

The FTC Staff Report on “40 Years of Experience with the Fair Credit Reporting Act” Illuminates Areas of Potential Class Action Exposure for Employers

December 2011

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IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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Jennifer also has special expertise in and advises employers and consumer reporting agencies on the intersection of federal and state background check laws.

The FTC Staff Report on “40 Years of Experience with the Fair Credit Reporting Act” Illuminates Areas of Potential Class Action Exposure for Employers

I. INTRODUCTION

Earlier this year, the Federal Trade Commission (FTC or “the Commission”) staff published a report entitled, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations*.¹ The Fair Credit Reporting Act (FCRA)² regulates the scope and flow of information between “users”³ of “consumer reports,”⁴ “furnishers” of consumer information,⁵ and “consumer reporting agencies” or “CRAs.”⁶ The FCRA is widely known as the federal law that regulates the exchange of consumer *credit* information between the credit bureaus (e.g., Experian, Trans Union and Equifax) and creditors in connection with mortgage lending and other consumer credit transactions (e.g., credit reports). By its terms, however, the FCRA also regulates the exchange of consumer information between employers and CRAs that provide background reports.⁷ Further, the obligations that the FCRA imposes on employers are not only triggered when an employer orders a credit report from a CRA. Generally speaking, employers must comply with the FCRA when they order virtually any type of report from a CRA, including reports derived from public record sources (e.g., criminal and motor vehicle records checks).⁸

For many years, it was relatively uncommon to see lawsuits or FTC enforcement actions against employers for alleged violations of the FCRA. The plaintiffs’ bar and the FTC regularly targeted the credit bureaus, merchants and lenders, but did not target employers. Now, times have changed. In the past few years, there has been an unprecedented spike in class action and single-plaintiff lawsuits against employers for alleged violations of the FCRA. As a result, compliance with the various provisions of the FCRA is essential for all employers that use background reports even in part to make hiring and employment decisions.⁹

This Littler Report highlights critical portions of the FTC’s Staff Report, which summarizes and expounds on the interpretations offered by the Commission and the Commission’s staff since the enactment of the FCRA in 1970. The Staff Report states outright that the “staff opinion letters do not represent the formal policy or views of the Commission and are not binding,” but also notes they “provide important guidance on issues of statutory interpretation,” and that “[s]ome courts have cited to staff letters to support their findings.”¹⁰

Developing familiarity with the Staff Report also may help employers take measures to minimize the risk of class action FCRA lawsuits. The FCRA has two remedy provisions. Section 617 provides a remedy for “negligent” noncompliance with the FCRA.¹¹ Section 616 provides a remedy for “willful” noncompliance with the FCRA.¹² An important difference between Sections 617 and 616 is that the former requires the plaintiff to prove actual damages to state a viable cause of action, but the latter does not. For a willful violation, the plaintiff can recover

1 www.ftc.gov/os/2011/07/110720fcrareport.pdf.

2 15 U.S.C. § 1681 *et seq.*

3 See 15 U.S.C. §§ 1681b(b) and 1681m.

4 15 U.S.C. § 1681a(d)(1) (“The term consumer reports means 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 ... employment purposes.”). “The term ‘employment purposes’ ... means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.” 15 U.S.C. § 1681a(h).

5 See 15 U.S.C. § 1681e(d).

6 15 U.S.C. § 1681a(f).

7 In 1996, Congress passed the Consumer Credit Reporting Reform Act. That amendment augmented the FCRA’s specific protections for job applicants and employees (e.g., the “pre-adverse” action notice requirement in 15 U.S.C. § 1681b(b)).

8 The specific obligations that employers have will vary depending on the purpose of the report (e.g., whether it will be used for pre-employment screening or in connection with an investigation into suspected misconduct related to employment). Compare 15 U.S.C. § 1681b(b) (general requirements for employers) with § 1681a(y) (relaxed rules for misconduct investigations).

9 The “pre-adverse” action notice requirement in 15 U.S.C. § 1681b(b) applies when an employer takes adverse action based in whole or in part on a consumer report.

10 Staff Report at 6.

11 15 U.S.C. § 1681o.

12 15 U.S.C. § 1681n.

statutory damages of at least \$100 and up to a maximum of \$1,000.¹³ The need for individualized proof of actual damages and causation can preclude class certification under Federal Rule of Civil Procedure 23(b)(3). For that reason, the plaintiffs' bar regularly tries to mount class action claims against employers for alleged willful violations. To do so, however, the plaintiff must prove that the employer acted knowingly or "recklessly" in violation of clearly established law.¹⁴

To be clear, nothing stated herein should be construed as endorsing or in any way directly or indirectly confirming any position articulated by the FTC staff in the Staff Report or the FTC's prior advisory guidance. This Littler Report summarizes the Staff Report so that employers can familiarize themselves with its substance and leaves for another day whether any of the views expressed by the FTC staff are entitled to deference of any kind. As noted by the Staff Report, some courts have expressly refused to extend any deference to the advisory opinion letters issued by the FTC staff.¹⁵

Several states have also enacted state fair credit reporting laws. Some of these state laws impose state-specific obligations on employers that use consumer reports for employment purposes. Although this report does not discuss those state law considerations, employers must be sure to comply with the federal FCRA and applicable state law. This is especially true in California, which has two comprehensive statutes that separately regulate the use of credit reports and background reports with all other types of information (e.g., criminal and motor vehicle records).¹⁶

II. BACKGROUND FOR THE FTC STAFF REPORT

The FTC had no rulemaking authority until Congress passed the Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act").¹⁷ Even before the FACT Act was enacted, however, the FTC played a role in the implementation, oversight, enforcement and interpretation of the FCRA. For example, according to the Staff Report, the FTC has brought 87 enforcement actions against CRAs, users of consumer reports and furnishers of information to CRAs.¹⁸

In 1990, the Commission issued its most comprehensive written commentary on the FTC ("Commentary").¹⁹ According to the Staff Report, the FTC staff had been working on an update to the 1990 Commentary because amendments to the FCRA had rendered some portions of the Commentary obsolete. The FTC staff decided to publish the Staff Report instead of drafting a replacement for the 1990 Commentary in light of the passage of the Consumer Financial Protection Act of 2010 (CFPA).²⁰ Pursuant to the CFPA, the FTC will now share its traditional responsibility for overseeing the FCRA with the newly created Consumer Financial Protection Bureau (CFPB).

III. SUMMARY OF FCRA OBLIGATIONS ON EMPLOYERS THAT USE CONSUMER REPORTS FOR EMPLOYMENT PURPOSES

Employers must follow various requirements *before* they obtain a consumer report from a CRA, and if the employer intends to take "adverse action"²¹ against the individual based in whole or in part on the contents of the consumer report, *before* adverse action is taken. In addition, the FCRA imposes additional obligations on employers that obtain investigative consumer reports from a CRA. A consumer report is generally known as a "credit report" or a "background check report" prepared by a CRA whereas an investigative consumer report is a special type of consumer report whereby the CRA obtains information through personal interviews (e.g., an in-depth reference check).²²

13 15 U.S.C. § 1681n. The plaintiff also can seek punitive damages.

14 See generally *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007).

15 Staff Report at 6.

16 See Cal. Civ. Code § 1785 *et seq.* and Cal. Civ. Code § 1786 *et seq.* See also [California Joins States Restricting Use of Credit Reports for Employment Purposes](http://www.littler.com/publication-press/publication/california-joins-states-restricting-use-credit-reports-employment-purp) by Rod M. Fliegel and Jennifer L. Mora. www.littler.com/publication-press/publication/california-joins-states-restricting-use-credit-reports-employment-purp.

17 Public Law 108-159.

18 Staff Report at 4.

19 55 Fed. Reg. 18804 (May 4, 1990).

20 Title X of Pub. L. 111-203 (Dodd-Frank Wall Street Reform and Consumer Protection Act).

21 In the context of a consumer report used for employment purposes, an adverse action broadly includes "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee." 15 U.S.C. § 1681a(k)(1)(B)(ii).

22 15 U.S.C. §§ 1681a(d) and (e).

Employers typically must provide disclosures to and obtain authorizations from applicants or employees before obtaining a consumer report.

Before an employer may obtain a consumer report from a CRA, typically it must make a clear and conspicuous written disclosure to the consumer, in a document that consists solely of the disclosure, that a consumer report may be obtained.²³ The applicant or employee must provide written permission for the employer to obtain a consumer report for employment purposes.²⁴ Authorization to access reports during employment may be obtained at the time the employment relationship commences.²⁵ In other words, a properly worded disclosure and authorization from an applicant will allow an employer to obtain a consumer report during employment without the need obtain a new authorization after the individual is hired.

Employers must certify to the CRA that they have a permissible purpose and will comply with the FCRA.

Next, the employer must certify to the CRA that it has a “permissible purpose” for procuring a report from the CRA.²⁶ The employer also must certify to the CRA that it: (1) has provided the required disclosures to the applicant or employee (described above); (2) has obtained the requisite written authorization from the applicant or employee; (3) will not use the information contained in the report in violation of any federal or state equal opportunity law or regulation; and (4) will, if any adverse action is to be taken based on the consumer report, provide the applicant or employee with a copy of the consumer report and a summary of the consumer’s rights under the FCRA.²⁷

Employers must make additional disclosures for investigative consumer reports.

In addition to the disclosure obligations on employers that use consumer reports, the FCRA imposes additional disclosure obligations on employers that intend to use an *investigative consumer report* (i.e., a consumer report based on personal interviews by the CRA) for employment purposes. Specifically, employers must disclose to the applicant or employee that an investigative consumer report may be obtained.²⁸ This disclosure must be provided in a written notice that is mailed, or otherwise delivered, to the individual at some time before or not later than three days after the date on which the employer first requests the investigative consumer report.²⁹ The disclosure also must include a statement informing the applicant or employee of his or her right to request additional disclosures of the “nature and scope” of the investigation, as well as the FTC’s Summary of Rights.³⁰ The employer also must certify to the CRA that these disclosures have been made.³¹

If the applicant or employee requests disclosure of the “nature and scope” of the investigation, the employer must respond in a written statement that is mailed, or otherwise delivered, to the applicant or employee no later than five days after the date on which the request was received from the individual or the report was first requested by the employer, whichever is later in time.³²

23 15 U.S.C. § 1681b(b). *But see* 15 U.S.C. § 1681a(y) (relaxed rules for misconduct investigations). For employers regulated by the federal Department of Transportation (DOT), and where the applicant applies for employment by mail, telephone, computer or other similar means, the employer may provide the disclosure, along with a summary of rights under the FCRA, to the applicant or employee orally, in writing or by electronic means. 15 U.S.C. § 1681b(b)(2)(B)(i).

24 15 U.S.C. §§ 1681b(a)(3)(B) and 1681b(b). For DOT-regulated motor carriers, and where the applicant applies for employment by mail, telephone, computer or other similar means, consent may be oral, written or electronic. 15 U.S.C. § 1681b(b)(2)(B)(ii).

25 15 U.S.C. §§ 1681b(a)(3)(B) and 1681b(b).

26 15 U.S.C. § 1681b(f). The permissible purpose is rarely at issue for pre-employment screening because the statutory permissible purposes include “employment purposes.” 15 U.S.C. § 1681b(a)(3)(B).

27 15 U.S.C. § 1681b(b). The employer is not required to make this certification each time that it orders a consumer report. Rather, a blanket certification to the CRA is permissible in most circumstances. In addition, only the CRA can be liable for a violation of this portion of the FCRA, rather than an employer, because the FCRA places this duty on the CRA. 1681b(b)(1)(B). The Summary of Rights is available at the FTC’s website. *See* www.ftc.gov/os/2004/07/040709fcraappxf.pdf. An updated Summary of Rights likely will be available in 2012. *See* note 92, *infra*.

28 15 U.S.C. § 1681d.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

Additional notices are required when adverse action is taken based even in part on information contained in a consumer or investigative consumer report.

If the employer, upon receipt of either a consumer report or an investigative consumer report, takes any adverse action against the applicant or employee based in whole or in part on information contained in the report, the employer typically must follow a two-step notification process.³³ First, before the employer implements the adverse action against the applicant or employee, the employer must provide a "pre-adverse action" notice to the individual, which must include a copy of the consumer report and the FTC's Summary of Rights.³⁴

Once the employer is prepared to take the adverse action against the applicant or employee, it must then provide an "adverse action" notice to the individual.³⁵ The adverse action notice, which can be in writing or delivered orally or by electronic means, must contain the following information:

- The name, address and telephone number of the CRA that provided the report to the employer;
- A statement that the CRA did not make the adverse decision and is not able to explain why the decision was made;
- A statement setting forth the applicant's or employee's right to obtain a free disclosure of his or her report from the CRA if the applicant or employee makes a request for such a disclosure within 60 days; and
- A statement setting forth the applicant's or employee's right to dispute directly with the CRA the accuracy or completeness of any information contained in the report that the CRA provided to the employer.³⁶

IV. SUMMARY OF FCRA REMEDIES

The FCRA allows an applicant or an employee to pursue a private right of action against an employer for "negligently" or "willfully" failing to comply with any of the FCRA's requirements with respect to that individual.³⁷ The statute of limitations for violations of the FCRA requires that an action must be brought by the earlier of: (1) two years after the date of discovery by the plaintiff of the violation; or (2) five years after the date on which the violation that is the basis of the alleged liability occurred.³⁸ The range of available damages varies for negligent and willful violations. An employer that negligently fails to comply with any requirement of the FCRA with respect to an applicant or employee is liable for: (1) actual damages sustained by that individual; and (2) reasonable attorneys' fees and costs.³⁹ The FCRA also sets forth remedies for willful violations of the statute. There are three different types of damages available for a willful violation: (1) actual damages or statutory damages ranging between \$100 and \$1,000; (2) punitive damages; and (3) attorneys' fees and costs.⁴⁰

33 *But see* 15 U.S.C. § 1681a(y) (relaxed rules for misconduct investigations).

34 15 U.S.C. § 1681b(b). If an individual contacts the employer in response to the pre-adverse action notice to say there was a mistake (inaccuracy or incompleteness) in the consumer report, the employer may exercise its discretion whether or not to move forward with the hiring decision or engagement; the FCRA does not dictate a course of action. However, by law, the CRA must within 30 days promptly investigate any dispute about the accuracy or completeness of the report from the individual. 15 U.S.C. § 1681i. If the CRA updates the consumer report, both the individual and the employer will receive notice.

35 15 U.S.C. § 1681m(a).

36 *Id.* DOT-regulated motor carriers are not required to provide a "pre-adverse action" notice to applicants or employees if the applicant applied for employment by mail, telephone, computer or other similar means. 15 U.S.C. § 1681b(b)(3)(B). Rather, motor carriers must provide to the individual, within three days of taking adverse action, an oral, written or electronic notification that adverse action has been taken, which must include the same disclosures required in "adverse action" notices for non-trucking employers.

37 *Id.* 15 U.S.C. §§ 1681n and 1681o.

38 15 U.S.C. § 1681p.

39 15 U.S.C. § 1681o.

40 15 U.S.C. § 1681n.

V. THE FTC STAFF REPORT HIGHLIGHTS OBLIGATIONS UNDER THE FCRA FOR EMPLOYERS THAT USE CONSUMER REPORTS AND INVESTIGATIVE CONSUMER REPORTS FOR EMPLOYMENT PURPOSES

Section 603: Key FCRA Definitions⁴¹

FTC Staff Report Commentary on Key FCRA Definitions

The Staff Report commentary may assist employers in determining whether their actions in obtaining consumer reports are subject to the requirements set forth in the FCRA. Specifically:

- **RELATION TO “CONSUMER REPORTING AGENCY”:** To be a “consumer report” and, therefore, subject to the FCRA’s requirements, the information must be provided to an employer by a “consumer reporting agency.”
- **REPORT CONCERNING A “CONSUMER’S” ATTRIBUTES AND HISTORY:** A “consumer report” includes more than just consumer credit information. Rather, when CRAs provide information to employers regarding an applicant’s or employee’s driving record, employment history, criminal history, education, and licenses, they are providing “consumer reports” because the data involves the applicant’s or employee’s “character, general reputation, personal characteristics, or mode of living.” For example, according to the Staff Report, “when a private investigator who compiles and provides court documents to employer clients requests criminal or civil records on employees or job applicants, the investigator is a CRA providing a ‘consumer report.’”⁴² Similarly, an employment screening service that provides employers with education verifications, employment verifications, and reference checks, even if the information is provided telephonically, is a CRA providing “consumer reports” because that information bears upon an applicant’s or employee’s “character, general reputation, personal characteristics, or mode of living” and is used for employment purposes.⁴³
- **EXCLUSIONS FROM THE DEFINITION OF CONSUMER REPORT:** Certain reports by a CRA that otherwise would be a consumer report are excluded from the FCRA’s definition of a consumer report, including third party reports concerning suspected misconduct relating to employment.⁴⁴ In addition, if a former employer directly communicates with a prospective employer about a job applicant, the information does not constitute a “consumer report” because the conversation pertains to “transactions between the consumer (the employee or applicant) and the person making the report (the current or former employer).”⁴⁵
- **FACT-CHECKING WITH FORMER EMPLOYERS:** A discussion between a CRA and a job applicant’s former or current employer to verify or confirm facts reported on an employment application (*e.g.*, length of employment, job titles or salaries) is not an “interview” and, therefore, the discussion would not result in an investigative consumer report.⁴⁶ However, a discussion about the applicant’s job performance by a prior or current employer to a CRA that goes beyond fact-checking (*e.g.*, whether the applicant had been disciplined on the job, terminated for cause or engaged in misconduct), would constitute an interview.⁴⁷ As a result, such a report from a CRA to a potential employer would be an investigative consumer report.
- **“EMPLOYMENT PURPOSES”:** The term “employment purposes” is interpreted liberally to effectuate the broad remedial purpose of the FCRA. As a result, it may apply to situations where an entity uses individuals who are not technically “employees” to perform work or duties for the entity. Thus, for example, it includes a trucking company that obtains consumer reports on individual drivers who own and operate their own equipment or a nonprofit organization that has volunteers working for it.⁴⁸ In addition, a consumer report used in connection with security clearances of a government contractor’s employees would be for “employment purposes” under the FCRA.⁴⁹ The Staff Report further adds that employers may obtain a consumer report on a current employee, provided

⁴¹ See generally 15 U.S.C. § 1681a.

⁴² Staff Report at 22.

⁴³ Staff Report at 22.

⁴⁴ Staff Report at 20. See also 15 U.S.C. § 1681a(y).

⁴⁵ Staff Report at 24.

⁴⁶ Staff Report at 27.

⁴⁷ Staff Report at 27.

⁴⁸ Staff Report at 32.

⁴⁹ Staff Report at 32.

that the employer has obtained prior, written authorization from the employee (e.g., during the hiring process), because “promotion, reassignment, or retention as an employee” are included in the FCRA’s definition of “employment purposes.”⁵⁰

- “ADVERSE ACTION”: The definition of “adverse action” is not limited to a denial of an individual’s application for employment. Rather, “adverse action” under the FCRA includes corrective or other disciplinary action taken against an employee based in whole or in part on a consumer report.⁵¹ An employer’s decision may “adversely” affect an employee even if his or her pay is not reduced.⁵² For example, according to the Staff Report, “an employee who is denied an assignment requiring a security clearance that is withheld in whole or in part because of a consumer report suffers an ‘adverse action’ in employment even if the assignment would not have raised the employee’s salary.”⁵³

Littler Comments About Key FCRA Definitions

- The Staff Report reiterates the FTC’s view both that a consumer report is a report that the user obtains from a CRA, and that the FCRA regulates the collection of information well beyond traditional credit reports. More than ever before, employers now have virtually instant access to information about job applicants from any number of on-line resources. An emerging compliance issue for employers is which, if any, of these on-line resources operate as—or may be viewed by the FTC as—a CRA. For example, in May 2011, the Associate Director of the FTC’s Division of Privacy and Identity Protection issued a “closing letter” to the attorneys for Social Intelligence, a company that provides employers with social media activities of applicants and employees, which concluded that Social Intelligence is a CRA.⁵⁴
- The Staff Report notes but fails to expound on the scope of the FCRA’s exclusion from the definition of the term consumer report for, among other things, third party reports into suspected misconduct relating to employment.⁵⁵ An emerging compliance issue for employers is when a company can invoke this exclusion in order to obviate the need for compliance with the FCRA’s authorization and pre-adverse action notice requirements.⁵⁶
- The Staff Report notes in this section the distinction between “consumer reports”⁵⁷ and “investigative consumer reports,”⁵⁸ and in a later section notes that an employer must make *additional* disclosures with regard to the latter.⁵⁹ It is prudent for employers to confirm the completeness of their background check program paperwork in the current litigation environment.
- The Staff Report reiterates the FTC’s view that the FCRA’s broad definition of the term “employment purposes” extends beyond traditional employment relationships (e.g., to volunteers and independent contractors).⁶⁰ It is common knowledge that the downturn in the economy has re-shaped the role that contingent labor plays in U.S. businesses. It is prudent for employers to consider the potential significance of the FTC’s commentary with respect to how they vet individuals for, among other thing, project labor assignments.
- The Staff Report reiterates the FTC’s view that the FCRA’s broad definition of the term “adverse action” extends beyond decisions to disqualify a job applicant from further consideration for an available position.⁶¹ It is prudent for employers to consider the potential significance of the FTC’s commentary with respect to both, one, how they vet incumbents for promotions and lateral transfers (even

⁵⁰ Staff Report at 46.

⁵¹ Staff Report at 34.

⁵² Staff Report at 35.

⁵³ Staff Report at 35.

⁵⁴ www.ftc.gov/os/closings/staffclosing.shtm. In September 2011, Senators Richard Blumenthal (D-Conn) and Al Franken (D-Minn) sent a letter to Social Intelligence with questions about how the company handles consumer information. blumenthal.senate.gov/newsroom/press/release/blumenthal-franken-call-on-social-intelligence-corp-to-clarify-privacy-practice.

⁵⁵ See 15 U.S.C. § 1681a(y). See also generally Rod M. Fliegel and Ron Arena, *The Impact of the FACT Act on Employee Misconduct Investigations and Implications for FCRA and Title VII Compliance*, THE LABOR LAWYER, Vol. 20, No. 1 (2004).

⁵⁶ Compare 15 U.S.C. § 1681b(b) with § 1681a(y)(2).

⁵⁷ 15 U.S.C. § 1681a(d).

⁵⁸ 15 U.S.C. § 1681a(e).

⁵⁹ Staff Report at 62-63 . See also 15 U.S.C. § 1681d.

⁶⁰ Staff Report at 32.

⁶¹ Staff Report at 34-35.

ones without an increase or reduction in pay), and two, how, if at all, they use consumer reports to take corrective or disciplinary action against employees.

VI. SECTION 604(B)(2): DISCLOSURES AND AUTHORIZATIONS FOR CONSUMER REPORTS AND INVESTIGATIVE CONSUMER REPORTS

FTC Staff Report Commentary on Disclosures and Authorizations

- **“IN A DOCUMENT THAT CONSISTS SOLELY OF THE DISCLOSURE”:** The disclosure cannot be part of a printed employment application.⁶² Instead, the document that the employer provides to an applicant or employee stating that a consumer report may be obtained for employment purposes may contain only minor additional items. The disclosure may include a brief description of the types of information that may be included in the consumer report so long as the description does not confuse the consumer or detract from the mandated disclosure.⁶³
- **THE DISCLOSURE AND AUTHORIZATION CAN BE IN A SINGLE DOCUMENT:** Employers may include within the disclosure document the required request that the applicant or employee authorize the employer to obtain a consumer report for employment purposes. If the disclosure and the authorization are combined in a single document, certain identifying information may be included. However, the document may not include extraneous or contradictory information, such as a request that the individual waive his or her rights under the FCRA.⁶⁴
- **TIMING AND EFFECTIVENESS OF THE DISCLOSURE AND AUTHORIZATION:** Employers may provide the required disclosure and obtain the necessary authorization when an individual applies for or commences employment.⁶⁵ Employers may use a one-time blanket disclosure to obtain permission from applicants or current employees to obtain consumer reports at any time during the application process or the employee’s tenure.⁶⁶ The disclosure must state “clearly and conspicuously” that the employer intends for the disclosure and authorization to cover both consumer reports obtained as part of the application process, and if the applicant is hired, any additional consumer reports obtained while the individual is an employee.⁶⁷ A disclosure and authorization that complies with the FCRA remains effective throughout the duration of employment.⁶⁸
- **REFUSAL TO CONSENT:** The Staff Report states the FTC takes the position that the FCRA “does not prohibit an employer from taking adverse action against an employee or applicant who refuses to authorize the employer to procure a consumer report.”⁶⁹ However, the FCRA does not specifically authorize an employer to take such action.⁷⁰
- **COMBINED DISCLOSURES FOR CONSUMER REPORTS AND INVESTIGATIVE CONSUMER REPORTS:** As discussed above, an “investigative consumer report” is a type of “consumer report” prepared by a CRA based on in-person interviews with third parties. Employers that intend to obtain both types of reports must provide the disclosures required by Section 604(b) for consumer reports and separately by Section 606(a) for investigative consumer reports.⁷¹ The latter notice must clearly and accurately disclose that an “investigative consumer report” may be obtained and that such a report involves personal interviews with sources such as neighbors, friends or associates.⁷² The employer must further disclose to the applicant or employee of the right under Section 606(b) to “request complete and accurate disclosure of the nature and scope of the investigation.”⁷³

62 Staff Report at 51.

63 Staff Report at 51.

64 Staff Report at 51.

65 Staff Report at 51.

66 Staff Report at 51.

67 Staff Report at 51.

68 Staff Report at 51.

69 Staff Report at 52.

70 Staff Report at 52.

71 Staff Report at 51; 62-63.

72 Staff Report at 63.

73 Staff Report at 63.

- **DISCLOSING THE “NATURE AND SCOPE” OF THE INVESTIGATION IN INVESTIGATIVE CONSUMER REPORTS:** In addition to the initial disclosure that must be made before obtaining an investigative consumer report, the employer is required under Section 606(b) to disclose the “nature and scope” of the investigation if requested by the applicant or employee. In this regard, the disclosure “must include a complete and accurate description of the types of questions asked, the types of persons interviewed, and the name and address of the investigating agency.”⁷⁴ The Staff Report notes that the employer is not required to “disclose the names of sources of information, or to provide the consumer with a copy of the report.”⁷⁵ Although the Staff Report suggests that the Section 606(b) “nature and scope” of investigation disclosure may be combined with the initial Section 606(a) disclosure “in those cases where the employer is able to describe with sufficient specificity the nature and scope of any such investigation that might be requested in the future,”⁷⁶ the Staff Report further adds that, with respect to a Section 604(b) disclosure for consumer reports, an employer “may not meet its obligation under Section 606(b) to describe the nature and scope of the investigation in the same notice, because it would likely overshadow the disclosure required by” Section 604(b).⁷⁷

Littler Comments on Disclosures and Authorizations for Consumer Reports

- The Staff Report reiterates the FTC’s position that employers may combine the disclosures for consumer reports and investigative consumer reports into one document, and that in the same document, the employer may seek the applicant’s or employee’s authorization. But the Staff Report also emphasizes the FTC’s formalistic reading of the FCRA, *i.e.*, that the statute literally commands the use of a stand-alone document. Given the rash of class action lawsuits alleging violations of this provision of the FCRA, it is prudent for employers to review, and as needed update, the text and format of their FCRA disclosure and authorization forms.
- For whatever reason, the Staff Report does not address how, if at all, the increasing use by employers of electronic employment applications impacts its formalistic reading of the FCRA. The conspicuous failure to examine that question certainly diminishes the practical significance of the Staff Report for employers. Interestingly, although the FTC staff reiterated its opinion that, pursuant to the federal Electronic Signatures in Global and National Commerce Act (“ESIGN”),⁷⁸ an applicant or employee may provide a general (rather than employment-related) authorization in an electronic format, the Staff Report does not discuss whether authorization for employment-purposed reports also may be provided electronically.⁷⁹ Both provisions of the FCRA require “written” authorization.⁸⁰ Thus, the opinion of the FTC staff with regard to the general authorization rationally would appear to extend to employment-purposed reports. But it is somewhat curious that the FTC staff made implicit what easily could have been (and should have been) explicit.⁸¹
- The Staff Report reaffirms the FTC’s longstanding view that “Evergreen” or “one-time blanket” authorization is permissible, *i.e.*, that an employer may obtain authorization from a job applicant that will be good throughout the term of employment if he or she is hired.⁸² This is useful in that employers seem to be increasingly ordering screens on current employees (*e.g.*, to satisfy regulatory requirements, customer requirements, etc.). Also useful is the statement by the FTC staff that no claim is cognizable under the FCRA for an adverse action taken against an employee for refusing to provide authorization.
- Requests by applicants or employees for a disclosure of the “nature and scope” of the investigation are uncommon. When such a request is made, however, it would be prudent for employers to provide the Section 606(b) “nature and scope” disclosure in a stand-alone document and not in the Section 606(a) initial disclosure.

74 Staff Report at 64.

75 Staff Report at 64.

76 Staff Report at 64.

77 Staff Report at 51.

78 15 U.S.C. §§ 7001 *et seq.*

79 Compare Staff Report at 43 (general authorization, pursuant to 15 U.S.C. § 1681b(a)(2)) and 51 (authorization for employment-purposed reports).

80 See 15 U.S.C. §§ 1681b(a)(2) and 1681b(b)(2). Electronic authorization is permitted by the text of the FCRA for DOT-regulated employers in certain specified circumstances. 15 U.S.C. §§ 1681b(b)(2)(B), (C).

81 Another question not addressed by the FTC Staff is whether an employer can transmit the required notices via email.

82 Staff Report at 51.

VII. SECTIONS 604(B)(3) AND 615: THE “PRE-ADVERSE ACTION” AND “ADVERSE ACTION” NOTICES

FTC Staff Report Commentary on the “Pre-Adverse Action” and “Adverse Action” Notices

- **TWO NOTICES ARE REQUIRED:** If an employer takes adverse action against an applicant or employee based in whole or in part on information contained in a consumer report or an investigative consumer report, the employer must provide a “pre-adverse action” notice under Section 604(b) before taking the adverse action and a subsequent “adverse action” notice under Section 615(a) after adverse action is taken. As a result, according to the Staff Report, “the notices may not be included in the same document.”⁸³
- **ORAL COPY OF THE REPORT IN THE ABSENCE OF A WRITTEN REPORT:** Where the employer does not have a “written” consumer report or investigative consumer report because the CRA provided the information to the employer orally, the employer may tell the applicant orally what is in the report before taking adverse action. “Because the report itself is oral, an oral ‘copy’ is the proper method of compliance, as it conveys the information that Congress intended the consumer to know prior to suffering adverse action.”⁸⁴
- **EMPLOYERS THAT USE CRAs TO PROVIDE PRE-ADVERSE ACTION NOTICES REMAIN LIABLE:** Although employers may arrange to have the CRA provide pre-adverse action notices directly to applicants or employees (*i.e.*, outsource the process), the employer retains the ultimate liability.⁸⁵
- **PRE-ADVERSE ACTION NOTICES ARE REQUIRED FOR ANY TYPE OF ADVERSE ACTION:** Employers still must provide a “pre-adverse action” notice even if the information contained in the consumer report (such as a criminal record) would automatically disqualify the applicant or employee from employment (or otherwise lead to an adverse employment action) based on the employer’s policies and procedures.⁸⁶
- **EMPLOYERS MUST WAIT A “REASONABLE PERIOD OF TIME” BEFORE TAKING ADVERSE ACTION:** Once the employer provides the pre-adverse action notice, there is no specific period of time an employer must wait before taking the adverse action against the applicant or employee. According to the Staff Report, employers must wait a “reasonable period of time,” but this will vary depending on the particular circumstances involved.⁸⁷
- **DRAFTING THE ADVERSE ACTION NOTICE TO AVOID DUPLICATION:** As discussed above, employers that take adverse action based in whole or in part on information contained in a consumer report or an investigative consumer report are required to provide a “pre-adverse action” notice and an “adverse action” notice. This is true even though there are similarities as to what must be provided in both notices. Employers may provide to the applicant or employee the “adverse action” notice in a way that minimizes duplication with the “pre-adverse” action notice.⁸⁸ According to the Staff Report, for example, in the “adverse action” notice, the employer could note that the applicant or employee has already received a copy of his or her consumer report and a copy of the FTC Summary of Rights.⁸⁹
- **DESCRIBING THE ADVERSE ACTION TAKEN:** The requirement that employers provide “notice of the adverse action” to the applicant or consumer does not require use of the term “adverse.” However, employers are required to accurately convey to the individual that the consumer report “led to less than optimal results” for him or her.⁹⁰ The adverse action notice should be accurate and not include false statements.⁹¹

83 Staff Report at 52.

84 Staff Report at 53.

85 Staff Report at 53.

86 Staff Report at 53.

87 Staff Report at 52-53.

88 Staff Report at 52.

89 Staff Report at 52.

90 Staff Report at 85.

91 Staff Report at 85.

Littler Comments on the "Pre-Adverse Action" and "Adverse Action" Notices

- One of the primary arguments advanced by the plaintiffs' bar in FCRA class actions is that the employer did not wait the requisite reasonable period of time between providing job applicants with the pre-adverse action notice and the adverse action notice. Neither the FCRA nor the FTC has provided a bright-line test in this regard. However, based on the existing case law authorities it is prudent for employers to wait at least five *business* days before taking the adverse action and providing job applicants with the final adverse action notice.
- Employers also should consider periodically auditing their background check policies and procedures to ensure that applicants and employees are being provided with an adequate amount of time to consider the information contained in their background check reports. It also would be prudent for employers to review the indemnity provision in their "subscriber agreements" with CRAs. As noted, employers may outsource the process of mailing the notices, but the employer remains potentially liable under the statute.
- In 2004, the FTC revised its Summary of Rights notice and in 2010, it proposed revisions to the notice for the purpose of, among other things, making the notice "more useful and easier to understand."⁹² Because plaintiffs have sued employers and CRAs for providing outdated Summary of Rights notices, employers should take steps to ensure that they are providing applicants and employees with the most recent version of the FTC Summary of Rights document.
- The weight of legal authority has concluded that there is no private right of action against a user that violates the "adverse action" requirements. Because the courts are not unanimous on this point, it is prudent for employers to take steps to ensure their adverse action notices are complete.⁹³

VIII. CONCLUSION

Now more than ever, it is essential for employers that use background checks for employment purposes to take steps to ensure compliance with the applicable provisions of the FCRA. There is more FCRA litigation against employers for alleged willful violations of the FCRA than ever before, especially class action litigation against larger, national employers. In addition, because various other laws affect the use of background checks for employment purposes, such as Title VII of the Civil Rights Act of 1964 and state fair employment and fair credit reporting laws, employers should continue to be mindful of their obligations to comply with all of these laws. In fact, the Equal Employment Opportunity Commission has intensified its focus on employer-use of both criminal records and credit reports for employment purposes and is prosecuting at least two class action lawsuits against employers under the theory that such use resulted in an unlawful "disparate impact" on protected class members in violation of Title VII.⁹⁴

⁹² www.ftc.gov/opa/2010/08/fcra.shtm.

⁹³ Section 615 was recently amended to require adverse action disclosures to include certain information about credit scores. 15 U.S.C. § 1681m. However, because employers typically do not rely on credit scores as part of their background screening process, the amendment impacts very few employers.

⁹⁴ See generally *The EEOC's Priorities Still Include Regulating the Use of Criminal Records by Employers* by Rod M. Fliegel and Barry A. Hartstein, www.littler.com/publication-press/publication/eoocs-priorities-still-include-regulating-use-criminal-records-employe; Conviction Records and Disparate Impact, Rod M. Fliegel, Allan King and Frederick J. Barrow, *Journal of Labor & Employment Law*, ABA, Vol. 26, Number 3.

IX. APPENDIX A — RELEVANT PORTIONS OF SECTION 604 OF THE FCRA

§ 604. Permissible purposes of consumer reports [15 U.S.C. § 1681b]

(b) Conditions for Furnishing and Using Consumer Reports for Employment Purposes.

(1) Certification from user. A consumer reporting agency may furnish a consumer report for employment purposes only if

(A) the person who obtains such report from the agency certifies to the agency that

- (i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and
- (ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this title, as prescribed by the Bureau under section 609(c)(3) [§ 1681g].

(2) Disclosure to Consumer.

(A) In general. Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless –

- (i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and
- (ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

(B) Application by mail, telephone, computer, or other similar means. If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, at any time before a consumer report is procured or caused to be procured in connection with that application –

- (i) the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 615(a)(3); and
- (ii) the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.

(C) Scope. Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if –

- (i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and
- (ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(3) Conditions on use for adverse actions.

(A) In general. Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates –

- (i) a copy of the report; and
 - (ii) a description in writing of the rights of the consumer under this title, as prescribed by the Bureau under section 609(c)(3).³
- (B) Application by mail, telephone, computer, or other similar means.
- (i) If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, and if a person who has procured a consumer report on the consumer for employment purposes takes adverse action on the employment application based in whole or in part on the report, then the person must provide to the consumer to whom the report relates, in lieu of the notices required under subparagraph (A) of this section and under section 615(a), within 3 business days of taking such action, an oral, written or electronic notification—
 - (I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;
 - (II) of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);
 - (III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific reasons why the adverse action was taken; and
 - (IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.
 - (ii) If, under clause (B)(i)(IV), the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Bureau under section 609(c)(3).⁹⁵

⁹⁵ The references in Sections 604(b)(3)(A) and 604(b)(3)(B) should be to Section 609(c)(1), not (c)(3) that no longer exists as the result of Congress' re-organization of Section 609(c) in 2003 (FACT Act).

X. APPENDIX B: FTC "A SUMMARY OF YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT"

Para informacion en espanol, visite www.ftc.gov/credit o escribe a la FTC Consumer Response Center, Room 130-A 600 Pennsylvania Ave. N.W., Washington, D.C. 20580.

A Summary of Your Rights Under the Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies. There are many types of consumer reporting agencies, including credit bureaus and specialty agencies (such as agencies that sell information about check writing histories, medical records, and rental history records). Here is a summary of your major rights under the FCRA. **For more information, including information about additional rights, go to www.ftc.gov/credit or write to: Consumer Response Center, Room 130-A, Federal Trade Commission, 600 Pennsylvania Ave. N.W., Washington, D.C. 20580.**

- **You must be told if information in your file has been used against you.** Anyone who uses a credit report or another type of consumer report to deny your application for credit, insurance, or employment – or to take another adverse action against you – must tell you, and must give you the name, address, and phone number of the agency that provided the information.
- **You have the right to know what is in your file.** You may request and obtain all the information about you in the files of a consumer reporting agency (your “file disclosure”). You will be required to provide proper identification, which may include your Social Security number. In many cases, the disclosure will be free. You are entitled to a free file disclosure if:
 - a person has taken adverse action against you because of information in your credit report;
 - you are the victim of identify theft and place a fraud alert in your file;
 - your file contains inaccurate information as a result of fraud;
 - you are on public assistance;
 - you are unemployed but expect to apply for employment within 60 days.
 In addition, by September 2005 all consumers will be entitled to one free disclosure every 12 months upon request from each nationwide credit bureau and from nationwide specialty consumer reporting agencies. See www.ftc.gov/credit for additional information.
- **You have the right to ask for a credit score.** Credit scores are numerical summaries of your credit-worthiness based on information from credit bureaus. You may request a credit score from consumer reporting agencies that create scores or distribute scores used in residential real property loans, but you will have to pay for it. In some mortgage transactions, you will receive credit score information for free from the mortgage lender.
- **You have the right to dispute incomplete or inaccurate information.** If you identify information in your file that is incomplete or inaccurate, and report it to the consumer reporting agency, the agency must investigate unless your dispute is frivolous. See www.ftc.gov/credit for an explanation of dispute procedures.
- **Consumer reporting agencies must correct or delete inaccurate, incomplete, or unverifiable information.** Inaccurate, incomplete or unverifiable information must be removed or corrected, usually within 30 days. However, a consumer reporting agency may continue to report information it has verified as accurate.

- **Consumer reporting agencies may not report outdated negative information.** In most cases, a consumer reporting agency may not report negative information that is more than seven years old, or bankruptcies that are more than 10 years old.
- **Access to your file is limited.** A consumer reporting agency may provide information about you only to people with a valid need -- usually to consider an application with a creditor, insurer, employer, landlord, or other business. The FCRA specifies those with a valid need for access.
- **You must give your consent for reports to be provided to employers.** A consumer reporting agency may not give out information about you to your employer, or a potential employer, without your written consent given to the employer. Written consent generally is not required in the trucking industry. For more information, go to www.ftc.gov/credit.
- **You may limit "prescreened" offers of credit and insurance you get based on information in your credit report.** Unsolicited "prescreened" offers for credit and insurance must include a toll-free phone number you can call if you choose to remove your name and address from the lists these offers are based on. You may opt-out with the nationwide credit bureaus at 1-888-5-OPTOUT (1-888-567-8688).
- **You may seek damages from violators.** If a consumer reporting agency, or, in some cases, a user of consumer reports or a furnisher of information to a consumer reporting agency violates the FCRA, you may be able to sue in state or federal court.
- **Identity theft victims and active duty military personnel have additional rights.** For more information, visit www.ftc.gov/credit.

States may enforce the FCRA, and many states have their own consumer reporting laws. In some cases, you may have more rights under state law. For more information, contact your state or local consumer protection agency or your state Attorney General. Federal enforcers are:

TYPE OF BUSINESS:	CONTACT:
Consumer reporting agencies, creditors and others not listed below	Federal Trade Commission: Consumer Response Center - FCRA Washington, DC 20580 1-877-382-4357
National banks, federal branches/agencies of foreign banks (word "National" or initials "N.A." appear in or after bank's name)	Office of the Comptroller of the Currency Compliance Management, Mail Stop 6-6 Washington, DC 20219 800-613-6743
Federal Reserve System member banks (except national banks, and federal branches/agencies of foreign banks)	Federal Reserve Consumer Help (FRCH) P O Box 1200 Minneapolis, MN 55480 Telephone: 888-851-1920 Website Address: www.federalreserveconsumerhelp.gov Email Address: ConsumerHelp@FederalReserve.gov
Savings associations and federally chartered savings banks (word "Federal" or initials "F.S.B." appear in federal institution's name)	Office of Thrift Supervision Consumer Complaints Washington, DC 20552 800-842-6929
Federal credit unions (words "Federal Credit Union" appear in institution's name)	National Credit Union Administration 1775 Duke Street Alexandria, VA 22314 703-519-4600
State-chartered banks that are not members of the Federal Reserve System	Federal Deposit Insurance Corporation Consumer Response Center, 2345 Grand Avenue, Suite 100 Kansas City, Missouri 64108-2638 1-877-275-3342
Air, surface, or rail common carriers regulated by former Civil Aeronautics Board or Interstate Commerce Commission	Department of Transportation, Office of Financial Management Washington, DC 20590 202-366-1306
Activities subject to the Packers and Stockyards Act, 1921	Department of Agriculture
	Office of Deputy Administrator - GIPSA Washington, DC 20250 202-720-7051

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