to insure their availability in connection with audits and litigation. For example, case law interpreting the Employee Retirement Income Security Act (“ERISA”) grants benefit plan participants the right to access and review all information that formed the basis for a denial of benefits, including the results of any investigation into the participant's eligibility for benefits. Similarly, most states require employers to allow employees access to their complete personnel records. In the litigation context, non-privileged workplace investigation reports are almost certainly relevant to employment related litigation, and would therefore be subject to production pursuant to a discovery request.

VII Current Landscape For Employment Misconduct Investigations

The FCRA currently does not apply to investigators who are not consumer reporting agencies. Thus, investigations by the following are not governed by the Act:

- any company employee, regardless of their lack of information & training (e.g., president, business manager, director of human resources, internal legal counsel, internal private security guards, a part-time employee).

- any employee regardless of their bias and/or relationship to individuals involved in the investigation.
- any outside consultant who does not regularly engage in workplace investigations or who does not accept a fee for engaging in workplace investigations.

Instead, many employers have chosen to conduct investigations through professional consultants who regularly provide employers with investigative services designed to meet their legal obligations to employees. The following are examples of instances where an employer may opt for an outside investigation entity:

- small businesses without any internal human resource/legal resource.
- employers of any size, large or small, that want to comply with recent Supreme Court rulings and the EEOC guidelines and provide employees with prompt, impartial and thorough EEO investigations by a well trained professional.
- executives accused of wrongdoing creating fear of bias in outcome.
- individuals with responsibility to investigate may themselves be accused of wrongdoing.
- accusations that may be too time consuming or time sensitive to use existing internal resources.
- accusations that may require investigative techniques/knowledge of laws not available internally.
- accusations that invoke complex laws with potentially competing interests.

However, as noted above, employers who chose to investigate through outside consultants who regularly engage in this type of work face undue scrutiny and burdensome administrative and other requirements under the FCRA. The ultimate question is what heightened risk is it to consumers when employers choose outside objective, trained, and

experienced consultants to conduct employment-related misconduct investigations. The clear answer is none.

Indeed, an outside consultant will provide an employer the skill and knowledge to conduct a comprehensive investigation as required by many laws and consistent with good employer-employee relations. Additionally, outside consultants can supply employers with investigations free of bias and with less chance of a privacy risk.

Finally, the use of outside consultants will ultimately inure to the benefit of the consumer. As an alleged wrongdoer, the consumer is entitled to a fair and complete investigation conducted by persons skilled and knowledgeable regarding the issue at hand to minimize the chance of an improper decision being made with respect to the accusations leveled at the consumer.

For all of the above reasons, the Act should be amended in the manner proposed herein.

April 3, 2000