

FCRA PROVISIONS	UNREASONABLE BURDENS	FTC'S PROPOSED FCRA AMENDMENT
<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 (e.g., doctor/patient privilege, state privacy laws, etc.).</p>	<p>FTC agrees this requirement is <u>unnecessary</u>.</p>

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<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 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. Further, The EEOC and state agencies provide for "continuing violations" causes of action that sometimes exceed seven years. Careers last longer than seven years and so can the continuing violations.</p>	<p>Not addressed.</p>

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<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 counts 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. It will also trigger more retaliation claims from witnesses who have participated in a "statutorily protected activity." 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</p>	<p>Not addressed.</p>

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<p><u>Section 607 - Reasonable Procedures</u></p> <p>Reports must be prepared using reasonable procedures to assure maximum possible accuracy.</p>	<p>not subject to the 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> <p>As noted above, the term "reasonable procedures" is vaguely defined and will promote an onslaught of litigation (i.e., 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-</p>	<p>FTC agrees this requirement is <u>unnecessary</u>.</p> <p>Not addressed.</p>

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<p><u>Section 609 - Accountability</u></p> <p>Consumer reporting agencies (CRAs) must disclose to individuals the identify of anyone obtaining an employment report on them in the prior two years.</p>	<p>vaguely defined "reasonable procedures" requirements.</p> <p>In addition, it will replace 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, 29C.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> <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, agents engaged in such investigations do not</p>	<p>The FTC suggests disclosure of nature and substance reports. The FTC did not address the need to inform the consumer of other inquiries in the last two years.</p>

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<p><u>Section 610 - Disclosure to Consumers</u></p> <p>CRA's are required to</p>	<p>Rather, the files address the particular incident that prompted the investigation. Thus, disclosures relating to individuals impose an undue burden on CRA's functioning in the employment context.</p> <p>In addition, CRA's 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 CRA's functioning in the employment context.</p> <p>CRA's conducting employment-related investigations do not have access to information about what reports 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>CRA's conducting employment-related investigations rarely have direct contact with consumers regarding the results of the investigation. The type of information reported pursuant to a</p>	<p>Not addressed.</p>

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<p>identification from consumers before disclosure of a report and must have gained personnel to explain any information furnished about the consumer.</p> <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>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> <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 consultant 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 inexperience and/or internal investigators are not subject to reinvestigation requirements. This will also trigger more retaliation claims This provision will also add</p>	<p>Not addressed.</p>

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<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>investigation. If a CRA is used, this section will promote an onslaught of litigation (i.e., every employment-related lawsuit will allege insufficient reinvestigation).</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, consultants 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 consultants 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, disruption of working relationships, and will increase the number of lawsuits filed against employers.</p>	<p>Not specifically addressed. An exemption only for 609 (a)(1) is provided. It appears that Section 609 influences Section 612.</p>

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<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>Provisions of public record information to consumer will tip-off consumer to ongoing investigation. Consultants 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>Not addressed.</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>	<p>Not addressed.</p>

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<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, consultants 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 consultants 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>The FTC's proposed amendment leaves in tact this provision.</p>

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<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>Not addressed.</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 and 617 are applicable here. Criminal penalties generally are not available in comparable state and federal employment laws.</p>	<p>Not addressed.</p>
<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 requirements, <i>see</i> Sections 611 & 614.</p>	<p>Not addressed.</p>

Addendum 1, Table 1