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The Fair and Accurate Credit Transactions Act of 2003 ("FACT") Amends the Federal Fair Credit Reporting Act ("FCRA") to Allow More Latitude for Employers Conducting Workplace Investigations.

THE FACT AND HOW IT AFFECTS FCRA AND EMPLOYMENT INVESTIGATIONS (THE *VAIL* LETTER)

By Rod M. Fliegel and Ronald D. Arena

On December 4, 2003, President Bush signed the Fair and Accurate Credit Transactions Act of 2003 ("FACT"). The final bill (H.R. 2622; H. Rept. 108-159) amends the federal Fair Credit Reporting Act ("FCRA") in response to, among other things, the controversial *Vail* opinion letter from the Federal Trade Commission ("FTC"). The staff attorney who authored the *Vail* letter in 1999 reached the novel conclusion that the FCRA regulates workplace misconduct investigations conducted by third parties, such as private investigators. Title VI of the FACT nullifies the *Vail* letter by excluding misconduct investigations from the FCRA's more onerous provisions, including the need for the accused's advance consent to investigate. However, employers must be mindful of Title VI's scope limitations as well as *new* obligations regarding medical information. Additionally, while the FACT removes the January 2004 "Sunset Clause" from Section 624 of the FCRA, which *preempts* certain state legislation, employers should become familiar with, and continue to monitor, the state laws where they do business. Employers will also want to review impending FTC regulations interpreting the FACT and establishing effective dates for the various provisions in the legislation.

***Question No. 1*: Who sponsored the FACT?** In April 2003, Reps. Peter Sessions (R-Texas) and Sheila Jackson Lee (D-Texas) introduced the Civil Rights and Employee Investigation Clarification Act (H.R. 1543). (In 1999, Rep. Sessions had sponsored a similar bill, the Fair Credit Reporting Amendments Act.) In July 2003, the House Financial Services Committee approved H.R. 2622, which incorporated H.R. 1543, by a 61-3 vote. Numerous amendments were voted down or withdrawn, including one allowing the accused to demand a reinvestigation. The Senate passed its own version of the legislation, but committee members reconciled the two bills. The House approved the conference report on November 21 by a 379-49 vote; the Senate gave unanimous approval the next day.

***Question No. 2*: How does Title VI nullify the *Vail* letter?** The FCRA prohibits "consumer reporting agencies" from furnishing "consumer reports" for "employment purposes" unless the "consumer" is notified of and consents to disclosure of the report, and is furnished with a copy of the report if it results in an "adverse" personnel action (e.g., discipline, demotion, termination, etc.). Consumer reporting agencies include background check vendors and credit reporting agencies, and in some circumstances, private investigators and even law firms. Consumer reports include "any communication of information by a consumer reporting agency bearing on a consumer's character, general reputation, personal characteristics, or mode of living." "Investigative consumer reports" are a subset of consumer reports that trigger additional notices to the consumer. Investigative consumer reports are reports in which protected information is obtained "through personal interviews with neighbors, friends, or associates or others with whom the consumer is acquainted." Title VI of the FACT *excludes* from the definition of consumer reports misconduct investigation reports *and* investigation reports into "compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer." As a result, employers no longer have to (1) notify the accused of the investigation, (2) seek consent from the accused, (3) provide the accused with a copy of the report, or (4) wait a "reasonable" amount of time between

giving the accused a copy of the report and taking adverse action. Eliminating the first two requirements helps minimize the risk the accused will alter or destroy evidence, intimidate or influence witnesses, or otherwise impair the reliability of the investigation. Eliminating the third requirement helps minimize the risk witnesses will refuse to participate in the investigation for fear of retribution.

***Question No. 3*: How are investigations still regulated?** If adverse action is taken against the accused based at least in part upon a report that would otherwise be a consumer or investigative consumer report, the accused is entitled to a summary of the "nature and substance" of the report. Title VI does not prescribe the amount of information that must be disclosed, but permits exclusion of "the sources of the information acquired solely for use in preparing [the report]," e.g., the names of any witnesses. Title VI leaves open whether the summary must be in writing (presumably it does), and exactly how long after the adverse action is taken the summary must be provided to the subject of the report (presumably not too long). Title VI also restricts circulation of the report to "the employer or an agent of the employer," and the exemption *may be forfeit* by making overbroad disclosures. (The report may be disclosed to government agencies and "as otherwise required by law.") Because an employee who makes the initial allegation or complaint is not the "employer" or its "agent," an important question is what he or she is entitled to know. Likewise unclear is whether authorized disclosures include the board of directors, shareholders or "joint employers," for example, a temporary agency that employs the accused. Title VI does not restrict the disclosure of *summaries* of the report. Thus, such narrow and business-related disclosures may be permissible and in accordance with procedures mandated by the anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964.

***Question No. 4*: Is "reasonable suspicion" required by Title VI?** No foundational requirements are imposed on employers for initiating investigations, for example, "reasonable suspicion" of misconduct or that evidence may be destroyed, etc. (The FTC had recommended such a requirement in its testimony before Congress in connection with the amendments proposed in 1999.) Moreover, the breadth of the exemption appears to be very expansive. Title VI does not limit the types of "misconduct" investigations that are exempted (e.g., threats of serious harm or violence, abuse of controlled substances, the loss of more than $1,000 in cash or property, etc.). Title VI also extends to investigations into compliance with "any preexisting written policies" and may encompass financial audits, information technology audits, loss prevention audits, etc. On the other hand, the FACT's text suggests at least some substantive limitations. For example, the suspected misconduct must "relate to employment," and, the policies must predate the investigation and be in writing. Moreover, the scope of Title VI arguably derives from the specific objectives furthered by the legislation: eliminating the *Vail* letter as an obstacle to the use of neutral investigative resources.

***Question No. 5*: Is Title VI limited to investigations of current employees?** The legislative purpose of Title VI seems to presuppose an existing employment relationship. However, the FACT refers to "consumers," not to "employees" (e.g., the *consumer* is entitled to a summary of the investigation report). Therefore, it remains to be seen whether Title VI permits investigations of former employees. Such investigations are not uncommon, especially during or in connection with litigation. For example, Able Company is sued for fraud. The board of directors hires a third party to investigate the current and former officers. On the one hand, the investigation "relates to" the current and former officers' employment. On the other hand, by speaking to "adverse action," the FACT appears to contemplate an ongoing relationship. Thus, both interpretations find support in the text and structure of the legislation.

***Question No. 6*: How does the FACT regulate medical information?** Title IV prohibits consumer reporting agencies from furnishing employment-related consumer reports containing medical information unless the information is "relevant to process or effect the employment transaction," and the consumer provides "specific written consent." Title IV likely does not encompass the results of drug tests or pre-employment examinations, because such results usually come within the FCRA's exception for "direct transactions" between the consumer and the reporting agency. On the other hand, Title IV may encompass some third party reports of workers' compensation cases and claims for disability or medical benefits.

CONCLUSION

Thorough and impartial workplace investigations are becoming increasingly important, even indispensable, in today's legal and business climate. Title VI of the FACT gives employers more latitude regarding such investigations and is a timely and welcome development. Employers, however, must be mindful of Title VI's scope limitations, particularly the restrictions on disclosure of any investigation reports, as well as *new* obligations regarding medical information. Additionally, while the FACT removes the Sunset Clause from the FCRA, employers should become familiar with, and continue to monitor, the state laws where they do business. Employers should also review the impending regulations. Until these regulations are available from the FTC, employers may want to interpret the new legislation conservatively and with due regard for its intended purpose: nullifying the *Vail* letter.

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