EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.

U.S. Equal Employment Opportunity Commission Office of Legal Counsel 2012

Why is this a Civil Rights Issue?

Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination based on race, color, religion, sex, or national origin.

- Disparate treatment discrimination
- Disparate impact discrimination

Arrest Records

- Arrest records are unreliable because:
 - <u>Innocent until proven guilty principle</u>: Not proof of criminal conduct; merely an allegation.
 - <u>Incomplete records</u>: Many arrest records lack the details of what happened post-arrest.
 - <u>Inaccurate Records</u>: Many records report arrests for the wrong person (mistaken identity); others continue to report records that were sealed or expunged.

Conviction Records

- More reliable than arrest records but, employers should still be cautious:
 - <u>Inaccurate records</u>: Continue to report conviction records that were expunged or sealed; Mistaken identity.
 - <u>Outdated records</u>: Continue to report as a felony, offenses that were downgraded to a misdemeanor.
- Best practice: Wait to ask about convictions until later in the selection process; limit the inquiries to relevant convictions.

Disparate Treatment Discrimination

• **Definition:** Treating applicants/employees differently because of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a).

Decisions based on criminal records:

- Rejecting a Black or Hispanic applicant because of his criminal record, but hiring a White applicant with a similar criminal record and job qualifications;
- **Prohibiting** Black or Hispanic applicants from explaining their criminal history but **allowing** White applicants to explain theirs; or
- Rejecting Black or Hispanic applicants based on racial or ethnic stereotypes about criminality.

Disparate Impact Discrimination

• **Definition:** When an employer's **neutral** policy or practice **disproportionately screens out** or **disadvantages** Title VII-protected individuals and does not relate to the job in question and is not consistent with a business necessity.

42 U.S.C. § 2000e-2(k)(1)(A)(i).

- Criminal record screening policies/practices:
 - A policy or practice that requires all new hires to be "conviction free" or have a "clean background"; or
 - A policy or practice that screens out all applicants with felony convictions.

Disparate Impact Discrimination

- Policies or practices that will disproportionately screen out or disadvantage Title-VII protected individuals, e.g., Blacks and Hispanics; and
- Policies or practices that do not meet the job related and consistent with a business necessity standard.
 - Overly restrictive;
 - Require across-the-board exclusions; or
 - Do not try to establish a connection between the job and specific criminal conduct.

Determining Whether a Criminal Conduct Exclusion Is Job Related and Consistent with Business Necessity

The Commission believes there are **two circumstances** in which employers will consistently meet the "job related and consistent with business necessity" standard.

Job Related and Consistent with Business Necessity

• 1# Validating the policy or practice under the Uniform Guidelines on Employee Selection Procedures if relevant data is available and validation is possible. 29 C.F.R. part 1607.

Job Related and Consistent with Business Necessity

• 2# Developing a targeted screen that is supplemented by an individualized assessment process.

- Established by *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977).
- Screening policies or practices that consider at least three factors:
 - (1) The nature and gravity of the offense or conduct;
 - (2) The time elapsed since the offense, conduct and/or completion of the sentence occurred; and
 - (3) The position held or sought.

- (1) The nature and gravity of the offense or conduct:
 - What was the harm caused by the offense or conduct?
 - What are the legal elements of the crime?
 - Was the crime categorized as a misdemeanor or a felony?

- (2) The time elapsed since the offense, conduct and/or completion of the sentence:
 - Permanent, lifetime bans based on any and all offenses are inconsistent with Title VII's business necessity standard; and

 Research shows that the amount of time that has passed since a person committed an offense is linked to a reduced risk that he will commit another offense in the future.

- (3) The position held or sought:
 - What is the job's title?
 - What are the job's duties/responsibilities?
 - What are the job's essential functions?
 - Under what circumstances will the job be performed?
 - What environment will the job be performed in?

Individualized Assessments: Process

- Notice: Informing the individual that he may be excluded from the job because of his past criminal conduct (typically, as identified by a targeted screening policy); and
- Opportunity to Explain/Considering mitigation information:
 - Providing the individual an opportunity to explain why he shouldn't be excluded despite his criminal background; and
 - Considering whether the individual's mitigating information shows that the policy, as applied, shouldn't exclude him from the particular job.

Individualized Assessments: Information

- Evaluating mitigating information on a case-by-case basis:
 - Information explaining the inaccuracy or incompleteness of the criminal record in question;
 - A more detailed explanation of the circumstances surrounding the offense or conduct;
 - Information demonstrating that the individual performed the same/similar work, post conviction, with the same or different employer without incident;
 - Proof of rehabilitation; or
 - Character and/or employment reference letters, among other factors.

Best Practices

- Eliminate across-the-board exclusions based on any criminal record.
- Train managers, hiring officials, and decisionmakers on how to implement the policy and procedures consistent with Title VII requirements.
- Develop a narrowly tailored written policy and procedure for screening applicants and employees for past criminal conduct.
- Limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.

Additional Information

 For additional information about the topics I addressed during the presentation, please reference the following sites:

- Enforcement Guidance: <u>http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm</u>
- Qs & As: <u>http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.</u> <u>cfm</u>
- What You Should Know Fact Sheet:
 http://www.eeoc.gov/eeoc/newsroom/wysk/arrest_convict
 ion records.cfm

Contact Information

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EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210

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DATE
May 25, 2012

ADVISORY: TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 31-11

TO: ONE-STOP CAREER CENTERS

STATE WORKFORCE AGENCIES

STATE WORKFORCE ADMINISTRATORS

STATE WORKFORCE LIAISONS

STATE AND LOCAL WORKFORCE BOARD CHAIRS AND DIRECTORS

STATE AND LOCAL EQUAL OPPORTUNITY OFFICERS

STATE LABOR COMMISSIONERS

WORKFORCE INVESTMENT ACT SECTION 166 INDIAN AND NATIVE

AMERICAN GRANTEES

WORKFORCE INVESTMENT ACT SECTION 167 MIGRANT AND

NATIONAL FARMWORKER JOBS PROGRAM GRANTEES

SENIOR COMMUNITY SERVICE EMPLOYMENT PROGRAM GRANTEES

EMPLOYMENT AND TRAINING ADMINISTRATION REGIONAL

ADMINISTRATORS

JOB CORPS CONTRACTORS

SUB-RECIPIENTS OF DEPARTMENT OF LABOR FINANCIAL

ASSISTANCE

FROM: JANE OATES /s/

Assistant Secretary

Employment and Training Administration

NAOMI BARRY-PEREZ /s/

Acting Director Civil Rights Center

SUBJECT: Update on Complying with Nondiscrimination Provisions: Criminal Record

Restrictions and Disparate Impact Based on Race and National Origin

1. <u>Purpose</u>. The purpose of this Training and Employment Guidance Letter (TEGL) is to provide information about exclusions based on criminal records, and how they are relevant to the existing nondiscrimination obligations for the public workforce system and other entities (including the "covered entities" listed above) that receive federal financial assistance to operate Job Banks, to provide assistance to job seekers in locating and obtaining employment, and to assist employers by screening and referring qualified applicants. As explained in this TEGL, restrictions based on criminal history records may have a disparate impact on members of a particular race or national origin, in violation of federal antidiscrimination laws.

RESCISSIONS	EXPIRATION DATE
None	Continuing

This guidance is being issued by the Employment and Training Administration (ETA), in conjunction with the Civil Rights Center (CRC).

2. References.¹

- Title VII of the Civil Rights Act of 1964, as amended: 42 U.S.C. 2000e-2(a) (disparate treatment), 2000e-2(b) (employment agency practices), 2000e-2(a)(2) and 2000e-2(k) (disparate impact by employers and employment agencies), 2000e-3(b) (employment agency job postings)
 - Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (April 25, 2012), http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf
- Title VI of the Civil Rights Act of 1964: 42 U.S.C. 2000d (nondiscrimination by recipients of federal financial assistance)
 - o 29 C.F.R. 31.3(b)(2) (disparate impact), 31.3(c)(1) (nondiscrimination in employment practices), 31.3(d)(1) (selection and referral for employment or training)
- Workforce Investment Act (WIA): 29 U.S.C. 2938 (nondiscrimination by recipients of federal financial assistance under WIA)
 - o 29 C.F.R. 37.2(a)(2) (programs operated by One-Stop partners as part of the One-Stop system must comply with nondiscrimination regulations), 37.6(d)(1) (administration of programs cannot have discriminatory purpose or effect)
- Wagner-Peyser Act: 20 C.F.R. 652.8(j)(1) (nondiscrimination by recipients of federal financial assistance under Wagner-Peyser), 652.8(j)(2) (States must assure that discriminatory job orders will not be accepted except where there is a bona fide occupational qualification (BFOQ))
- **3. Background.** In recent decades, the number of Americans who have had contact with the criminal justice system has increased exponentially. It is estimated that about one in three adults now has a criminal history record² which often consists of an arrest that did not lead to conviction, a conviction for which the person was not sentenced to a term of incarceration, or a conviction for a non-violent crime. On any given day, about 2.3 million people are incarcerated.³ And each year 700,000 people are released from prison⁴ and almost 13 million are admitted to and released from local jails.⁵

Racial and ethnic disparities are reflected in incarceration rates: According to the Pew Center on the States, one in 106 white men, one in 36 Hispanic men, and one in 15 African American men are incarcerated. Additionally, on average one in 31 adults are under correctional control (i.e., probation, parole, or incarceration), including one in 45 white adults, one in 27 Hispanic adults and one in 11 African American adults. Racial and ethnic disparities may also be reflected in other criminal history records. For example, although African Americans constitute approximately 13 percent of the overall population, they

account for 28 percent of those arrested 9 and almost 40 percent of the incarcerated population. 10

Because of these racial and ethnic disparities, employers and agencies within the public workforce system should be mindful of federal antidiscrimination laws if they choose to rely on job applicants' criminal history records as a tool to help assess potential risk to employees, customers, and business assets. Hiring policies and practices that exclude workers with criminal records may run afoul of such laws, which prohibit both intentional discrimination on the basis of race, national origin, or other protected bases, and policies or practices that have a disparate impact on these protected groups and cannot be justified as job related and consistent with business necessity. Policies that exclude people from employment or other services based on the mere existence of a criminal history record and that do not take into account the age and nature of an offense, for example, are likely to unjustifiably restrict the employment opportunities of individuals with conviction histories and, due to racial and ethnic disparities in the criminal justice system, are likely to violate federal antidiscrimination law. Accordingly, employers and agencies should carefully consider their legal obligations before adopting such policies.

As recognized by the federally-assisted workforce system, which is already engaged in promoting job opportunities for people with criminal records through various reentry grants and programs, obtaining employment is critical in reducing recidivism and easing the reintegration of persons returning from incarceration. Secretary of Labor Hilda Solis recently observed that the public workforce system's mix of strategies, interventions and service partnerships must be designed and executed with the goal of helping people with criminal records obtain employment that can support them and their families. These efforts are consistent with the Federal Interagency Reentry Council's mission to make communities safer by reducing recidivism, assist those returning from prison and jail in becoming productive citizens, and save taxpayer dollars by lowering the direct and collateral costs of incarceration. As Secretary Solis stated recently: "When someone serves time in our penal system, they shouldn't face a lifetime sentence of unemployment when they are released. Those who want to make amends must be given the opportunity to make an honest living." 12

This TEGL is intended to help covered entities (and their employer customers) comply with their nondiscrimination obligations when serving the population of individuals with criminal records, and to ensure that exclusionary policies are not at cross-purposes with the public workforce system's efforts to promote employment opportunities for such workers. This TEGL applies to all jobs available through a covered entity's job bank without regard to whether the job is in government or the private sector, including federal contractors and subcontractors.

4. Applicable Statutes, Regulations, and Guidance.

a. The nondiscrimination provisions that apply to the federally-assisted workforce system prohibit both "disparate treatment" – intentionally treating members of protected groups differently based on their protected status – and "disparate impact" – the use of policies or practices that are neutral on their face, but have a disproportionate impact on members of protected groups, and are not job related and consistent with business necessity. Although

individuals with criminal history records are not a protected group under the applicable federal laws, antidiscrimination laws may be implicated when criminal records are being considered. For example, studies have shown that employers may treat whites with a criminal record more favorably than similarly-situated African Americans with the same or similar criminal record, which would be a form of disparate treatment. Likewise, if a One-Stop Career Center were to refer a white job seeker with a criminal record for a job, but not an equally-qualified Hispanic job seeker with the same or similar criminal record, this could constitute disparate treatment. Additionally, One-Stop Career Centers may be posting job announcements that categorically exclude people who have any kind of conviction or arrest, or screening out job seekers with criminal records by not referring them to employers who have stated that they will only accept applicants with "clean" criminal records. Because of racial and ethnic disparities reflected in the criminal justice system, these policies or practices will likely have a disparate impact on certain protected groups, in violation of federal law.

- b. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., applies to employers with 15 or more employees, and prohibits employment discrimination (both disparate treatment and disparate impact) based on race, color, religion, sex, or national origin. 16 Title VII also contains provisions that specifically address employment agency activities. Entities within the public workforce system like the nation's State Workforce Agencies and One-Stop Career Centers may be regarded as "employment agencies" under the law. ¹⁷ Therefore, they are not permitted to "print or publish or cause to be printed" any job announcement that discriminates based on race, color, religion, sex, or national origin unless there is a bona fide occupational qualification for a preference based on religion, sex, or national origin. ¹⁸ In addition, employment agencies are prohibited from refusing to refer an individual for employment or otherwise to discriminate against any individual based on race, color, religion, sex, or national origin. ¹⁹ The Equal Employment Opportunity Commission (EEOC), the federal agency that administers and enforces Title VII, has issued guidance on the use of arrest and conviction records in employment decisions (see attached summary and best practices; for full guidance see: http://www.eeoc.gov/laws/guidance/upload/arrest conviction.pdf).²⁰
- c. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, applies to all programs or activities receiving federal financial assistance, such as the covered entities referred to in this TEGL that receive assistance under the Workforce Investment Act and/or the Wagner-Peyser Act. Title VI and its implementing regulations prohibit any program or activity from excluding from participation in or denying the benefits of the program, or otherwise subjecting anyone to discrimination, on the ground of race, color, or national origin. As a condition of initiating or continuing federal financial assistance, recipients must provide assurances that "the program will be conducted or the facility operated in compliance with all requirements imposed by" the nondiscrimination provision in Title VI.

Under the Department's Title VI regulations, recipients may not use any "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of race, color or national origin." Further, the "selection, and referral of individuals for job openings or training opportunities and all other activities performed by or through employment service offices" must be done without regard to

race, color, or national origin.²⁴ Disparate impact claims under Title VI are analyzed using principles derived from Title VII disparate impact law.²⁵

d. The Workforce Investment Act (WIA) is the key source of federal assistance for state and local workforce development activities. The relevant WIA nondiscrimination provision states that no "individual shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with, any such program or activity" on the basis of race, color, religion, sex, national origin, age, disability, or political affiliation or belief. ²⁶ The regulations implementing this provision, administered and enforced by CRC, apply to all programs and activities that are operated by One-Stop partners as part of the One-Stop delivery system. ²⁷ Similarly, under the Wagner-Peyser Act regulations, states are required to assure nondiscrimination regarding any services or activities authorized under that Act. ²⁸

The WIA nondiscrimination regulations prohibit recipients from using "standards, procedures, criteria, or administrative methods" that have the purpose or effect of subjecting individuals to discrimination on a prohibited ground due to the recipient's administration of programs providing aid, benefits, services, training or facilities "in any manner." In addition, the Wagner-Peyser Act regulations specifically require states to "[a]ssure that discriminatory job orders will not be accepted, except where the stated requirement is a bona fide occupational qualification (BFOQ)." 30

5. Covered Entities Should Conduct Their Activities Using Safeguards to Prevent Discrimination and Promote Employment Opportunities for Formerly-Incarcerated Individuals and Other Individuals with Criminal Records.

In light of the legal obligations discussed above and the Department's interest, which it shares with the nation's public workforce system, in promoting employment opportunities for people with criminal records, the following guidance regarding specific activities engaged in by covered entities is being provided to enhance covered entities' compliance with nondiscrimination requirements. The Department cannot ensure that covered entities will ultimately avoid liability under the above-described laws by following this guidance, but the guidance represents practical steps to aid compliance with the law.

a. Posting job announcements in Job Banks.

When soliciting or obtaining, for posting on-site or on a covered entity's website or Job Bank, vacancy announcements from employers, Business Services Representatives, or other sources, policies and procedures should be in place to ensure that, for job postings that take criminal records into account, the steps described below are taken.

When an employer registers with the One-Stop (or other covered entity) to use the Job Bank, it should receive the notice that appears as notice #1 attached to this TEGL. The notice explains that the covered entity must comply with federal civil rights laws which, due to the likely disparate impact of criminal record exclusions on protected groups, generally prohibit categorical exclusions of individuals based solely on an arrest or conviction history (see attached information from EEOC guidance). The notice also provides information to employers about their obligations under the Fair Credit Reporting Act, which requires employers to obtain

- applicants' permission before asking a background screening company for a criminal history report and to provide applicants with a copy of the report and a summary of their rights before taking adverse action. Additionally, the notice describes the Work Opportunity Tax Credit and the Federal Bonding Program, two incentives that support employers' hiring of individuals with conviction histories.
- Covered entities should use a system (automated or otherwise) for identifying vacancy announcements that include hiring restrictions based on arrest and/or conviction records. This system may be the same system that entities already use to identify other discriminatory language in job postings.
- when job postings that exclude individuals based on arrest and/or conviction history have been identified, covered entities should provide employers that have posted these vacancy announcements the notice that appears as notice #2 attached to this TEGL, which states that in order to ensure that the employer and covered entity are in compliance with federal civil rights laws, the employer will be given the opportunity to remove or edit the vacancy announcement. The notice and opportunity to remove or edit should be provided to the employer whether the vacancy announcement has been posted directly with the covered entity or has instead been made available in the Job Bank through other means of aggregating job postings.
- Any vacancy announcements containing language excluding candidates based on criminal history should only remain posted when accompanied by the notice to job seekers that appears as notice #3 attached to this TEGL. This notice explains that the exclusions in the posting may have an adverse impact on protected groups, as set forth in the EEOC guidance. The notice further informs job seekers that individuals with criminal history records are not prohibited from applying for the posted position.
- Covered entities may wish to retain records of the notices sent to address vacancy announcements containing hiring restrictions based on arrest and/or conviction records.
- The Department recognizes that covered entities have a variety of systems in place to comply with nondiscrimination obligations, and that entities engage with employer customers in varying ways. Entities may elect to take other steps that are at least equally effective in achieving compliance with their nondiscrimination obligations.

b. Screening and referral based on criminal record restrictions.

When screening or referring individuals for vacancy announcements, job orders, training, or other employment-related services:

- Covered entity staff should refrain from screening and refusing to make referrals because an applicant has a criminal history record. Job seekers who are referred for positions where the job posting takes criminal history into account should receive a copy of the attached notice #3 for job seekers along with the job announcement.
- In the event that covered entity staff take into account arrest or conviction history for purposes of excluding an individual from the entity's training programs or other employment-related services, staff should follow the EEOC's arrest and conviction guidance. However, nothing in this TEGL prevents covered entity staff from taking

into account an individual's arrest or conviction history for purposes of receiving employment-related services or programs designed to aid individuals with arrest or conviction histories.

- **6.** <u>Action Requested.</u> Program operators are directed to review their existing policies and procedures and make any changes necessary to implement the guidance discussed in this TEGL.
- 7. <u>Contact Information</u>. Inquiries about incentive programs and other efforts to promote employment opportunities for people with criminal records should be addressed to the appropriate ETA regional or national office. Inquiries about civil rights issues should be addressed to CRC, by phone at 202-693-6500 (voice) or 202-693-6516 (TTY); by relay at 800-877-8339 (TTY/TDD), or (877) 709-5797 or myfedvrs.tv (video); or by e-mail at <u>CivilRightsCenter@dol.gov</u>. Complaints alleging discrimination by entities in the public workforce system may be filed with CRC by postal mail, e-mail, or fax, addressed to Director, Civil Rights Center, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-4123, Washington, DC 20210, <u>CRCExternalComplaints@dol.gov</u>, 202-693-6505 (fax). Further information about the discrimination complaint process is available on CRC's website at http://www.dol.gov/oasam/programs/crc/external-enforc-complaints.htm.

Attachments:

- Notice #1 for Employers Regarding Job Bank Nondiscrimination and Criminal Record Exclusions
- Notice #2 for Employers Regarding Job Posting Containing Criminal Record Exclusions
- Notice #3 for Job Seekers to be Attached to Job Postings with Criminal Record Exclusions
- Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (April 25, 2012), Summary and Best Practices; for full guidance see: http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.
- EEOC Reentry Myth Buster
- Federal Trade Commission Reentry Myth Buster

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¹ Many states and cities have enacted restrictions on employer consideration of arrest and conviction records. *See*, *e.g.*, Cal. Lab. Code § 432.7(a); N.Y. Correct. Law §§ 750-755; 18 Pa. Cons. Stat. § 9125; City of Boston Municipal Code 4-7. Covered entities should familiarize themselves with their state and local laws as well. The Department of Labor is aware of the following resources on state and local laws that may be helpful (though the Department cannot guarantee the accuracy of or otherwise endorse these resources): Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* (June 2008), *available at:*

http://www.sentencingproject.org/detail/publication.cfm?publication_id=115; Selection.com, State Laws and Their Impact on Use of Criminal Records for Employment Purposes, available at: www.selection.com/ pdfs/statelaw_criminalchecks.pdf; National Employment Law Project, Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair

Barriers to Employment of People with Criminal Records (Feb. 6, 2012), *available at*: nelp.3cdn.net/abddb6b65a14826f92_n5m6bz5bp.pdf.

² See Written Testimony of Amy Solomon, Senior Advisor to the Asst. Attorney General, Office of Justice Programs, U.S. Dep't of Justice (DOJ), at 1 & nn.5-7 (July 26, 2011), submitted for Equal Employment Opportunity Commission (EEOC) Meeting to Examine Arrest and Conviction Records as a Hiring Barrier, available at http://www.eeoc.gov/eeoc/meetings/7-26-11/solomon.cfm (citing DOJ Bureau of Justice Statistics data that over 92 million people have a criminal history on file in state criminal history repositories and comparing that to Census data on the number of adults in the U.S.); see also Robert Brame, Michael G. Turner, Raymond Paternoster & Shawn D. Bushway, "Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample," 129 Pediatrics 21-27 (Jan. 1, 2012), abstract available at http://pediatrics.aappublications.org/content/129/1/21.abstract.

³ Lauren E. Glaze, *Correctional Population in the United States*, 2010, NCJ 236319 (Bureau of Justice Statistics Dec. 2011), *available at* http://www.bjs.gov/content/pub/pdf/cpus10.pdf.

⁴ Paul Guerino, Paige M. Harrison & William J. Sabol, *Prisoners in 2010*, NCJ 236096 (Bureau of Justice Statistics Dec. 2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf.

⁵ Todd D. Minton, *Jail Inmates at Midyear*, 2010, NCJ 233431 (Bureau of Justice Statistics Apr. 2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jim10st.pdf.

⁶ The Pew Center on the States, *One in 100: Behind Bars in America 2008* at 6 (2008), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf.

⁷ The Pew Center on the States, *One in 31: The Long Reach of American Corrections* at 5, 7 (2009), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

⁸ U.S. Census Bureau, *USA QuickFacts* 2010, *available at* http://quickfacts.census.gov/qfd/states/00000.html.

⁹ FBI Uniform Crime Reports 2010, *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-43.

William J. Sabol, Todd D. Minton, & Paige M. Harrison, *Prison and Jail Inmates at Midyear 2006*, NCJ 217675 (Bureau of Justice Statistics June 2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim06.pdf. These racial disparities in the criminal justice system have been attributed primarily to disparate law enforcement practices and sentencing policies. *See, e.g.*, Mark Maurer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, 37 Human Rights (Fall 2010), *available at* http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2 http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2 http://www.americanbar.org/publications/human_rights_criminal_justice_system.html.

¹¹ See Federal Interagency Reentry Council, Mission Statement and Goals, available at http://www.nationalreentryresourcecenter.org/reentry-council/mission-and-goals.

Remarks of Hilda L. Solis, Secretary of Labor, Workforce Development & Employment Strategies for the Formerly-Incarcerated (June 21, 2011), *available at* https://www.dol.gov/_sec/media/speeches/20110621_EX.htm.

¹³ See 42 U.S.C. 2000e-2(a); Devah Pager, *The Mark of a Criminal Record*, 108 American Journal of Sociology 937, 957-60 (Mar. 2003), *available at* http://www.princeton.edu/~pager/pager_ajs.pdf. See generally Devah Pager & Bruce Western, *Race at Work: The Realities of Race and Criminal Record in the NYC Job Market* (NYC Commission on Human Rights 2005), *available at* http://www.nyc.gov/html/cchr/pdf/race_report_web.pdf.

Examples of such job announcements recently found posted in One-Stop Career Center Job Banks were announcements with the following criminal record exclusions: "No criminal background"; "Have no criminal history"; "CLEAN criminal background (NO felonies or misdemeanors)."

¹⁵ See 42 U.S.C. 2000e-2(k)(1)(A)(i).

¹⁶ See 42 U.S.C. 2000e, 2000e-2.

¹⁷ See 42 U.S.C. 2000e(c) (defining "employment agency" as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer"); EEOC Decision No. N-917.002, 1991 WL 11665181, at *1-2 & n.1 (Sept. 20, 1991) (EEOC policy guidance on "[w]hat constitutes an employment agency under Title VII," explaining that a government entity that "regularly refers potential employees to employers or provides employers with the names of potential employees" is subject to Title VII as long as at least one of the employers is covered under Title VII).

¹⁸ 42 U.S.C. 2000e-3(b). Under the Communications Decency Act of 1996 (CDA), 47 U.S.C. 230, providers of an "interactive computer service," which could include Internet-based Job Banks, are shielded from civil liability for posting content created by third parties. In addition, such services are not liable for taking steps to restrict the availability of third-party material that the provider considers to be objectionable. *See* 47 U.S.C. 230(c). Under this statutory safe harbor, providers such as Craigslist have not been held liable for third-party housing postings that were alleged to be discriminatory under a posting provision in the Fair Housing Act, 42 U.S.C. 3604(a), that is similar to the Title VII posting provision. *See Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008). The CDA's liability shield is only available where the service provider does not create the content; where the service provider is "responsible, in whole or in part, for the creation or development" of the content, it can no longer avail itself of the safe-harbor provision. *See* 47 U.S.C. 230(c)(1) and (f)(3); *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009). Irrespective whether covered entities may ultimately be able to invoke the CDA's safe-harbor provision in litigation,

the Department advises that they follow the guidance in this TEGL to ensure compliance with the applicable nondiscrimination provisions.

¹⁹ 42 U.S.C. 2000e-2(b).

The Department's Office of Federal Contract Compliance Programs (OFCCP) administers Executive Order 11246, which, similar to Title VII, prohibits covered federal contractors, federally-assisted construction contractors, and covered subcontractors from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. *See* Executive Order 11246, as amended. OFCCP enforces the nondiscrimination requirements of Executive Order 11246 in accordance with Title VII. OFCCP also administers and enforces the Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended (VEVRAA), which requires covered federal government contractors to post certain categories of job announcements in the state workforce agency job bank or with the local employment service delivery system (One-Stop). *See* 38 U.S.C. 4212(a)(2).

²¹ 42 U.S.C. 2000d.

²² 29 C.F.R. 31.6(a) and (b).

²³ 29 C.F.R. 31.3(b)(2).

²⁴ 29 C.F.R. 31.3(d)(1)(i).

²⁵ See New York Urban League, Inc. v. State of New York, 71 F.3d 1031, 1036 (2d Cir. 1995).

²⁶ 29 U.S.C. 2938(a)(2).

²⁷ 29 C.F.R. 37.2(a)(2).

²⁸ 20 C.F.R. 652.8(j)(1).

²⁹ 29 C.F.R. 37.6(d).

³⁰ 20 C.F.R. 652.8(j)(2).

EEOC Enforcement Guidance

Number 915.002 **Date** 4/25/2012

- 1. **SUBJECT**: Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.
- 2. **PURPOSE**: The purpose of this Enforcement Guidance is to consolidate and update the U.S. Equal Employment Opportunity Commission's guidance documents regarding the use of arrest or conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*.
- 3. **EFFECTIVE DATE**: Upon receipt.
- 4. **EXPIRATION DATE**: This Notice will remain in effect until rescinded or superseded.
- 5. **ORIGINATOR**: Office of Legal Counsel.

Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964

Table of Contents

I.	Summary			
II.	Introduction			
III.	Background		4	
	A. B. C.	Criminal History Records Employers' Use of Criminal History Information The EEOC's Interest in Employers' Use of Criminal Records in Employment Screening	4 6	
IV.	Dispa	arate Treatment Discrimination and Criminal Records	6	
V.	Disparate Impact Discrimination and Criminal Records		8	
	A. B.	 Determining Disparate Impact of Policies or Practices that Screen Individuals Based on Records of Criminal Conduct Identifying the Practice or Policy Determining Disparate Impact Job Related for the Position in Question and Consistent with Business Necessity Generally Arrests Convictions Determining Whether a Criminal Conduct Exclusion Is Job Related and Consistent with Business Necessity Validation Detailed Discussion of the <i>Green</i> Factors and Criminal Conduct Screens a. The Nature and Gravity of the Offense or Conduct b. The Time that Has Passed Since the Offense, Conduct and/or Completion of the Sentence c. The Nature of the Job Held or Sought Examples of Criminal Conduct Exclusions that Do Not Consider the <i>Green</i> Factors Targeted Exclusions that Are Guided by the <i>Green</i> Factors Individualized Assessment 	9 9 9 10 10 12 13 14 14 15 15 16 16 17 18	
	C.	Less Discriminatory Alternatives	20	

VI.	Positions Subject to Federal Prohibitions or Restrictions on Individuals with Records of Certain Criminal Conduct		
	A.	Hiring in Certain Industries	20
	B.	Obtaining Occupational Licenses	21
	C.	Waiving or Appealing Federally Imposed Occupational	
		Restrictions	21
	D.	Security Clearances	23
	E.	Working for the Federal Government	23
VII.	VII. Positions Subject to State and Local Prohibitions or Restrictions on Individual With Records of Certain Criminal Conduct		24
			25
VIII.	. Employer Best Practices		

I. Summary

- An employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended.
- The Guidance builds on longstanding court decisions and existing guidance documents that the U.S. Equal Employment Opportunity Commission (Commission or EEOC) issued over twenty years ago.
- The Guidance focuses on employment discrimination based on race and national origin. The Introduction provides information about criminal records, employer practices, and Title VII.
- The Guidance discusses the differences between arrest and conviction records.
 - The fact of an arrest does not establish that criminal conduct has occurred, and an
 exclusion based on an arrest, in itself, is not job related and consistent with
 business necessity. However, an employer may make an employment decision
 based on the conduct underlying an arrest if the conduct makes the individual
 unfit for the position in question.
 - In contrast, a conviction record will usually serve as sufficient evidence that a person engaged in particular conduct. In certain circumstances, however, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision.
- The Guidance discusses disparate treatment and disparate impact analysis under Title VII.
 - A violation may occur when an employer treats criminal history information differently for different applicants or employees, based on their race or national origin (disparate treatment liability).
 - An employer's neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity (disparate impact liability).
 - National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.

- Two circumstances in which the Commission believes employers will consistently meet the "job related and consistent with business necessity" defense are as follows:
 - The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or
 - The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)). The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.).
- Compliance with other federal laws and/or regulations that conflict with Title VII is a defense to a charge of discrimination under Title VII.
- State and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7.
- The Guidance concludes with best practices for employers.

II. Introduction

The EEOC enforces Title VII of the Civil Rights Act of 1964 (Title VII) which prohibits employment discrimination based on race, color, religion, sex, or national origin. This Enforcement Guidance is issued as part of the Commission's efforts to eliminate unlawful discrimination in employment screening, for hiring or retention, by entities covered by Title VII, including private employers as well as federal, state, and local governments. ²

In the last twenty years, there has been a significant increase in the number of Americans who have had contact³ with the criminal justice system⁴ and, concomitantly, a major increase in the number of people with criminal records in the working-age population.⁵ In 1991, only 1.8% of the adult population had served time in prison.⁶ After ten years, in 2001, the percentage rose to 2.7% (1 in 37 adults).⁷ By the end of 2007, 3.2% of all adults in the United States (1 in every 31) were under some form of correctional control involving probation, parole, prison, or jail.⁸ The Department of Justice's Bureau of Justice Statistics (DOJ/BJS) has concluded that, if incarceration rates do not decrease, approximately 6.6% of all persons born in the United States in 2001 will serve time in state or federal prison during their lifetimes.⁹

Arrest and incarceration rates are particularly high for African American and Hispanic men. African Americans and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population. Assuming that current incarceration rates remain unchanged, about 1 in 17 White men are expected to serve time in prison during their lifetime; by contrast, this rate climbs to 1 in 6 for Hispanic men; and to 1 in 3 for African American men.

The Commission, which has enforced Title VII since it became effective in 1965, has well-established guidance applying Title VII principles to employers' use of criminal records to screen for employment. This Enforcement Guidance builds on longstanding court decisions and policy documents that were issued over twenty years ago. In light of employers' increased access to criminal history information, case law analyzing Title VII requirements for criminal record exclusions, and other developments, the Commission has decided to update and consolidate in this document all of its prior policy statements about Title VII and the use of criminal records in employment decisions. Thus, this Enforcement Guidance will supersede the Commission's previous policy statements on this issue.

The Commission intends this document for use by employers considering the use of criminal records in their selection and retention processes; by individuals who suspect that they have been denied jobs or promotions, or have been discharged because of their criminal records; and by EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions.

III. Background

The contextual framework for the Title VII analysis in this Enforcement Guidance includes how criminal record information is collected and recorded, why employers use criminal records, and the EEOC's interest in such criminal record screening.

A. Criminal History Records

Criminal history information can be obtained from a wide variety of sources including, but not limited to, the following:

- <u>Court Records</u>. Courthouses maintain records relating to criminal charges and convictions, including arraignments, trials, pleas, and other dispositions.¹⁷ Searching county courthouse records typically provides the most complete criminal history. ¹⁸ Many county courthouse records must be retrieved on-site, ¹⁹ but some courthouses offer their records online. ²⁰ Information about federal crimes such as interstate drug trafficking, financial fraud, bank robbery, and crimes against the government may be found online in federal court records by searching the federal courts' Public Access to Court Electronic Records or Case Management/Electronic Case Files.²¹
- <u>Law Enforcement and Corrections Agency Records</u>. Law enforcement agencies such as state police agencies and corrections agencies may allow the public to access their records, including records of complaints, investigations, arrests, indictments, and periods of incarceration, probation, and parole. Each agency may differ with respect to how and where the records may be searched, and whether they are indexed. ²³
- <u>Registries or Watch Lists</u>. Some government entities maintain publicly available lists of individuals who have been convicted of, or are suspected of having committed, a certain type of crime. Examples of such lists include state and federal sex offender registries and lists of individuals with outstanding warrants.²⁴
- <u>State Criminal Record Repositories</u>. Most states maintain their own centralized repositories of criminal records, which include records that are submitted by most or all of their criminal justice agencies, including their county courthouses. States differ with respect to the types of records included in the repository, the completeness of the records, the frequency with which they are updated, and whether they permit the public to search the records by name, by fingerprint, or both. Some states permit employers (or third-parties acting on their behalf) to access these records, often for a fee. Others limit access to certain types of records, and still others deny access altogether.
- <u>The Interstate Identification Index (III)</u>. The Federal Bureau of Investigation (FBI) maintains the most comprehensive collection of criminal records in the nation, called the "Interstate Identification Index" (III). The III database compiles

records from each of the state repositories, as well as records from federal and international criminal justice agencies. ³³

The FBI's III database may be accessed for employment purposes by:

- the federal government;³⁴
- employers in certain industries that are regulated by the federal government, such as "the banking, nursing home, securities, nuclear energy, and private security guard industries; as well as required security screenings by federal agencies of airport workers, HAZMAT truck drivers and other transportation workers";³⁵ and
- employers in certain industries "that the state has sought to regulate, such as persons employed as civil servants, day care, school, or nursing home workers, taxi drivers, private security guards, or members of regulated professions."

Recent studies have found that a significant number of state and federal criminal record databases include incomplete criminal records.

- ➤ A 2011 study by the DOJ/BJS reported that, as of 2010, many state criminal history record repositories still had not recorded the final dispositions for a significant number of arrests.³⁷
- ➤ A 2006 study by the DOJ/BJS found that only 50% of arrest records in the FBI's III database were associated with a final disposition. ³⁸

Additionally, reports have documented that criminal records may be inaccurate.

- ➤ One report found that even if public access to criminal records has been restricted by a court order to seal and/or expunge such records, this does not guarantee that private companies also will purge the information from their systems or that the event will be erased from media archives.³⁹
- Another report found that criminal background checks may produce inaccurate results because criminal records may lack "unique" information or because of "misspellings, clerical errors or intentionally inaccurate identification information provided by search subjects who wish to avoid discovery of their prior criminal activities."⁴⁰

Employers performing background checks to screen applicants or employees may attempt to search these governmental sources themselves or conduct a simple Internet search, but they often rely on third-party background screening businesses.⁴¹ Businesses that sell criminal history information to employers are "consumer reporting agencies" (CRAs)⁴² if they provide the information in "consumer reports" under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (FCRA). Under FCRA, a CRA generally may not report records of arrests that did not result in entry of a judgment of conviction, where the arrests occurred more than seven years ago.⁴⁴

However, they may report convictions indefinitely. 45

CRAs often maintain their own proprietary databases that compile information from various sources, such as those described above, depending on the extent to which the business has purchased or otherwise obtained access to data. Such databases vary with respect to the geographic area covered, the type of information included (e.g., information about arrests, convictions, prison terms, or specialized information for a subset of employers such as information about workplace theft or shoplifting cases for retail employers information used (e.g., county databases, law enforcement agency records, sex offender registries), and the frequency with which they are updated. They also may be missing certain types of disposition information, such as updated convictions, sealing or expungement orders, or orders for entry into a diversion program.

B. Employers' Use of Criminal History Information

In one survey, a total of 92% of responding employers stated that they subjected all or some of their job candidates to criminal background checks. Employers have reported that their use of criminal history information is related to ongoing efforts to combat theft and fraud, see well as heightened concerns about workplace violence and potential liability for negligent hiring. Employers also cite federal laws as well as state and local laws as reasons for using criminal background checks.

C. The EEOC's Interest in Employers' Use of Criminal Records in Employment Screening

The EEOC enforces Title VII, which prohibits employment discrimination based on race, color, religion, sex, or national origin. Having a criminal record is not listed as a protected basis in Title VII. Therefore, whether a covered employer's reliance on a criminal record to deny employment violates Title VII depends on whether it is part of a claim of employment discrimination based on race, color, religion, sex, or national origin. Title VII liability for employment discrimination is determined using two analytic frameworks: "disparate treatment" and "disparate impact." Disparate treatment is discussed in Section IV and disparate impact is discussed in Section V.

IV. Disparate Treatment Discrimination and Criminal Records

A covered employer is liable for violating Title VII when the plaintiff demonstrates that it treated him differently because of his race, national origin, or another protected basis.⁵⁴ For example, there is Title VII disparate treatment liability where the evidence shows that a covered employer rejected an African American applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record.⁵⁵

Example 1: Disparate Treatment Based on Race. John, who is White, and Robert, who is African American, are both recent graduates of State University. They have similar educational backgrounds, skills, and work experience. They each pled guilty to charges of possessing and

distributing marijuana as high school students, and neither of them had any subsequent contact with the criminal justice system.

After college, they both apply for employment with Office Jobs, Inc., which, after short intake interviews, obtains their consent to conduct a background check. Based on the outcome of the background check, which reveals their drug convictions, an Office Jobs, Inc., representative decides not to refer Robert for a follow-up interview. The representative remarked to a co-worker that Office Jobs, Inc., cannot afford to refer "these drug dealer types" to client companies. However, the same representative refers John for an interview, asserting that John's youth at the time of the conviction and his subsequent lack of contact with the criminal justice system make the conviction unimportant. Office Jobs, Inc., has treated John and Robert differently based on race, in violation of Title VII.

Title VII prohibits "not only decisions driven by racial [or ethnic] animosity, but also decisions infected by stereotyped thinking" Thus, an employer's decision to reject a job applicant based on racial or ethnic stereotypes about criminality—rather than qualifications and suitability for the position—is unlawful disparate treatment that violates Title VII. 57

Example 2: Disparate Treatment Based on National Origin. Tad, who is White, and Nelson, who is Latino, are both recent high school graduates with grade point averages above 4.0 and college plans. While Nelson has successfully worked full-time for a landscaping company during the summers, Tad only held occasional lawn-mowing and camp-counselor jobs. In an interview for a research job with Meaningful and Paid Internships, Inc. (MPII), Tad discloses that he pled guilty to a felony at age 16 for accessing his school's computer system over the course of several months without authorization and changing his classmates' grades. Nelson, in an interview with MPII, emphasizes his successful prior work experience, from which he has good references, but also discloses that, at age 16, he pled guilty to breaking and entering into his high school as part of a class prank that caused little damage to school property. Neither Tad nor Nelson had subsequent contact with the criminal justice system.

The hiring manager at MPII invites Tad for a second interview, despite his record of criminal conduct. However, the same hiring manager sends Nelson a rejection notice, saying to a colleague that Nelson is only qualified to do manual labor and, moreover, that he has a criminal record. In light of the evidence showing that Nelson's and Tad's educational backgrounds are similar, that Nelson's work experience is more extensive, and that Tad's criminal conduct is more indicative of untrustworthiness, MPII has failed to state a legitimate, nondiscriminatory reason for rejecting Nelson. If Nelson filed a Title VII charge alleging disparate treatment based on national origin and the EEOC's investigation

confirmed these facts, the EEOC would find reasonable cause to believe that discrimination occurred.

There are several kinds of evidence that may be used to establish that race, national origin, or other protected characteristics motivated an employer's use of criminal records in a selection decision, including, but not limited to:

- <u>Biased statements</u>. Comments by the employer or decisionmaker that are derogatory with respect to the charging party's protected group, or that express group-related stereotypes about criminality, might be evidence that such biases affected the evaluation of the applicant's or employee's criminal record.
- <u>Inconsistencies in the hiring process</u>. Evidence that the employer requested criminal history information more often for individuals with certain racial or ethnic backgrounds, or gave Whites but not racial minorities the opportunity to explain their criminal history, would support a showing of disparate treatment.
- Similarly situated comparators (individuals who are similar to the charging party in relevant respects, except for membership in the protected group). Comparators may include people in similar positions, former employees, and people chosen for a position over the charging party. The fact that a charging party was treated differently than individuals who are not in the charging party's protected group by, for example, being subjected to more or different criminal background checks or to different standards for evaluating criminal history, would be evidence of disparate treatment.
- Employment testing. Matched-pair testing may reveal that candidates are being treated differently because of a protected status. ⁵⁸
- <u>Statistical evidence</u>. Statistical analysis derived from an examination of the employer's applicant data, workforce data, and/or third party criminal background history data may help to determine if the employer counts criminal history information more heavily against members of a protected group.

V. Disparate Impact Discrimination and Criminal Records

A covered employer is liable for violating Title VII when the plaintiff demonstrates that the employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity. ⁵⁹

In its 1971 *Griggs v. Duke Power Company* decision, the Supreme Court first recognized that Title VII permits disparate impact claims. The *Griggs* Court explained that "[Title VII] proscribes . . . practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited." In 1991,

Congress amended Title VII to codify this analysis of discrimination and its burdens of proof. 62 Title VII, as amended, states:

An unlawful employment practice based on disparate impact is established . . . if a complaining party demonstrates that an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. . . . ⁶³

With respect to criminal records, there is Title VII disparate impact liability where the evidence shows that a covered employer's criminal record screening policy or practice disproportionately screens out a Title VII-protected group and the employer does not demonstrate that the policy or practice is job related for the positions in question and consistent with business necessity.

A. Determining Disparate Impact of Policies or Practices that Screen Individuals Based on Records of Criminal Conduct

1. Identifying the Policy or Practice

The first step in disparate impact analysis is to identify the particular policy or practice that causes the unlawful disparate impact. For criminal conduct exclusions, relevant information includes the text of the policy or practice, associated documentation, and information about how the policy or practice was actually implemented. More specifically, such information also includes which offenses or classes of offenses were reported to the employer (e.g., all felonies, all drug offenses); whether convictions (including sealed and/or expunged convictions), arrests, charges, or other criminal incidents were reported; how far back in time the reports reached (e.g., the last five, ten, or twenty years); and the jobs for which the criminal background screening was conducted. Training or guidance documents used by the employer also are relevant, because they may specify which types of criminal history information to gather for particular jobs, how to gather the data, and how to evaluate the information after it is obtained.

2. Determining Disparate Impact

Nationally, African Americans and Hispanics are arrested in numbers disproportionate to their representation in the general population. In 2010, 28% of all arrests were of African Americans, 65 even though African Americans only comprised approximately 14% of the general population. 66 In 2008, Hispanics were arrested for federal drug charges at a rate of approximately three times their proportion of the general population. 67 Moreover, African Americans and Hispanics were more likely than Whites to be arrested, convicted, or sentenced for drug offenses even though their rate of drug use is similar to the rate of drug use for Whites. 68

African Americans and Hispanics also are incarcerated at rates disproportionate to their numbers in the general population. Based on national incarceration data, the U.S. Department of Justice estimated in 2001 that 1 out of every 17 White men (5.9% of the White men in the U.S.)

is expected to go to prison at some point during his lifetime, assuming that current incarceration rates remain unchanged.⁶⁹ This rate climbs to 1 in 6 (or 17.2%) for Hispanic men.⁷⁰ For African American men, the rate of expected incarceration rises to 1 in 3 (or 32.2%).⁷¹ Based on a state-by-state examination of incarceration rates in 2005, African Americans were incarcerated at a rate 5.6 times higher than Whites,⁷² and 7 states had a Black-to-White ratio of incarceration that was 10 to1.⁷³ In 2010, Black men had an imprisonment rate that was nearly 7 times higher than White men and almost 3 times higher than Hispanic men.⁷⁴

National data, such as that cited above, supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to further investigate such Title VII disparate impact charges. During an EEOC investigation, the employer also has an opportunity to show, with relevant evidence, that its employment policy or practice does not cause a disparate impact on the protected group(s). For example, an employer may present regional or local data showing that African American and/or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer's particular geographic area. An employer also may use its own applicant data to demonstrate that its policy or practice did not cause a disparate impact. The Commission will assess relevant evidence when making a determination of disparate impact, including applicant flow information maintained pursuant to the Uniform Guidelines on Employee Selection Procedures, workforce data, criminal history background check data, demographic availability statistics, incarceration/conviction data, and/or relevant labor market statistics.

An employer's evidence of a racially balanced workforce will not be enough to disprove disparate impact. In *Connecticut v. Teal*, the Supreme Court held that a "bottom line" racial balance in the workforce does not preclude employees from establishing a prima facie case of disparate impact; nor does it provide employers with a defense. The issue is whether the policy or practice deprives a disproportionate number of Title VII-protected individuals of employment opportunities.

Finally, in determining disparate impact, the Commission will assess the probative value of an employer's applicant data. As the Supreme Court stated in *Dothard v. Rawlinson*, an employer's "application process might itself not adequately reflect the actual potential applicant pool since otherwise qualified people might be discouraged from applying" because of an alleged discriminatory policy or practice. Therefore, the Commission will closely consider whether an employer has a reputation in the community for excluding individuals with criminal records. Relevant evidence may come from ex-offender employment programs, individual testimony, employer statements, evidence of employer recruitment practices, or publicly posted notices, among other sources. The Commission will determine the persuasiveness of such evidence on a case-by-case basis.

B. Job Related For the Position in Question and Consistent with Business Necessity

1. Generally

After the plaintiff in litigation establishes disparate impact, Title VII shifts the burdens of

production and persuasion to the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." In the legislative history of the 1991 Civil Rights Act, Congress referred to *Griggs* and its progeny such as *Albemarle Paper Company v. Moody* and *Dothard* to explain how this standard should be construed. The *Griggs* Court stated that the employer's burden was to show that the policy or practice is one that "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used" and "measures the person for the job and not the person in the abstract." In both *Albemarle* and *Dothard*, the Court emphasized the factual nature of the business necessity inquiry. The Court further stated in *Dothard* that the terms of the exclusionary policy must "be shown to be necessary to safe and efficient job performance."

In a case involving a criminal record exclusion, the Eighth Circuit in its 1975 *Green v. Missouri Pacific Railroad* decision, held that it was discriminatory under Title VII for an employer to "follow[] the policy of disqualifying for employment any applicant with a conviction for any crime other than a minor traffic offense." The Eighth Circuit identified three factors (the "*Green* factors") that were relevant to assessing whether an exclusion is job related for the position in question and consistent with business necessity:

- The nature and gravity of the offense or conduct; 90
- The time that has passed since the offense or conduct and/or completion of the sentence; ⁹¹ and
- The nature of the job held or sought. 92

In 2007, the Third Circuit in *El v. Southeastern Pennsylvania Transportation Authority* developed the statutory analysis in greater depth. Douglas El challenged SEPTA's policy of excluding everyone ever convicted of a violent crime from the job of paratransit driver. El, a 55 year-old African American paratransit driver-trainee, was terminated from employment when SEPTA learned of his conviction for second-degree murder 40 years earlier; the conviction involved a gang fight when he was 15 years old and was his only disqualifying offense under SEPTA's policy. The Third Circuit expressed "reservations" about a policy such as SEPTA's (exclusion for all violent crimes, no matter how long ago they were committed) "in the abstract."

Applying Supreme Court precedent, the El court observed that some level of risk is inevitable in all hiring, and that, "[i]n a broad sense, hiring policies . . . ultimately concern the management of risk." Recognizing that assessing such risk is at the heart of criminal record exclusions, the Third Circuit concluded that Title VII requires employers to justify criminal record exclusions by demonstrating that they "accurately distinguish between applicants [who] pose an unacceptable level of risk and those [who] do not."

The Third Circuit affirmed summary judgment for SEPTA, but stated that the outcome of the case might have been different if Mr. El had, "for example, hired an expert who testified that there is a time at which a former criminal is no longer any more likely to recidivate than the average person, . . . [so] there would be a factual question for the jury to resolve." The Third Circuit reasoned, however, that the recidivism evidence presented by SEPTA's experts, in

conjunction with the nature of the position at issue—paratransit driver-trainee with unsupervised access to vulnerable adults—required the employer to exercise the utmost care. 100

In the subsections below, the Commission discusses considerations that are relevant to assessing whether criminal record exclusion policies or practices are job related and consistent with business necessity. First, we emphasize that arrests and convictions are treated differently.

2. Arrests

The fact of an arrest does not establish that criminal conduct has occurred. Arrests are not proof of criminal conduct. Many arrests do not result in criminal charges, or the charges are dismissed. Even if an individual is charged and subsequently prosecuted, he is presumed innocent unless proven guilty. 103

An arrest, however, may in some circumstances trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action. Title VII calls for a fact-based analysis to determine if an exclusionary policy or practice is job related and consistent with business necessity. Therefore, an exclusion based on an arrest, in itself, is not job related and consistent with business necessity.

Another reason for employers not to rely on arrest records is that they may not report the final disposition of the arrest (e.g., not prosecuted, convicted, or acquitted). As documented in Section III.A., *supra*, the DOJ/BJS reported that many arrest records in the FBI's III database and state criminal record repositories are not associated with final dispositions. Arrest records also may include inaccuracies or may continue to be reported even if expunged or sealed. 105

Example 3: Arrest Record Is Not Grounds for Exclusion. Mervin and Karen, a middle-aged African American couple, are driving to church in a predominantly white town. An officer stops them and interrogates them about their destination. When Mervin becomes annoyed and comments that his offense is simply "driving while Black," the officer arrests him for disorderly conduct. The prosecutor decides not to file charges against Mervin, but the arrest remains in the police department's database and is reported in a background check when Mervin applies with his employer of fifteen years for a promotion to an executive position. The employer's practice is to deny such promotions to individuals with arrest records, even without a conviction, because it views an arrest record as an indicator of untrustworthiness and irresponsibility. If Mervin filed a Title VII charge based on these facts, and disparate impact based on race were established, the EEOC would find reasonable cause to believe that his employer violated Title VII.

Although an arrest record standing alone may not be used to deny an employment opportunity, an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes.

Example 4: Employer's Inquiry into Conduct Underlying Arrest. Andrew, a Latino man, worked as an assistant principal in Elementary School for several years. After several ten and eleven-year-old girls attending the school accused him of touching them inappropriately on the chest, Andrew was arrested and charged with several counts of endangering the welfare of children and sexual abuse. Elementary School has a policy that requires suspension or termination of any employee who the school believes engaged in conduct that impacts the health or safety of the students. After learning of the accusations, the school immediately places Andrew on unpaid administrative leave pending an investigation. In the course of its investigation, the school provides Andrew a chance to explain the events and circumstances that led to his arrest. Andrew denies the allegations, saying that he may have brushed up against the girls in the crowded hallways or lunchroom, but that he doesn't really remember the incidents and does not have regular contact with any of the girls. The school also talks with the girls, and several of them recount touching in crowded situations. The school does not find Andrew's explanation credible. Based on Andrew's conduct, the school terminates his employment pursuant to its policy.

Andrew challenges the policy as discriminatory under Title VII. He asserts that it has a disparate impact based on national origin and that his employer may not suspend or terminate him based solely on an arrest without a conviction because he is innocent until proven guilty. After confirming that an arrest policy would have a disparate impact based on national origin, the EEOC concludes that no discrimination occurred. The school's policy is linked to conduct that is relevant to the particular jobs at issue, and the exclusion is made based on descriptions of the underlying conduct, not the fact of the arrest. The Commission finds no reasonable cause to believe Title VII was violated.

3. Convictions

By contrast, a record of a conviction will usually serve as sufficient evidence that a person engaged in particular conduct, given the procedural safeguards associated with trials and guilty pleas. However, there may be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction. For example, a database may continue to report a conviction that was later expunged, or may continue to report as a felony an offense that was subsequently downgraded to a misdemeanor. ¹⁰⁷

Some states require employers to wait until late in the selection process to ask about convictions. The policy rationale is that an employer is more likely to objectively assess the relevance of an applicant's conviction if it becomes known when the employer is already knowledgeable about the applicant's qualifications and experience. As a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about

convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.

4. Determining Whether a Criminal Conduct Exclusion Is Job Related and Consistent with Business Necessity

To establish that a criminal conduct exclusion that has a disparate impact is job related and consistent with business necessity under Title VII, the employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.

Two circumstances in which the Commission believes employers will consistently meet the "job related and consistent with business necessity" defense are as follows:

- o The employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible); 111 or
- o The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three *Green* factors), and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.

The individualized assessment would consist of notice to the individual that he has been screened out because of a criminal conviction; an opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances; and consideration by the employer as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity. *See* Section V.B.9, *infra* (examples of relevant considerations in individualized assessments).

Depending on the facts and circumstances, an employer may be able to justify a targeted criminal records screen solely under the *Green* factors. Such a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question. Title VII thus does not necessarily require individualized assessment in all circumstances. However, the use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity.

5. Validation

The Uniform Guidelines describe three different approaches to validating employment screens. However, they recognize that "[t]here are circumstances in which a user cannot or

need not utilize" formal validation techniques and that in such circumstances an employer "should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact as set forth [in the following subsections]." Although there may be social science studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications, ¹¹⁴ and thereby provide a framework for validating some employment exclusions, such studies are rare at the time of this drafting.

6. Detailed Discussion of the *Green* Factors and Criminal Conduct Screens

Absent a validation study that meets the Uniform Guidelines' standards, the *Green* factors provide the starting point for analyzing how specific criminal conduct may be linked to particular positions. The three *Green* factors are:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct and/or completion of the sentence; and
- The nature of the job held or sought.

a. The Nature and Gravity of the Offense or Conduct

Careful consideration of the nature and gravity of the offense or conduct is the first step in determining whether a specific crime may be relevant to concerns about risks in a particular position. The nature of the offense or conduct may be assessed with reference to the harm caused by the crime (e.g., theft causes property loss). The legal elements of a crime also may be instructive. For example, a conviction for felony theft may involve deception, threat, or intimidation. With respect to the gravity of the crime, offenses identified as misdemeanors may be less severe than those identified as felonies.

b. The Time that Has Passed Since the Offense, Conduct and/or Completion of the Sentence

Employer policies typically specify the duration of a criminal conduct exclusion. While the *Green* court did not endorse a specific timeframe for criminal conduct exclusions, it did acknowledge that permanent exclusions from all employment based on any and all offenses were not consistent with the business necessity standard. Subsequently, in *El*, the court noted that the plaintiff might have survived summary judgment if he had presented evidence that "there is a time at which a former criminal is no longer any more likely to recidivate than the average person . . ." Thus, the court recognized that the amount of time that had passed since the plaintiff's criminal conduct occurred was probative of the risk he posed in the position in question.

Whether the duration of an exclusion will be sufficiently tailored to satisfy the business necessity standard will depend on the particular facts and circumstances of each case. Relevant and available information to make this assessment includes, for example, studies demonstrating how much the risk of recidivism declines over a specified time. 118

c. The Nature of the Job Held or Sought

Finally, it is important to identify the particular job(s) subject to the exclusion. While a factual inquiry may begin with identifying the job title, it also encompasses the nature of the job's duties (e.g., data entry, lifting boxes), identification of the job's essential functions, the circumstances under which the job is performed (e.g., the level of supervision, oversight, and interaction with co-workers or vulnerable individuals), and the environment in which the job's duties are performed (e.g., out of doors, in a warehouse, in a private home). Linking the criminal conduct to the essential functions of the position in question may assist an employer in demonstrating that its policy or practice is job related and consistent with business necessity because it "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used." ¹¹⁹

7. Examples of Criminal Conduct Exclusions that Do Not Consider the *Green* Factors

A policy or practice requiring an automatic, across-the-board exclusion from all employment opportunities because of any criminal conduct is inconsistent with the *Green* factors because it does not focus on the dangers of particular crimes and the risks in particular positions. As the court recognized in *Green*, "[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed." ¹²⁰

Example 5: Exclusion Is Not Job Related and Consistent with Business Necessity. The National Equipment Rental Company uses the Internet to accept job applications for all positions. All applicants must answer certain questions before they are permitted to submit their online application, including "have you ever been convicted of a crime?" If the applicant answers "yes," the online application process automatically terminates, and the applicant sees a screen that simply says "Thank you for your interest. We cannot continue to process your application at this time."

The Company does not have a record of the reasons why it adopted this exclusion, and it does not have information to show that convictions for all offenses render all applicants unacceptable risks in all of its jobs, which range from warehouse work, to delivery, to management positions. If a Title VII charge were filed based on these facts, and there was a disparate impact on a Title VII-protected basis, the EEOC would find reasonable cause to believe that the blanket exclusion was not job related and consistent with business necessity because the risks associated with all convictions are not pertinent to all of the Company's jobs.

Example 6: Exclusion Is Not Job Related and Consistent with Business Necessity. Leo, an African American man, has worked

successfully at PR Agency as an account executive for three years. After a change of ownership, the new owners adopt a policy under which it will not employ anyone with a conviction. The policy does not allow for any individualized assessment before exclusion. The new owners, who are highly respected in the industry, pride themselves on employing only the "best of the best" for every position. The owners assert that a quality workforce is a key driver of profitability.

Twenty years earlier, as a teenager, Leo pled guilty to a misdemeanor assault charge. During the intervening twenty years, Leo graduated from college and worked successfully in advertising and public relations without further contact with the criminal justice system. At PR Agency, all of Leo's supervisors assessed him as a talented, reliable, and trustworthy employee, and he has never posed a risk to people or property at work. However, once the new ownership of PR Agency learns about Leo's conviction record through a background check, it terminates his employment. It refuses to reconsider its decision despite Leo's positive employment history at PR Agency.

Leo files a Title VII charge alleging that PR Agency's conviction policy has a disparate impact based on race and is not job related for the position in question and consistent with business necessity. After confirming disparate impact, the EEOC considers PR Agency's defense that it employs only the "best of the best" for every position, and that this necessitates excluding everyone with a conviction. PR Agency does not show that all convictions are indicative of risk or danger in all its jobs for all time, under the *Green* factors. Nor does PR Agency provide any factual support for its assertion that having a conviction is necessarily indicative of poor work or a lack of professionalism. The EEOC concludes that there is reasonable cause to believe that the Agency's policy is not job related for the position in question and consistent with business necessity. ¹²¹

8. Targeted Exclusions that Are Guided by the *Green* Factors

An employer policy or practice of excluding individuals from particular positions for specified criminal conduct within a defined time period, as guided by the *Green* factors, is a targeted exclusion. Targeted exclusions are tailored to the rationale for their adoption, in light of the particular criminal conduct and jobs involved, taking into consideration fact-based evidence, legal requirements, and/or relevant and available studies.

As discussed above in Section V.B.4, depending on the facts and circumstances, an employer may be able to justify a targeted criminal records screen solely under the *Green* factors. Such a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question. Title VII thus does not necessarily require individualized assessment in all circumstances. However, the use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity.

9. Individualized Assessment

Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity.

The individual's showing may include information that he was not correctly identified in the criminal record, or that the record is otherwise inaccurate. Other relevant individualized evidence includes, for example:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison; ¹²²
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct:
- The length and consistency of employment history before and after the offense or conduct; 123
- Rehabilitation efforts, e.g., education/training; ¹²⁴
- Employment or character references and any other information regarding fitness for the particular position; ¹²⁵ and
- Whether the individual is bonded under a federal, state, or local bonding program. 126

If the individual does not respond to the employer's attempt to gather additional information about his background, the employer may make its employment decision without the information.

Example 7: Targeted Screen with Individualized Assessment Is Job Related and Consistent with Business Necessity. County Community Center rents meeting rooms to civic organizations and small businesses, party rooms to families and social groups, and athletic facilities to local recreational sports leagues. The County has a targeted rule prohibiting anyone with a conviction for theft crimes (e.g., burglary, robbery, larceny, identity theft) from working in a position with access to personal financial

information for at least four years after the conviction or release from incarceration. This rule was adopted by the County's Human Resources Department based on data from the County Corrections Department, national criminal data, and recent recidivism research for theft crimes. The Community Center also offers an opportunity for individuals identified for exclusion to provide information showing that the exclusion should not be applied to them.

Isaac, who is Hispanic, applies to the Community Center for a full-time position as an administrative assistant, which involves accepting credit card payments for room rentals, in addition to having unsupervised access to the personal belongings of people using the facilities. After conducting a background check, the County learns that Isaac pled guilty eighteen months earlier, at age twenty, to credit card fraud, and that he did not serve time in prison. Isaac confirms these facts, provides a reference from the restaurant where he now works on Saturday nights, and asks the County for a "second chance" to show that he is trustworthy. The County tells Isaac that it is still rejecting his employment application because his criminal conduct occurred eighteen months ago and is directly pertinent to the job in question. The information he provided did nothing to dispel the County's concerns.

Isaac challenges this rejection under Title VII, alleging that the policy has a disparate impact on Hispanics and is not job related and consistent with business necessity. After confirming disparate impact, the EEOC finds that this screen was carefully tailored to assess unacceptable risk in relevant positions, for a limited time period, consistent with the evidence, and that the policy avoided overbroad exclusions by allowing individuals an opportunity to explain special circumstances regarding their criminal conduct. Thus, even though the policy has a disparate impact on Hispanics, the EEOC does not find reasonable cause to believe that discrimination occurred because the policy is job related and consistent with business necessity. ¹²⁷

Example 8: Targeted Exclusion Without Individualized Assessment Is Not Job Related and Consistent with Business Necessity. "Shred 4 You" employs over 100 people to pick up discarded files and sensitive materials from offices, transport the materials to a secure facility, and shred and recycle them. The owner of "Shred 4 You" sells the company to a competitor, known as "We Shred." Employees of "Shred 4 You" must reapply for employment with "We Shred" and undergo a background check. "We Shred" has a targeted criminal conduct exclusion policy that prohibits the employment of anyone who has been convicted of any crime related to theft or fraud in the past five years, and the policy does not provide for any individualized consideration. The company explains that its clients entrust it with handling sensitive and confidential information

and materials; therefore, it cannot risk employing people who pose an above-average risk of stealing information.

Jamie, who is African American, worked successfully for "Shred 4 You" for five years before the company changed ownership. Jamie applies for his old job, and "We Shred" reviews Jamie's performance appraisals, which include high marks for his reliability, trustworthiness, and honesty. However, when "We Shred" does a background check, it finds that Jamie pled guilty to misdemeanor insurance fraud five years ago, because he exaggerated the costs of several home repairs after a winter storm. "We Shred" management informs Jamie that his guilty plea is evidence of criminal conduct and that his employment will be terminated. Jamie asks management to consider his reliable and honest performance in the same job at "Shred 4 You," but "We Shred" refuses to do so. The employer's conclusion that Jamie's guilty plea demonstrates that he poses an elevated risk of dishonesty is not factually based given Jamie's history of trustworthiness in the same job. After confirming disparate impact based on race (African American), the EEOC finds reasonable cause to believe that Title VII was violated because the targeted exclusion was not job related and consistent with business necessity based on these facts.

C. Less Discriminatory Alternatives

If an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory "alternative employment practice" that serves the employer's legitimate goals as effectively as the challenged practice but that the employer refused to adopt. 128

VI. Positions Subject to Federal Prohibitions or Restrictions on Individuals with Records of Certain Criminal Conduct

In some industries, employers are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations. Compliance with federal laws and/or regulations is a defense to a charge of discrimination. However, the EEOC will continue to coordinate with other federal departments and agencies with the goal of maximizing federal regulatory consistency with respect to the use of criminal history information in employment decisions. ¹²⁹

A. Hiring in Certain Industries

Federal laws and regulations govern the employment of individuals with specific convictions in certain industries or positions in both the private and public sectors. For example, federal law excludes an individual who was convicted in the previous ten years of specified crimes from working as a security screener or otherwise having unescorted access to the secure areas of an airport. There are equivalent requirements for federal law enforcement officers, 131

child care workers in federal agencies or facilities, ¹³² bank employees, ¹³³ and port workers, ¹³⁴ among other positions. ¹³⁵ Title VII does not preempt these federally imposed restrictions. However, if an employer decides to impose an exclusion that goes beyond the scope of a federally imposed restriction, the discretionary aspect of the policy would be subject to Title VII analysis.

Example 9: Exclusion Is Not Job Related and Consistent with Business Necessity. Your Bank has a rule prohibiting anyone with convictions for any type of financial or fraud-related crimes within the last twenty years from working in positions with access to customer financial information, even though the federal ban is ten years for individuals who are convicted of any criminal offense involving dishonesty, breach of trust, or money laundering from serving in such positions.

Sam, who is Latino, applies to Your Bank to work as a customer service representative. A background check reveals that Sam was convicted of a misdemeanor for misrepresenting his income on a loan application fifteen years earlier. Your Bank therefore rejects Sam, and he files a Title VII charge with the EEOC, alleging that the Bank's policy has a disparate impact based on national origin and is not job related and consistent with business necessity. Your Bank asserts that its policy does not cause a disparate impact and that, even if it does, it is job related for the position in question because customer service representatives have regular access to financial information and depositors must have "100% confidence" that their funds are safe. However, Your Bank does not offer evidence showing that there is an elevated likelihood of committing financial crimes for someone who has been crime-free for more than ten years. After establishing that the Bank's policy has a disparate impact based on national origin, the EEOC finds that the policy is not job related for the position in question and consistent with business necessity. The Bank's justification for adding ten years to the federally mandated exclusion is insufficient because it is only a generalized concern about security, without proof.

B. Obtaining Occupational Licenses

Title VII also does not preempt federal statutes and regulations that govern eligibility for occupational licenses and registrations. These restrictions cover diverse sectors of the economy including the transportation industry, the financial industry, and import/export activities, among others. These restrictions cover diverse sectors of the economy the financial industry, and import/export activities, among others.

C. Waiving or Appealing Federally Imposed Occupational Restrictions

Several federal statutes and regulations provide a mechanism for employers or individuals to appeal or apply for waivers of federally imposed occupational restrictions. For example, unless a bank receives prior written consent from the Federal Deposit Insurance

Corporation (FDIC), an individual convicted of a criminal offense involving dishonesty, breach of trust, money laundering, or another financially related crime may not work in, own, or control "an insured depository institution" (e.g., bank) for ten years under the Federal Deposit Insurance Act. To obtain such FDIC consent, the insured institution must file an application for a waiver on behalf of the particular individual. Alternatively, if the insured institution does not apply for the waiver on the individual's behalf, the individual may file a request directly with the FDIC for a waiver of the institution filing requirement, demonstrating "substantial good cause" to grant the waiver. If the FDIC grants the individual's waiver request, the individual can then file an application directly with the FDIC for consent to work for the insured institution in question. Once the institution, or the individual, submits the application, the FDIC's criminal record waiver review process requires consideration of mitigating factors that are consistent with Title VII, including evidence of rehabilitation, and the nature and circumstances of the crime.

Additionally, port workers who are denied the Transportation Workers Identification Credential (TWIC) based on their conviction record may seek a waiver for certain permanently disqualifying offenses or interim disqualifying offenses, and also may file an individualized appeal from the Transportation Security Administration's initial determination of threat assessment based on the conviction. The Maritime Transportation Security Act, which requires all port workers to undergo a criminal background check to obtain a TWIC, have provides that individuals with convictions for offenses such as espionage, treason, murder, and a federal crime of terrorism are permanently disqualified from obtaining credentials, but those with convictions for firearms violations and distribution of controlled substances may be temporarily disqualified. Most offenses related to dishonesty are only temporarily disqualifying. The transportation is deniented to dishonesty are only temporarily disqualifying.

Example 10: Consideration of Federally Imposed Occupational **Restrictions.** John Doe applies for a position as a truck driver for Truckers USA. John's duties will involve transporting cargo to, from, and around ports, and Truckers USA requires all of its port truck drivers to have a TWIC. The Transportation Security Administration (TSA) conducts a criminal background check and may deny the credential to applicants who have permanently disqualifying criminal offenses in their background as defined by federal law. After conducting the background check for John Doe, TSA discovers that he was convicted nine years earlier for conspiracy to use weapons of mass destruction. TSA denies John a security card because this is a permanently disqualifying criminal offense under federal law. 149 John, who points out that he was a minor at the time of the conviction, requests a waiver by TSA because he had limited involvement and no direct knowledge of the underlying crime at the time of the offense. John explains that he helped a friend transport some chemical materials that the friend later tried to use to damage government property. TSA refuses to grant John's waiver request because a conviction for conspiracy to use weapons of mass destruction is not subject to the TSA's waiver procedures. 150 Based on this denial, Truckers USA rejects John's application for the port truck driver position. Title VII does not override Truckers USA's policy because the policy is consistent with another federal law.

While Title VII does not mandate that an employer seek such waivers, where an employer does seek waivers it must do so in a nondiscriminatory manner.

D. Security Clearances

The existence of a criminal record may result in the denial of a federal security clearance, which is a prerequisite for a variety of positions with the federal government and federal government contractors. A federal security clearance is used to ensure employees' trustworthiness, reliability, and loyalty before providing them with access to sensitive national security information. Under Title VII's national security exception, it is not unlawful for an employer to "fail or refuse to hire and employ" an individual because "such individual has not fulfilled or has ceased to fulfill" the federal security requirements. This exception focuses on whether the position in question is, in fact, subject to national security requirements that are imposed by federal statute or Executive Order, and whether the adverse employment action actually resulted from the denial or revocation of a security clearance. Procedural requirements related to security clearances must be followed without regard to an individual's race, color, religion, sex, or national origin.

E. Working for the Federal Government

Title VII provides that, with limited coverage exceptions, "[a]ll personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." The principles discussed above in this Guidance apply in the federal employment context. In most circumstances, individuals with criminal records are not automatically barred from working for the federal government. 157 However, the federal government imposes criminal record restrictions on its workforce through "suitability" requirements for certain positions. The federal government's Office of Personnel Management (OPM) defines suitability as "determinations based on a person's character or conduct that may have an impact on the integrity or efficiency of the service." 159 Under OPM's rules, agencies may bar individuals from federal employment for up to three years if they are found unsuitable based on criminal or dishonest conduct, among other factors. 160 OPM gives federal agencies the discretion to consider relevant mitigating criteria when deciding whether an individual is suitable for a federal position. ¹⁶¹ These mitigating criteria, which are consistent with the three Green factors and also provide an individualized assessment of the applicant's background, allow consideration of: (1) the nature of the position for which the person is applying or in which the person is employed; (2) the nature and seriousness of the conduct; (3) the circumstances surrounding the conduct; (4) the recency of the conduct; (5) the age of the person involved at the time of the conduct; (6) contributing societal conditions; and (7) the absence or presence of rehabilitation or efforts toward rehabilitation. 162 In general, OPM requires federal agencies and departments to consider hiring an individual with a criminal record if he is the best candidate for the position in question and can comply with relevant job requirements. 163 The EEOC continues to coordinate with OPM to achieve employer best practices in the federal sector. 164

VII. Positions Subject to State and Local Prohibitions or Restrictions on Individuals with Records of Certain Criminal Conduct

States and local jurisdictions also have laws and/or regulations that restrict or prohibit the employment of individuals with records of certain criminal conduct. Unlike federal laws or regulations, however, state and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. Therefore, if an employer's exclusionary policy or practice is *not* job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability. 167

Example 11: State Law Exclusion Is Job Related and Consistent with Business Necessity. Elijah, who is African American, applies for a position as an office assistant at Pre-School, which is in a state that imposes criminal record restrictions on school employees. Pre-School, which employs twenty-five full- and part-time employees, uses all of its workers to help with the children. Pre-School performs a background check and learns that Elijah pled guilty to charges of indecent exposure two years ago. After being rejected for the position because of his conviction, Elijah files a Title VII disparate impact charge based on race to challenge Pre-School's policy. The EEOC conducts an investigation and finds that the policy has a disparate impact and that the exclusion is job related for the position in question and consistent with business necessity because it addresses serious safety risks of employment in a position involving regular contact with children. As a result, the EEOC would not find reasonable cause to believe that discrimination occurred.

Example 12: State Law Exclusion Is Not Consistent with Title VII. County Y enforces a law that prohibits all individuals with a criminal conviction from working for it. Chris, an African American man, was convicted of felony welfare fraud fifteen years ago, and has not had subsequent contact with the criminal justice system. Chris applies to County Y for a job as an animal control officer trainee, a position that involves learning how to respond to citizen complaints and handle animals. The County rejects Chris's application as soon as it learns that he has a felony conviction. Chris files a Title VII charge, and the EEOC investigates, finding disparate impact based on race and also that the exclusionary policy is not job related and consistent with business necessity. The County cannot justify rejecting everyone with any conviction from all jobs. Based on these facts, County Y's law "purports to require or permit the doing of an[] act which would be an unlawful employment practice" under Title VII.

VIII. Employer Best Practices

The following are examples of best practices for employers who are considering criminal record information when making employment decisions.

General

- Eliminate policies or practices that exclude people from employment based on any criminal record.
- Train managers, hiring officials, and decisionmakers about Title VII and its prohibition on employment discrimination.

Developing a Policy

- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
 - Identify essential job requirements and the actual circumstances under which the jobs are performed.
 - Determine the specific offenses that may demonstrate unfitness for performing such jobs.
 - o Identify the criminal offenses based on all available evidence.
 - Determine the duration of exclusions for criminal conduct based on all available evidence.
 - o Include an individualized assessment.
 - Record the justification for the policy and procedures.
 - Note and keep a record of consultations and research considered in crafting the policy and procedures.
- Train managers, hiring officials, and decisionmakers on how to implement the policy and procedures consistent with Title VII.

Questions about Criminal Records

• When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.

Confidentiality		
•	Keep information about applicants' and employees' criminal records confidential. it for the purpose for which it was intended.	Only use
Ap	proved by the Commission:	

Date

Chair Jacqueline A. Berrien

ENDNOTES

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http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf ("[M]ore than one in every 100 adults is now confined in an American jail or

⁴² U.S.C. § 2000e *et seq*. The EEOC also enforces other anti-discrimination laws including: Title I of the Americans with Disabilities Act of 1990, as amended (ADA), and Section 501 of the Rehabilitation Act, as amended, which prohibit employment discrimination on the basis of disability; the Age Discrimination in Employment Act of 1967, as amended (ADEA), which prohibits discrimination on the basis of age 40 or above; Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits discrimination on the basis of genetic information; and the Equal Pay Act of 1963, as amended (EPA), which requires employers to pay male and female employees at the same establishment equal wages for equal work.

All entities covered by Title VII are subject to this analysis. *See* 42 U.S.C. § 2000e-2 (anti-discrimination provisions); 42 U.S.C. § 2000e(b)–(e) (defining "employer," "employment agency," and "labor organization"); 42 U.S.C. § 2000e-16(a) (prohibiting discriminatory employment practices by federal departments and agencies). For purposes of this Guidance, the term "employer" is used in lieu of listing all Title VII-covered entities. The Commission considers other coverage questions that arise in particular charges involving, for example, joint employment or third party interference in *Compliance Manual Section 2: Threshold Issues*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, § 2-III B., *Covered Entities*, http://www.eeoc.gov/policy/docs/threshold.html#2-III-B (last visited April 23, 2012).

For the purposes of this Guidance, references to "contact" with the criminal justice system may include, for example, an arrest, charge, indictment, citation, conviction, incarceration, probation, or parole.

See Thomas P. Bonczar, Bureau of Justice Statistics, U.S. Dep't of Justice, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 3 (2003), http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf [hereinafter PREVALENCE OF IMPRISONMENT] ("Between 1974 and 2001 the number of former prisoners living in the United States more than doubled, from 1,603,000 to 4,299,000."); SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 1 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (reporting that between 1990 and 2006, there has been a 37% increase in the number of felony offenders sentenced in state courts); see also PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 4 (2009), http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-<u>09.pdf</u> [hereinafter ONE IN 31] ("During the past quarter-century, the number of prison and jail inmates has grown by 274 percent [bringing] the total population in custody to 2.3 million. During the same period, the number under community supervision grew by a staggering 3,535,660 to a total of 5.1 million."); PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 3 (2008),

prison."); Robert Brame, Michael G. Turner, Raymond Paternoster, & Shawn D. Bushway, *Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25, 26 (2012) (finding that approximately 1 out of 3 of all American youth will experience at least 1 arrest for a nontraffic offense by the age of 23).

- ⁵ See John Schmitt & Kris Warner, Ctr. For Econ. & Policy Research, Ex-Offenders and the Labor Market 12 (2010), www.cepr.net/documents/publications/ex-offenders-2010-11.pdf ("In 2008, ex-prisoners were 2.9 to 3.2 percent of the total working-age population (excluding those currently in prison or jail) or about one in 33 working-age adults. Ex-felons were a larger share of the total working-age population: 6.6 to 7.4 percent, or about one in 15 working-age adults [not all felons serve prison terms]."); see id. at 3 (concluding that "in the absence of some reform of the criminal justice system, the share of ex-offenders in the working-age population will rise substantially in coming decades").
- PREVALENCE OF IMPRISONMENT, *supra* note 4, at 4, Table 3.
- ⁷ *Id.*
- ONE IN 31, *supra* note 4, at 5 (noting that when all of the individuals who are probationers, parolees, prisoners or jail inmates are added up, the total is more than 7.3 million adults; this is more than the populations of Chicago, Philadelphia, San Diego, and Dallas combined, and larger than the populations of 38 states and the District of Columbia).
- PREVALENCE OF IMPRISONMENT, *supra* note 4, at 7.
- Id. at 5, Table 5; cf. PEW CTR. ON THE STATES, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 6 (2010), http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653 ("Simply stated, incarceration in America is concentrated among African American men. While 1 in every 87 white males ages 18 to 64 is incarcerated and the number for similarly-aged Hispanic males is 1 in 36, for black men it is 1 in 12."). Incarceration rates are even starker for 20-to-34-year-old men without a high school diploma or GED: 1 in 8 White males in this demographic group is incarcerated, compared to 1 in 14 Hispanic males, and 1 in 3 Black males. PEW CTR. ON THE STATES, supra, at 8, Figure 2.
- This document uses the terms "Black" and "African American," and the terms "Hispanic" and "Latino," interchangeably.
- See infra notes 65–67 (citing data for the arrest rates and population statistics for African Americans and Hispanics).
- PREVALENCE OF IMPRISONMENT, *supra* note 4, at 1.
- 14 *Id.* at 8.

In 2011, U.S. Attorney General Eric Holder assembled a Cabinet-level interagency Reentry Council to support the federal government's efforts to promote the successful reintegration of ex-offenders back into their communities. *National Reentry Resource Center – Federal Interagency Reentry Council*, http://www.nationalreentryresourcecenter.org/reentry-council (last visited April 23, 2012). As a part of the Council's efforts, it has focused on removing barriers to employment for ex-offenders to reduce recidivism by publishing several fact sheets on employing individuals with criminal records. *See, e.g.*, FED. INTERAGENCY REENTRY COUNCIL, REENTRY MYTHBUSTER! ON FEDERAL HIRING POLICIES (2011), http://www.nationalreentryresourcecenter.org/documents/0000/1083/Reentry Council Mythbuster_Fed_Employment.pdf; FED. INTERAGENCY REENTRY COUNCIL, REENTRY MYTHBUSTER! ON HIRING/CRIMINAL RECORDS GUIDANCE (2011),

http://www.nationalreentryresourcecenter.org/documents/0000/1082/Reentry_Council_Mythbust er_Employment.pdf; Fed. Interagency Reentry Council, Reentry Mythbuster! Criminal Histories and Employment Background Checks (2011),

http://www.nationalreentryresourcecenter.org/documents/0000/1176/Reentry_Council_Mythbust er_FCRA_Employment.pdf; Fed. Interagency Reentry Council, Reentry Mythbuster! on Federal Bonding Program (2011),

http://www.nationalreentryresourcecenter.org/documents/0000/1061/Reentry_Council_Mythbust er_Federal_Bonding.pdf.

In addition to these federal efforts, several state law enforcement agencies have embraced initiatives and programs that encourage the employment of ex-offenders. For example, Texas' Department of Criminal Justice has a Reentry and Integration Division and within that Division, a Reentry Task Force Workgroup. *See Reentry and Integration Division-Reentry Task Force*, TEX. DEP'T OF CRIMINAL JUSTICE,

http://www.tdcj.state.tx.us/divisions/rid/rid_texas_reentry_task_force.html (last visited April 23, 2012). One of the Workgroups in this Task Force specifically focuses on identifying

29

See Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 4, 1987), http://www.eeoc.gov/policy/docs/convict1.html; EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (July 29, 1987), http://www.eeoc.gov/policy/docs/convict2.html; Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Sept. 7, 1990), http://www.eeoc.gov/policy/docs/arrest_records.html; Compliance Manual Section 15: Race & Color Discrimination, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, § 15-VI.B.2 (April 19, 2006), http://www.eeoc.gov/policy/docs/race-color.pdf. See also EEOC Decision No. 72-1497 (1972) (challenging a criminal record exclusion policy based on "serious crimes"); EEOC Decision No. 74-89 (1974) (challenging a policy where a felony conviction was considered an adverse factor that would lead to disqualification); EEOC Decision No. 78-03 (1977) (challenging an exclusion policy based on felony or misdemeanor convictions involving moral turpitude or the use of drugs); EEOC Decision No. 78-35 (1978) (concluding that an employee's discharge was reasonable given his pattern of criminal behavior and the severity and recentness of his criminal conduct).

employment opportunities for ex-offenders and barriers that affect ex-offenders' access to employment or vocational training programs. *Reentry and Integration Division – Reentry Task Force Workgroups*, TEX. DEP'T OF CRIMINAL JUSTICE,

http://www.tdcj.state.tx.us/divisions/rid/r_workgroup/rid_workgroup_employment.html (last visited April 23, 2012). Similarly, Ohio's Department of Rehabilitation and Correction has an Offender Workforce Development Office that "works with departmental staff and correctional institutions within the Ohio Department of Rehabilitation and Correction to prepare offenders for employment and the job search process." *Jobs for Ohio Offenders*, Ohio DEP'T OF REHAB. AND CORR. OFFENDER WORKFORCE DEV., http://www.drc.ohio.gov/web/JOBOFFEN.HTM (last updated Aug. 9, 2010). Law enforcement agencies in other states such as Indiana and Florida have also recognized the importance of encouraging ex-offender employment. *See*, *e.g.*, *IDOC: Road to Re-Entry*, IND. DEP'T OF CORR., http://www.in.gov/idoc/reentry/index.htm (last visited April 23, 2012) (describing various services and programs that are available to ex-offenders to help them to obtain employment); FLA. DEP'T OF CORRS., RECIDIVISM REDUCTION STRATEGIC PLAN: FISCAL YEAR 2009-2014, at 11, 12 (2009),

http://www.dc.state.fl.us/orginfo/FinalRecidivismReductionPlan.pdf (identifying the lack of employment as one of the barriers to successful ex-offender reentry).

¹⁷ CARL R. ERNST & LES ROSEN, "NATIONAL" CRIMINAL HISTORY DATABASES 1 (2002), http://www.brbpub.com/articles/CriminalHistoryDB.pdf.

LEXISNEXIS, CRIMINAL BACKGROUND CHECKS: WHAT NON-PROFITS NEED TO KNOW ABOUT CRIMINAL RECORDS 4 (2009), http://www.lexisnexis.com/risk/nonprofit/documents/Volunteer Screening White Paper.pdf.

¹⁹ *Id.*

ERNST & ROSEN, *supra* note 17, at 1; NAT'L ASS'N OF PROF'L BACKGROUND SCREENERS, CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT PURPOSES 5, http://www.napbs.com/files/public/Learn_More/White_Papers/CriminalBackgroundChecks.pdf.

LEXISNEXIS, *supra* note 18, at 6. *See also* NAT'L ASS'N OF PROF'L BACKGROUND SCREENERS, *supra* note 20 at 5.

ERNST & ROSEN, *supra* note 17, at 1.

²³ *Id.*

See SEARCH, THE NATIONAL TASK FORCE ON THE CRIMINAL BACKGROUNDING OF AMERICA 3, 4 (2005), http://www.search.org/files/pdf/ReportofNTFCBA.pdf. Registries and watch lists can also include federal and international terrorist watch lists, and registries of individuals who are being investigated for certain types of crimes, such as gang-related crimes. <a href="https://doi.org/10.2016/jdb.2

See U.S. Dep't of Justice, The Attorney General's Report on Criminal History

BACKGROUND CHECKS 4 (2006), http://www.justice.gov/olp/ag_bgchecks_report.pdf [hereinafter BACKGROUND CHECKS]. See also ERNST & ROSEN, supra note 17, at 2.

- See NAT'L ASS'N OF PROF'L BACKGROUND SCREENERS, supra note 20, at 5. See also LEXISNEXIS, supra note 18, at 5.
- LEXISNEXIS, *supra* note 18, at 5. *See also* Am. ASS'N OF COLLS. OF PHARMACY, REPORT OF THE AACP CRIMINAL BACKGROUND CHECK ADVISORY PANEL 6–7 (2006), http://www.aacp.org/resources/academicpolicies/admissionsguidelines/Documents/AACPBackgroundChkRpt.pdf.
- AM. ASS'N OF COLLS. OF PHARMACY, *supra* note 27, at 6–7.
- BACKGROUND CHECKS, *supra* note 25, at 4.
- ³⁰ *Id.*
- NAT'L ASS'N OF PROF'L BACKGROUND SCREENERS, *supra* note 20, at 5.
- BACKGROUND CHECKS, *supra* note 25, at 4.
- ³³ *Id.* at 3.
- See id. ("Non-criminal justice screening using FBI criminal history records is typically done by a government agency applying suitability criteria that have been established by law or the responsible agency.").
- ³⁵ *Id.* at 5.
- 36 *Id.* at 4.
- DENNIS A. DEBACCO & OWEN M. GREENSPAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2010, at 2 (2011), https://www.ncjrs.gov/pdffiles1/bjs/grants/237253.pdf [hereinafter STATE CRIMINAL HISTORY].
- See BACKGROUND CHECKS, supra note 25, at 17.
- SEARCH, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 83 (2005), www.search.org/files/pdf/RNTFCSCJRI.pdf; see also Douglas Belkin, More Job Seekers Scramble to Erase Their Criminal Past, WALL ST. J., Nov. 11, 2009, at A1, available at http://online.wsj.com/article/SB125789494126242343.html?KEYWORDS=Douglas+Belkin ("Arrests that have been legally expunged may remain on databases that data-harvesting companies offer to prospective employers; such background companies are under no legal obligation to erase them.").

If applicants deny the existence of expunged or sealed records, as they are permitted to do in several states, they may appear dishonest if such records are reported in a criminal background check. *See generally* Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1509–10 (2003) (noting that 29 of the 40 states that allow expungement/sealing of arrest records permit the subject of the record to deny its existence if asked about it on employment applications or similar forms, and 13 of the 16 states that allow the expungement/sealing of adult conviction records permit the subject of the record to deny its existence under similar circumstances).

- See SEARCH, INTERSTATE IDENTIFICATION NAME CHECK EFFICACY: REPORT OF THE NATIONAL TASK FORCE TO THE U.S. ATTORNEY GENERAL 21–22 (1999), www.search.org/files/pdf/III_Name_Check.pdf ("A so-called 'name check' is based not only on an individual's name, but also on other personal identifiers such as sex, race, date of birth and Social Security Number. . . . [N]ame checks are known to produce inaccurate results as a consequence of identical or similar names and other identifiers."); id. at 7 (finding that in a sample of 82,601 employment applicants, 4,562 of these individuals were inaccurately indicated by a "name check" to have criminal records, which represents approximately 5.5% of the overall sample).
- BACKGROUND CHECKS, *supra* note 25, at 2.
- A "consumer reporting agency" is defined by FCRA as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information *or other information* on consumers for the purposes of furnishing consumer reports to third parties" 15 U.S.C. § 1681a(f) (emphasis added); *see also* BACKGROUND CHECKS, *supra* note 25, at 43 (stating that the records that CRAs collect include "criminal history information, such as arrest and conviction information").
- A "consumer report" is defined by FCRA as "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" 15 U.S.C. § 1681a(d)(1) (emphasis added).
- See 15 U.S.C. § 1681c(a)(2) ("[N]o consumer reporting agency may make any consumer report containing . . . records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period."). But see id. §1681c(b)(3) (stating that the reporting restrictions for arrest records do not apply to individuals who will earn "an annual salary which equals, or which may reasonably be expected to equal \$75,000 or more").
- 15 U.S.C. § 1681c(a)(5) ("[N]o consumer reporting agency may make any consumer report containing . . . [a]ny other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.").

32

- Soc'y for Human Res. Mgmt., Background Checking: Conducting Criminal Background Checks, slide 3 (Jan. 22, 2010), http://www.slideshare.net/shrm/background-check-criminal?from=share_email [hereinafter Conducting Criminal Background Checks] (73% of the responding employers reported that they conducted criminal background checks on all of their job candidates, 19% reported that they conducted criminal background checks on selected job candidates, and a mere 7% reported that they did not conduct criminal background checks on any of their candidates). The survey excluded the "not sure" responses from its analysis, which may account for the 1% gap in the total number of employer responses. *Id.*
- CONDUCTING CRIMINAL BACKGROUND CHECKS, *supra* note 49, at slide 7 (39% of the surveyed employers reported that they conducted criminal background checks "[t]o reduce/prevent theft and embezzlement, other criminal activity"); *see also* Sarah E. Needleman, *Businesses Say Theft by Their Workers is Up*, WALL St. J., Dec. 11, 2008, at B8, *available at* http://online.wsj.com/article/SB122896381748896999.html.
- CONDUCTING CRIMINAL BACKGROUND CHECKS, *supra* note 49, at slide 7 (61% of the surveyed employers reported that they conducted criminal background checks "[to] ensure a safe work environment for employees"); *see also* ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WORKPLACE VIOLENCE, 1993–2009, at 1 (2011), http://bjs.oip.usdoj.gov/content/pub/pdf/wv09.pdf (reporting that in 2009, "[n]onfatal violence in the workplace was about 15% of all nonfatal violent crime against persons age 16 or older"). *But see id.* (noting that from "2002 to 2009, the rate of nonfatal workplace violence has declined by 35%, following a 62% decline in the rate from 1993 to 2002"). Studies indicate that most workplace violence is committed by individuals with no relationship to the business or its employees. *See id.* at 6 (reporting that between 2005 and 2009, strangers committed the majority of workplace violence against individuals (53% for males and 41% for females) while violence committed by co-workers accounted for a much smaller percentage (16.3% for males and 14.3% for females)); *see also* NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTR. FOR DISEASE CONTROL & PREVENTION, WORKPLACE VIOLENCE PREVENTION STRATEGIES AND RESEARCH

BACKGROUND CHECKS, *supra* note 25, at 2.

See Adam Klein, Written Testimony of Adam Klein, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/7-26-11/klein.cfm (last visited April 23, 2012) (describing how "several data-collection agencies also market and sell a retail-theft contributory database that is used by prospective employers to screen applicants"). See also Retail Theft Database, ESTEEM, Workplace Theft Contributory Database, LexisNexis, http://www.lexisnexis.com/risk/solutions/retail-theft-contributory-database.aspx (last visited April 23, 2012) (stating that their database has "[t]heft and shoplifting cases supplied by more than 75,000 business locations across the country"). These databases may contain inaccurate and/or misleading information about applicants and/or employees. See generally Goode v. LexisNexis Risk & Info. Analytics Grp., Inc., No. 2:11-CV-2950-JD, 2012 WL 975043 (E.D. Pa. Mar. 22, 2012) (unpublished).

BACKGROUND CHECKS, *supra* note 25, at 2.

NEEDS 4, Table 1 (2006), http://www.cdc.gov/niosh/docs/2006-144/pdfs/2006-144.pdf (reporting that approximately 85% of the workplace homicides examined were perpetrated in furtherance of a crime by persons with no relationship to the business or its employees; approximately 7% were perpetrated by employees or former employees, 5% were committed by persons with a personal relationship to an employee, and 3% were perpetrated by persons with a customer-client relationship to the business).

- CONDUCTING CRIMINAL BACKGROUND CHECKS, *supra* note 49, at slide 7 (55% percent of the surveyed employers reported that they conducted criminal background checks "[t]o reduce legal liability for negligent hiring"). Employers have a common law duty to exercise reasonable care in hiring to avoid foreseeable risks of harm to employees, customers, and the public. If an employee engages in harmful misconduct on the job, and the employer has not exercised such care in selecting the employee, the employer may be subject to liability for negligent hiring. *See*, *e.g.*, Stires v. Carnival Corp., 243 F. Supp. 2d 1313, 1318 (M.D. Fla. 2002) ("[N]egligent hiring occurs when . . . the employer knew or should have known of the employee's unfitness, and the issue of liability primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background.").
- CONDUCTING CRIMINAL BACKGROUND CHECKS, *supra* note 49, at slide 4 (40% of the surveyed employers reported that they conducted criminal background checks for "[j]ob candidates for positions for which state law requires a background check (e.g., day care teachers, licensed medical practitioners, etc.)"); *see id.* at slide 7 (20% of the employers reported that they conducted criminal background checks "[t]o comply with the applicable State law requiring a background check (e.g., day care teachers, licensed medical practitioners, etc.) for a particular position"). The study did not report the exact percentage of employers that conducted criminal background checks to comply with applicable federal laws or regulations, but it did report that 25% of the employers conducted background checks for "[j]ob candidates for positions involving national defense or homeland security." *Id.* at slide 4.
- ⁵⁴ See 42 U.S.C. § 2000e-2(a).
- Disparate treatment based on the race or national origin of job applicants with the same qualifications and criminal records has been documented. For example, a 2003 study demonstrated that White applicants with the same qualifications and criminal records as Black applicants were three times more likely to be invited for interviews than the Black applicants. See Devah Pager, The Mark of a Criminal Record, 108 Am. J. Soc. 937, 958, Figure 6 (2003), www.princeton.edu/~pager/pager_ajs.pdf. Pager matched pairs of young Black and White men as "testers" for her study. The "testers" in Pager's study were college students who applied for 350 low-skilled jobs advertised in Milwaukee-area classified advertisements, to test the degree to which a criminal record affects subsequent employment opportunities. The same study showed that White job applicants with a criminal record were called back for interviews more often than equally-qualified Black applicants who did not have a criminal record. Id. at 958. See also Devah Pager et al., Sequencing Disadvantage: The Effects of Race and Criminal Background for Low Wage Job Seekers, 623 Annals Am. Acad. Pol. & Soc. Sci., 199 (2009), www.princeton.edu/~pager/annals_sequencingdisadvantage.pdf (finding that among Black and

White testers with similar backgrounds and criminal records, "the negative effect of a criminal conviction is substantially larger for blacks than whites. . . . the magnitude of the criminal record penalty suffered by black applicants (60 percent) is roughly double the size of the penalty for whites with a record (30 percent)"); see id. at 200-201 (finding that personal contact plays an important role in mediating the effects of a criminal stigma in the hiring process, and that Black applicants are less often invited to interview, thereby having fewer opportunities to counteract the stigma by establishing rapport with the hiring official); Devah Pager, Statement of Devah Pager, Professor of Sociology at Princeton University, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/11-20-08/pager.cfm (last visited April 23, 2012) (discussing the results of the Sequencing Disadvantage study); DEVAH PAGER & BRUCE WESTERN, NYC COMMISSION ON HUMAN RIGHTS, RACE AT WORK, REALITIES OF RACE AND CRIMINAL RECORD IN THE NYC JOB MARKET 6, Figure 2 (2006), http://www.nyc.gov/html/cchr/pdf/race_report_web.pdf (finding that White testers with a felony conviction were called back 13% of the time, Hispanic testers without a criminal record were called back 14% of the time, and Black testers without a criminal record were called back 10% of the time).

- Race & Color Discrimination, supra note 15, § V.A.1.
- A 2006 study demonstrated that employers who are averse to hiring people with criminal records sometimes presumed, in the absence of evidence to the contrary, that African American men applying for jobs have disqualifying criminal records. Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451 (2006), http://www.jstor.org/stable/pdfplus/10.1086/501089.pdf; *see also* HARRY HOLZER ET AL., URBAN INST., EMPLOYER DEMAND FOR EX-OFFENDERS: RECENT EVIDENCE FROM LOS ANGELES 6–7 (2003), http://www.urban.org/UploadedPDF/410779 ExOffenders.pdf (describing the results of an employer survey where over 40% of the employers indicated that they would "probably not" or "definitely not" be willing to hire an applicant with a criminal record).
- The Commission has not done matched-pair testing to investigate alleged discriminatory employment practices. However, it has issued an Enforcement Guidance that discusses situations where individuals or organizations file charges on the basis of matched-pair testing, among other practices. *See generally Enforcement Guidance: Whether "Testers" Can File Charges and Litigate Claims of Employment Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (May 22, 1996), http://www.eeoc.gov/policy/docs/testers.html.
- 42 U.S.C. § 2000e-2(k)(1)(A)(i). If an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory "alternative employment practice" that serves the employer's legitimate goals as effectively as the challenged practice but that the employer refused to adopt. *Id.* § 2000e-2(k)(1)(A)(ii).
- ⁶⁰ 401 U.S. 424, 431–32 (1971).

- The Commission presumes that employers use the information sought and obtained from its applicants and others in making an employment decision. *See* Gregory v. Litton Sys. Inc.,316 F. Supp. 401, 403 (C.D. Cal.1970). If an employer asserts that it did not factor the applicant's or employee's known criminal record into an employment decision, the EEOC will seek evidence supporting this assertion. For example, evidence that the employer has other employees from the same protected group with roughly comparable criminal records may support the conclusion that the employer did not use the applicant's or employee's criminal record to exclude him from employment.
- UNIF. CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, CRIME IN THE U.S. 2010, at Table 43a (2011), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s/2010/tables/table-43/10tbl43a.xls.
- U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 3 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf (reporting that in 2010, "14 percent of all people in the United States identified as Black, either alone, or in combination with one or more races").
- Accurate data on the number of Hispanics arrested and convicted in the United States is limited. See Nancy E. Walker et al., Nat'l Council of La Raza, Lost Opportunities: The REALITY OF LATINOS IN THE U.S. CRIMINAL JUSTICE SYSTEM 17–18 (2004), http://www.policyarchive.org/handle/10207/bitstreams/20279.pdf (explaining why "[i]t is very difficult to find any information – let alone accurate information – on the number of Latinos arrested in the United States"). The Department of Justice's Bureau of Justice Statistics' (BJS) Sourcebook of Criminal Justice Statistics and the FBI's Crime Information Services Division do not provide data for arrests by ethnicity. Id. at 17. However, the U.S. Drug Enforcement Administration (DEA) disaggregates data by Hispanic and non-Hispanic ethnicity. *Id.* at 18. According to DOJ/BJS, from October 1, 2008 to September 30, 2009, 45.5% of drug arrests made by the DEA were of Hispanics or Latinos. MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2009 – STATISTICAL TABLES, at 6, Table 1.4 (2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf. Accordingly, Hispanics were arrested for drug offenses by the DEA at a rate of three times their numbers in the general population. See U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 3 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf (reporting that in 2010, "there were 50.5 million Hispanics in the United States, composing 16 percent of the total population"). However, national statistics indicate that Hispanics have similar or lower drug usage rates compared to Whites. See, e.g., SUBSTANCE ABUSE & MENTAL HEALTH SERVS.

⁶¹ *Id.* at 431.

The Civil Rights Act of 1991, Pub. L. No. 102-166, § 105; *see also* Lewis v. City of Chicago, 130 S. Ct. 2191 (2010) (reaffirming disparate impact analysis); Ricci v. DeStefano, 557 U.S. 557 (2009) (same).

⁶³ 42 U.S.C. § 2000e-2(k)(1)(A)(i).

ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 21, Figure 2.10 (2011), http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.pdf (reporting, for example, that the usage rate for Hispanics in 2009 was 7.9% compared to 8.8% for Whites).

- See, e.g., Human Rights Watch, Decades of Disparity: Drug Arrests and Race in THE UNITED STATES 1 (2009), http://www.hrw.org/sites/default/files/reports/us0309web_1.pdf (noting that the "[t]he higher rates of black drug arrests do not reflect higher rates of black drug offending blacks and whites engage in drug offenses - possession and sales - at roughly comparable rates"); Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of HEALTH & HUMAN SERVS., RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 21 (2011), http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.pdf (reporting that in 2010, the rates of illicit drug use in the United States among persons aged 12 or older were 10.7% for African Americans, 9.1% for Whites, and 8.1% for Hispanics); HARRY LEVINE & DEBORAH SMALL, N.Y. CIVIL LIBERTIES UNION, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY, 1997–2007, at 13–16 (2008), www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf (citing U.S. Government surveys showing that Whites use marijuana at higher rates than African Americans and Hispanics; however, the marijuana arrest rate of Hispanics is nearly three times the arrest rate of Whites, and the marijuana arrest rate of African Americans is five times the arrest rate of Whites).
- PREVALENCE OF IMPRISONMENT, *supra* note 4, at 1, 8. Due to the nature of available data, the Commission is using incarceration data as a proxy for conviction data.
- ⁷⁰ *Id.*
- ⁷¹ *Id*.
- MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 10 (2007), www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Crd_stateratesofincbyrace eandethnicity.pdf.
- ⁷³ *Id*.

PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2010, at 27, Table 14 (2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf (reporting that as of December 31, 2010, Black men were imprisoned at a rate of 3,074 per 100,000 Black male residents, Hispanic men were imprisoned at a rate of 1,258 per 100,000 Hispanic male residents, and White men were imprisoned at a rate of 459 per 100,000 White male residents); *cf.* ONE IN 31, *supra* note 4, at 5 ("Black adults are four times as likely as whites and nearly 2.5 times as likely as Hispanics to be under correctional control. One in 11 black adults -- 9.2 percent -- was under correctional control [probation, parole, prison, or jail] at year end 2007.").

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<sup>77</sup> 457 U.S. 440, 442 (1982).
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The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. part 1607, provide that "[employers] should maintain and have available . . . information on [the] adverse impact of [their employment selection procedures]." 29 C.F.R. § 1607.15A. "Where [an employer] has not maintained [such records, the EEOC] may draw an inference of adverse impact of the selection process from the failure of [the employer] to maintain such data" *Id.* § 1607.4D.

See, e.g., El v. SEPTA, 418 F. Supp. 2d 659, 668–69 (E.D. Pa. 2005) (finding that the plaintiff established a prima facie case of disparate impact with evidence from the defendant's personnel records and national data sources from the U.S. Bureau of Justice Statistics and the Statistical Abstract of the U.S.), aff'd on other grounds, 479 F.3d 232 (3d Cir. 2007); Green v. Mo. Pac. R.R., 523 F.2d 1290, 1294–95 (8th Cir. 1975) (concluding that the defendant's criminal record exclusion policy had a disparate impact based on race by evaluating local population statistics and applicant data), appeal after remand, 549 F.2d 1158, 1160 (8th Cir. 1977).

⁷⁸ *Id.* at 453–54

⁷⁹ 433 U.S. 321, 330 (1977).

See, e.g., Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365 (1977) (stating that "[a] consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection").

⁴² U.S.C. § 2000e-2(k)(1)(A)(i). *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See also* 42 U.S.C. § 2000e(m) (defining the term "demonstrates" to mean "meets the burdens of production and persuasion").

⁸² 422 U.S. 405 (1975).

⁴³³ U.S. 321 (1977).

¹³⁷ CONG. REC. 15273 (1991) (statement of Sen. Danforth) ("[T]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co*, and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio.*" (citations omitted)). Section 105(b) of the Civil Rights Act of 1991 provides that only the interpretive memorandum read by Senator Danforth in the Congressional Record may be considered legislative history or relied upon in construing or applying the business necessity standard.

⁸⁵ 401 U.S. at 431, 436.

⁴²² U.S. at 430–31 (endorsing the EEOC's position that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to predict or correlate with "important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated" (quoting 29 C.F.R. § 1607.4(c))).

⁴³³ U.S. at 331–32 (concluding that using height and weight as proxies for strength did not satisfy the business necessity defense because the employer failed to establish a correlation between height and weight and the necessary strength, and also did not specify the amount of strength necessary to perform the job safely and efficiently).

⁸⁸ *Id.* at 331 n.14.

⁵²³ F.2d 1290, 1293 (8th Cir. 1975). "In response to a question on an application form, Green [a 29-year-old African American man] disclosed that he had been convicted in December 1967 for refusing military induction. He stated that he had served 21 months in prison until paroled on July 24, 1970." *Id.* at 1292–93.

Green v. Mo. Pac. R.R., 549 F.2d 1158, 1160 (8th Cir. 1977) (upholding the district court's injunction prohibiting the employer from using an applicant's conviction record as an absolute bar to employment but allowing it to consider a prior criminal record as a factor in making individual hiring decisions, as long as the defendant took these three factors into account).

⁹¹ *Id.* (referring to completion of the sentence rather than completion of parole).

⁹² *Id.*

⁹³ 479 F.3d 232 (3d Cir. 2007).

⁹⁴ *Id.* at 235.

⁹⁵ *Id.* at 235, 236.

⁹⁶ *Id.* at 235.

⁹⁷ *Id.* at 244.

⁹⁸ *Id.* at 244–45.

Id. at 247. Cf. Shawn Bushway et al., The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?, 49 CRIMINOLOGY 27, 52 (2011) [hereinafter The Predictive Value of Criminal Background Checks] ("Given the results of the current as well as previous [recidivism] studies, the 40-year period put forward in El v. SEPTA (2007) . . . seems too old of a score to be still in need of settlement.").

El, 479 F.3d at 248.

Some states have enacted laws to limit employer inquiries concerning all or some arrest records. *See* BACKGROUND CHECKS, *supra* note 25, at 48–49. At least 13 states have statutes explicitly prohibiting arrest record inquiries and/or dissemination subject to certain exceptions. *See*, *e.g.*, Alaska (ALASKA STAT. § 12.62.160(b)(8)); Arkansas (ARK. CODE ANN. § 12-12-1009(c)); California (CAL. LAB. CODE § 432.7(a)); Connecticut (CONN. GEN. STAT. § 46a-80(e)); Illinois (775 ILL. COMP. STAT. § 5/2-103(A)) (dealing with arrest records that have been ordered expunged, sealed, or impounded); Massachusetts (MASS. GEN. LAWS ch. 151B § 4(9)); Michigan (MICH COMP. LAWS § 37.2205a(1) (applying to misdemeanor arrests only)); Nebraska (NEB. REV. STAT. § 29-3523(2)) (ordering no dissemination of arrest records under certain conditions and specified time periods)); New York (N.Y. EXEC. LAW § 296(16)); North Dakota (N.D. CENT. CODE § 12-60-16.6(2)); Pennsylvania (18 PA. CONS. STAT. § 9121(b)(2)); Rhode Island (R.I. GEN. LAWS § 28-5-7(7)), and Wisconsin (WIS. STAT. §§ 111.321, 111.335a).

See United States v. Armstrong, 517 U.S. 456, 464 (1996) (discussing federal prosecutors' broad discretionary authority to determine whether to prosecute cases and whether to bring charges before a grand jury); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (explaining same for state prosecutors); see also Thomas H. Cohen & Tracey Kyckelhahn, Bureau of Justice Statistics, U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 2006, at 10, Table 11 (2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf (reporting that in the 75 largest counties in the country, nearly one-third of the felony arrests did not result in a conviction because the charges against the defendants were dismissed).

103 Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 241 (1957) ("The mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct."); United States. v. Hynes, 467 F.3d 951, 957 (6th Cir. 2006) (upholding a preliminary jury instruction that stated that a "defendant is presumed to be innocent unless proven guilty. The indictment against the Defendant is only an accusation, nothing more. It's not proof of guilt or anything else."); see Gregory v. Litton Sys. Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) ("[I]nformation concerning a prospective employee's record of arrests without convictions, is irrelevant to [an applicant's] suitability or qualification for employment."), modified on other grounds, 472 F.2d 631 (9th Cir. 1972); Dozier v. Chupka, 395 F. Supp. 836, 850 n.10 (S.D. Ohio 1975) (stating that the use of arrest records was too crude a predictor of an employee's predilection for theft where there were no procedural safeguards to prevent reliance on unwarranted arrests); City of Cairo v. Ill. Fair Empl. Prac. Comm., 8 Empl. Prac. Dec. (CCH) ¶ 9682 (Ill. App. Ct. 1974) (concluding that, where applicants sought to become police officers, they could not be absolutely barred from appointment solely because they had been arrested, as distinguished from convicted); see also EEOC Dec. 74-83, ¶ 6424 (CCH) (1983) (finding no business justification for an employer's unconditional termination of all employees with arrest records (all five employees terminated were Black), purportedly to reduce thefts in the workplace; the employer produced no evidence that these particular employees had been involved in any of the thefts, or that all people who are arrested but not convicted are prone towards crime in the future); EEOC Dec. 76-87, ¶ 6665 (CCH) (1983) (holding that an applicant who sought to become a police officer could not be rejected based on one arrest five years earlier for riding in a stolen car when he asserted that he did not know that the car was stolen and the charge was dismissed).

- See~State~Criminal~History, supra~note~37,~at~2;~see~also~Background~Checks,~supra~note~25,~at~17.
- See supra notes 39–40.
- See Clark v. Arizona, 548 U.S. 735, 766 (2006) ("The first presumption [in a criminal case] is that a defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense charged. . . ."). See also FED. R. CRIM P 11 (criminal procedure rule governing pleas). The Supreme Court has concluded that criminal defendants have a Sixth Amendment right to effective assistance of counsel during plea negotiations. See generally Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012).
- See supra text accompanying note 39.
- See e.g., HAW. REV. STAT. § 378-2.5(b). Under this provision, the employer may withdraw the offer of employment if the prospective employee has a conviction record "that bears a rational relationship to the duties and responsibilities of the position." *Id. See also* CONN. GEN. STAT. § 46a-80(b) ("[N]o employer . . . shall inquire about a prospective employee's past convictions until such prospective employee has been deemed otherwise qualified for the position."); MINN. STAT. § 364.021(a) ("[A] public employer may not inquire or consider the criminal record or criminal history of an applicant for public employment until the applicant has been selected for an interview by the employer."). State fair employment practices agencies have information about applicable state law.
- See generally NAT'L LEAGUE OF CITIES & NAT'L EMP'T LAW PROJECT, CITIES PAVE THE WAY: PROMISING REENTRY POLICIES THAT PROMOTE LOCAL HIRING OF PEOPLE WITH CRIMINAL RECORDS (2010), www.nelp.org/page/-/SCLP/2010/CitiesPavetheWay.pdf?nocdn=1 (identifying local initiatives that address ways to increase employment opportunities for individuals with criminal records, including delaying a background check until the final stages of the hiring process, leveraging development funds, and expanding bid incentive programs to promote local hiring priorities); NAT'L EMP'T LAW PROJECT, CITY AND COUNTY HIRING INITIATIVES (2010), www.nelp.org/page/-/SCLP/CityandCountyHiringInitiatives.pdf (discussing the various city and county initiatives that have removed questions regarding criminal history from the job application and have waited until after a conditional offer of employment has been made to conduct a background check and inquire about the applicant's criminal background).
- Several federal laws automatically prohibit employing individuals with certain felony convictions or, in some cases, misdemeanor convictions. *See*, *e.g.*, 5 U.S.C. § 7371(b) (requiring the mandatory removal of any federal law enforcement officer who is convicted of a felony); 46 U.S.C. § 70105(c)(1)(A) (mandating that individuals who have been convicted of espionage, sedition, treason or terrorism be permanently disqualified from receiving a biometric transportation security card and thereby excluded from port work employment); 42 U.S.C.

§ 13726(b)(1) (disqualifying persons with felony convictions or domestic violence convictions from working for a private prisoner transport company); 25 U.S.C. § 3207(b) (prohibiting individuals with a felony conviction, or any of two or more misdemeanor convictions, from working with Indian children if their convictions involved crimes of violence, sexual assault, molestation, exploitation, contact or prostitution, crimes against persons, or offenses committed against children); 18 U.S.C. § 922(g)(1), (9) (prohibiting an individual convicted of a felony or a misdemeanor for domestic violence from possessing a firearm, thereby excluding such individual from a wide range of jobs that require such possession); 18 U.S.C. § 2381 (prohibiting individuals convicted of treason from "holding any office under the United States"). Other federal laws prohibit employing individuals with certain convictions for a defined time period. See, e.g., 5 U.S.C. § 7313(a) (prohibiting individuals convicted of a felony for inciting a riot or civil disorder from holding any position in the federal government for five years after the date of the conviction); 12 U.S.C. § 1829 (requiring a ten-year ban on employing individuals in banks if they have certain financial-related convictions); 49 U.S.C. § 44936(b)(1)(B) (imposing a ten-year ban on employing an individual as a security screener for an air carrier if that individuals has been convicted of specified crimes).

- See 29 C.F.R. § 1607.5 (describing the general standards for validity studies).
- ¹¹² *Id.*
- 113 *Id.* § 1607.6B. The following subsections state:
 - (1) Where informal or unscored procedures are used. When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.
 - (2) Where formal and scored procedures are used. When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accord with Federal law.

Id. § 1607.6A, B(1)–(2).

See, e.g., Brent W. Roberts et al., Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study, 92 J. APPLIED PSYCHOL. 1427, 1430 (2007), http://internal.psychology.illinois.edu/~broberts/Roberts,%20Harms,%20Caspi,%20&%20Moffitt,%202007.pdf (finding that in a study of New Zealand residents from birth to age 26, "[a]dolescent criminal convictions were unrelated to committing counterproductive activities at work [such as tardiness, absenteeism, disciplinary problems, etc.]. In fact, according to the

[results of the study], people with an adolescent criminal conviction record were less likely to get in a fight with their supervisor or steal things from work.").

- ¹¹⁵ See Ohio Rev. Code Ann. § 2913.02.
- 523 F.2d at 1298 (stating that "[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed").
- ¹¹⁷ 479 F.3d at 247.
- 118 See, e.g., Keith Soothill & Brian Francis, When do Ex-Offenders Become Like Non-Offenders?, 48 HOWARD J. OF CRIM. JUST., 373, 380–81 (2009) (examining conviction data from Britain and Wales, a 2009 study found that the risk of recidivism declined for the groups with prior records and eventually converged within 10 to 15 years with the risk of those of the nonoffending comparison groups); Alfred Blumstein & Kiminori Nakamura, Redemption in the Presence of Widespread Criminal Background Checks, 47 CRIMINOLOGY 327 (2009) (concluding that there may be a "point of redemption" (i.e., a point in time where an individual's risk of re-offending or re-arrest is reasonably comparable to individuals with no prior criminal record) for individuals arrested for certain offenses if they remain crime free for a certain number of years); Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement, 53 CRIME & DELINQUENCY 64 (2007) (analyzing juvenile police contacts and Racine, Wisconsin police contacts for an aggregate of crimes for 670 males born in 1942 and concluding that, after seven years, the risk of a new offense approximates that of a person without a criminal record); Megan C. Kurlychek et al., Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?, 5 CRIMINOLOGY & PUB. Pol'Y 483 (2006) (evaluating juvenile police contacts and arrest dates from Philadelphia police records for an aggregate of crimes for individuals born in 1958, a 2006 study concluded that the risk of recidivism decreases over time and that, six or seven years after an arrest, an individual's risk of re-arrest approximates that of an individual who has never been arrested).
- Griggs, 401 U.S. at 431.
- 523 F.2d at 1298; *see also* Field v. Orkin Extermination Co., No. Civ. A. 00-5913, 2002 WL 32345739, at *1 (E.D. Pa. Feb. 21, 2002) (unpublished) ("[A] blanket policy of denying employment to any person having a criminal conviction is a [*per se*] violation of Title VII."). The only exception would be if such an exclusion were required by federal law or regulation. *See, e.g., supra* note 110.
- Cf. Field, 2002 WL 32345739, at *1. In Field, an employee of ten years was fired after a new company that acquired her former employer discovered her 6-year-old felony conviction. The new company had a blanket policy of firing anyone with a felony conviction less than 10 years old. The court granted summary judgment for the employee because the employer's argument that her conviction was related to her job qualifications was "weak at best," especially

given her positive employment history with her former employer. *Id.*

Recidivism rates tend to decline as ex-offenders' ages increase. A 2011 study found that an individual's age at conviction is a variable that has a "substantial and significant impact on recidivism." *The Predictive Value of Criminal Background Checks, supra* note 99, at 43. For example, the 26-year-olds in the study, with no prior criminal convictions, had a 19.6% chance of reoffending in their first year after their first conviction, compared to the 36-year-olds who had an 8.8% chance of reoffending during the same time period, and the 46-year-olds who had a 5.3% of reoffending. *Id.* at 46. *See also* PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994, at 7 (2002), http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf (finding that, although 55.7% of ex-offenders aged 14–17 released in 1994 were reconvicted within three years, the percentage declined to 29.7% for ex-offenders aged 45 and older who were released the same year).

Consideration of an applicant's age at the time the offense occurred or at his release from prison would benefit older individuals and, therefore, would not violate the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq. See Age Discrimination in Employment Act, 29 C.F.R. § 1625.2 ("Favoring an older individual over a younger individual because of age is not unlawful discrimination under the ADEA, even if the younger individual is at least 40 years old."); see also Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (concluding that the ADEA does not preclude an employer from favoring an older employee over a younger one within the protected age group).

Employment Law Project's Second Chance Labor Project, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/11-20-08/moskowitz.cfm (last visited April 23, 2012) (stating that one of the factors that is relevant to the assessment of an ex-offender's risk to a workplace and to the business necessity analysis, is the "length and consistency of the person's work history, including whether the person has been recently employed"; also noting that various studies have "shown a strong relationship between employment and decreases in crime and recidivism"). But see Stephen J. Tripodi et al., Is Employment Associated With Reduced Recidivism?: The Complex Relationship Between Employment and Crime, 54 INT'L J. OF OFFENDER THERAPY AND COMP. CRIMINOLOGY 716, 716 (2010) (finding that "[b]ecoming employed after incarceration, although apparently providing initial motivation to desist from crime, does not seem to be on its own sufficient to prevent recidivism for many parolees").

See Wendy Erisman & Jeanne Bayer Contardo, Inst. for Higher Educ. Policy, Learning to Reduce Recidivism: A 50 State Analysis of Postsecondary Correctional Education 5 (2005), http://www.ihep.org/assets/files/publications/g-l/LearningReduceRecidivism.pdf (finding that increasing higher education for prisoners enhances their prospects for employment and serves as a cost-effective approach to reducing recidivism); see also John H. Laud & Robert J. Sampson, Understanding Desistance from Crime, 28 CRIME & JUST. 1, 17–24 (2001), http://www.ncjrs.gov/pdffiles1/Digitization/192542-192549NCJRS.pdf (stating that factors associated with personal rehabilitation and social

stability, such as stable employment, family and community involvement, and recovery from substance abuse, are correlated with a decreased risk of recidivism).

- Some employers have expressed a greater willingness to hire ex-offenders who have had an ongoing relationship with third party intermediary agencies that provide supportive services such as drug testing, referrals for social services, transportation, child care, clothing, and food. *See* Amy L. Solomon et al., *From Prison to Work: The Employment Dimensions of Prisoner Reentry*, 2004 URBAN INST. 20, http://www.urban.org/UploadedPDF/411097 From Prison to Work.pdf. These types of services can help ex-offenders avoid problems that may interfere with their ability to obtain and maintain employment. *Id.*; *see generally* Victoria Kane, *Transcript of 7-26-11 Meeting*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#kane (last visited April 23, 2012) (describing why employers should partner with organizations that provide supportive services to ex-offenders).
- See generally REENTRY MYTHBUSTER! ON FEDERAL BONDING PROGRAM, supra note 16; Work Opportunity Tax Credit (WOTC), EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, http://www.doleta.gov/business/incentives/opptax/ (last visited April 3, 2012); Directory of State Bonding Coordinators, EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, http://www.doleta.gov/usworkforce/onestop/FBPContact.cfm (last visited April 3, 2012); Federal Bonding Program Background, U.S. DEP'T OF LABOR, http://www.bonds4jobs.com/program-background.html (last visited April 3, 2012); Bureau of Prisons: UNICOR's Federal Bonding Program, http://www.bop.gov/inmate_programs/itb_bonding.jsp (last visited April 3, 2012).
- This example is loosely based on a study conducted by Alfred Blumstein and Kiminori Nakamura measuring the risk of recidivism for individuals who have committed burglary, robbery, or aggravated assault. *See* Blumstein & Nakamura, *supra* note 118.
- 128 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C). See also Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988).
- ¹²⁹ See Exec. Order No. 12,067, 3 C.F.R. 206 (1978 Comp.).
- See 49 U.S.C. §§ 44935(e)(2)(B), 44936(a)(1), (b)(1). The statute mandates a criminal background check.
- See 5 U.S.C. § 7371(b) (requiring mandatory removal from employment of law enforcement officers convicted of felonies).
- See 42 U.S.C. § 13041(c) ("Any conviction for a sex crime, an offense involving a child victim, or a drug felony may be grounds for denying employment or for dismissal of an employee. . . .").
- 133 12 U.S.C. § 1829.

¹³⁴ 46 U.S.C. § 70105(c).

- Other jobs and programs subject to federally-imposed restrictions based on criminal convictions include the business of insurance (18 U.S.C. § 1033(e)), employee benefits employee (29 U.S.C. § 1111(a)), participation in Medicare and state health care programs (42 U.S.C. § 1320a-7(a)–(b)), defense contractor (10 U.S.C. § 2408(a)), prisoner transportation (42 U.S.C. § 13726b(b)(1)), and court-imposed occupational restrictions (18 U.S.C. §§ 3563(b)(5), 3583(d)). This list is not meant to be exhaustive.
- See, e.g., federal statutes governing commercial motor vehicle operator's licenses (49 U.S.C. § 31310(b)-(h)), locomotive operator licenses (49 U.S.C. § 20135(b)(4)(B)), and certificates, ratings, and authorizations for pilots, flight instructors, and ground instructors (49 U.S.C. §§ 44709(b)(2), 44710(b), 4711(c); 14 C.F.R. § 61.15).
- See, e.g., federal statutes governing loan originator licensing/registration (12 U.S.C. § 5104(b)(2)), registration of brokers and dealers (15 U.S.C. § 780(b)(4)(B)), registration of commodity dealers (7 U.S.C. § 12a(2)(D), (3)(D), (E), (H)), and registration of investment advisers (15 U.S.C. § 80b-3(e)(2)-(3), (f)).
- See, e.g., custom broker's licenses (19 U.S.C. § 1641(d)(1)(B)), export licenses (50 U.S.C. App. § 2410(h)), and arms export (22 U.S.C. § 2778(g)).
- See, e.g., grain inspector's licenses (7 U.S.C. § 85), merchant mariner's documents, licenses, or certificates of registry (46 U.S.C. § 7503(b)), licenses to import, manufacture, or deal in explosives or permits to use explosives (18 U.S.C. § 843(d)), and farm labor contractor's certificates of registration (29 U.S.C. § 1813(a)(5)). This list of federally-imposed restrictions on occupational licenses and registrations for individuals with certain criminal convictions is not meant to be exhaustive. For additional information, please consult the relevant federal agency or department.
- See 12 U.S.C. § 1829(a)(1). The statute imposes a ten-year ban for individuals who have been convicted of certain financial crimes such as corruption involving the receipt of commissions or gifts for procuring loans (18 U.S.C. § 215), embezzlement or theft by an officer/employee of a lending, credit, or insurance institution (18 U.S.C. § 657), false or fraudulent statements by an officer/employee of the federal reserve or a depository institution (18 U.S.C. § 1005), or fraud by wire, radio, or television that affects a financial institution (18 U.S.C. § 1343), among other crimes. See 12 U.S.C. § 1829(a)(2)(A)(i)(I), (II). Individuals who have either been convicted of the crimes listed in § 1829(a)(2)(A), or conspiracy to commit those crimes, will not receive an exception to the application of the 10-year ban from the FDIC. 12 U.S.C. § 1829(a)(2)(A).
- See FED. DEPOSIT INS. CORP., FDIC STATEMENT OF POLICY FOR SECTION 19 OF THE FDI ACT, § C, "PROCEDURES" (amended May 13, 2011), http://www.fdic.gov/regulations/laws/rules/5000-1300.html [hereinafter FDIC POLICY]; see also

Statement of Policy, 63 Fed. Reg. 66,177, 66,184 (Dec. 1, 1998); Clarification of Statement of Policy, 76 Fed. Reg. 28,031 (May 13, 2011) (clarifying the FDIC's Statement of Policy for Section 19 of the FDI Act).

"Approval is automatically granted and an application [for a waiver] will not be required where [an individual who has been convicted of] the covered offense [criminal offenses involving dishonesty, breach of trust, or money laundering] . . . meets all of the ["de minimis"] criteria" set forth in the FDIC's Statement of Policy. FDIC POLICY, supra, § B (5). These criteria include the following: (1) there is only one conviction or program of record for a covered offense; (2) the offense was punishable by imprisonment for a term of one year or less and/or a fine of \$1,000 or less, and the individual did not serve time in jail; (3) the conviction or program was entered at least five years prior to the date an application would otherwise be required; and (4) the offense did not involve an insured depository institution or insured credit union. Id. Additionally, an individual's conviction for writing a "bad" check will be considered a de minimis offense, even if it involved an insured depository institution or insured credit union, if: (1) all other requirements of the de minimis offense provisions are met; (2) the aggregate total face value of the bad or insufficient funds check(s) cited in the conviction was \$1000 or less; and (3) no insured depository institution or insured credit union was a payee on any of the bad or insufficient funds checks that were the basis of the conviction. Id.

Id. But cf. Nat'l H.I.R.E. Network, People with Criminal Records Working in Financial Institutions: The Rules on FDIC Waivers, http://www.hirenetwork.org/FDIC.html ("Institutions rarely seek a waiver, except for higher level positions when the candidate is someone the institution wants to hire. Individuals can only seek FDIC approval themselves if they ask the FDIC to waive the usual requirement. Most individuals probably are unaware that they have this right."); FED. DEPOSIT INSUR. CORP. 2010 ANNUAL REPORT, § VI.A: KEY STATISTICS, FDIC ACTIONS ON FINANCIAL INSTITUTION APPLICATIONS 2008–2010 (2011), http://www.fdic.gov/about/strategic/report/2010annualreport/chpt6-01.html (reporting that between 2008 and 2010, the FDIC approved a total of 38 requests for consent to employ

http://www.fdic.gov/about/strategic/report/2010annualreport/chpt6-01.html (reporting that between 2008 and 2010, the FDIC approved a total of 38 requests for consent to employ individuals with covered offenses in their background; the agency did not deny any requests during this time period).

FDIC POLICY, *supra* note 141, § D, "EVALUATION OF SECTION 19 APPLICATIONS" (listing the factors that are considered in this waiver review process, which include: (1) the nature and circumstances underlying the offense; (2) "[e]vidence of rehabilitation including the person's reputation since the conviction . . . the person's age at the time of conviction . . . and the time which has elapsed since the conviction"; (3) the position to be held in the insured institution; (4) the amount of influence/control the individual will be able to exercise over management affairs; (5) management's ability to control and supervise the individual's activities; (6) the degree of ownership the individual will have in the insured institution; (7) whether the institution's fidelity bond coverage applies to the individual; (8) the opinion of the applicable federal and/or state regulators; and (9) any other relevant factors).

See FDIC POLICY, supra note 141, § C, "PROCEDURES."

See 49 C.F.R. §§ 1515.7 (describing the procedures for waiver of criminal offenses, among other standards), 1515.5 (explaining how to appeal the Initial Determination of Threat Assessment based on a criminal conviction). In practice, some worker advocacy groups have criticized the TWIC appeal process due to prolonged delays, which leaves many workers jobless; especially workers of color. See generally MAURICE EMSELLEM ET AL., NAT'L EMP'T LAW PROJECT, A SCORECARD ON THE POST-911 PORT WORKER BACKGROUND CHECKS: MODEL WORKER PROTECTIONS PROVIDE A LIFELINE FOR PEOPLE OF COLOR, WHILE MAJOR TSA DELAYS LEAVE THOUSANDS JOBLESS DURING THE RECESSION (2009), http://nelp.3cdn.net/2d5508b4cec6e13da6 upm6b20e5.pdf.

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6201, 124 Stat. 721 (2010) (the Act) includes a process to appeal or dispute the accuracy of information obtained from criminal records. The Act requires participating states to perform background checks on applicants and current employees who have direct access to patients in long-term care facilities, such as nursing homes, to determine if they have been convicted of an offense or have other disqualifying information in their background, such as a finding of patient or resident abuse, that would disqualify them from employment under the Social Security Act or as specified by state law. See 42 U.S.C. § 1320a-7l(a)(3)(A), (a)(4)(B), (6)(A)–(E). The background check involves an individualized assessment of the relevance of a conviction or other disqualifying information. The Act protects applicants and employees in several ways, for example, by: (1) providing a 60-day provisional period of employment for the prospective employee, pending the completion of the criminal records check; (2) providing an independent process to appeal or dispute the accuracy of the information obtained in the criminal records check; and (3) allowing the employee to remain employed (subject to direct on-site supervision) during the appeals process. 42 U.S.C. § 1320a-7l(a)(4)(B)(iii), (iv).

See 46 U.S.C. § 70105(d); see generally TWIC Program, 49 C.F.R. § 1572.103 (listing the disqualifying offenses for maritime and land transportation security credentials, such as convictions and findings of not guilty by reason of insanity for espionage, murder, or unlawful possession of an explosive; also listing temporarily disqualifying offenses, within seven years of conviction or five years of release from incarceration, including dishonesty, fraud, or misrepresentation (expressly excluding welfare fraud and passing bad checks), firearms violations, and distribution, intent to distribute, or importation of controlled substances).

¹⁴⁷ 46 U.S.C. § 70105(c)(1)(A)–(B).

¹⁴⁸ 46 U.S.C. § 70105(c)(1)(B)(iii).

See 46 U.S.C. § 70105(c)(1)(A)(iv) (listing "Federal crime of terrorism" as a permanent disqualifying offense); see also 18 U.S.C. § 2332b(g)(5)(B) (defining "Federal crime of terrorism" to include the use of weapons of mass destruction under § 2332a).

See 49 C.F.R. § 1515.7(a)(i) (explaining that only certain applicants with disqualifying crimes in their backgrounds may apply for a waiver; these applicants do not include individuals

who have been convicted of a Federal crime of terrorism as defined by 18 U.S.C. § 2332b(g)).

These positions are defined as "national security positions" and include positions that "involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States" or "require regular use of, or access to, classified information." 5 C.F.R. § 732.102(a)(1)–(2). The requirements for "national security positions" apply to competitive service positions, Senior Executive Service positions filled by career appointment within the Executive Branch, and excepted service positions within the Executive Branch. *Id.* § 732.102(b). The head of each Federal agency can designate any position within that department or agency as a "sensitive position" if the position "could bring about, by virtue of the nature of the position, a material adverse effect on the national security." *Id.* § 732.201(a). Designation of a position as a "sensitive position" will fall under one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive. *Id.*

See Exec. Order No. 12,968, § 3.1(b), 3 C.F.R. 391 (1995 Comp.):

[E]ligibility for access to classified information shall be granted only to employees who are United States citizens for whom an appropriate investigation has been completed and whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honestly, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information. A determination of eligibility for access to such information is a discretionary security decision based on judgments by appropriately trained adjudicative personnel. Eligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.

⁴² U.S.C. § 2000e-2(g); *see*, *e.g.*, Bennett v. Chertoff, 425 F.3d 999, 1001 (D.C. Cir. 2005) ("[E]mployment actions based on denial of a security clearance are not subject to judicial review, including under Title VII."); Ryan v. Reno, 168 F.3d 520, 524 (D.C. Cir. 1999) ("[A]n adverse employment action based on denial or revocation of a security clearance is not actionable under Title VII.").

See Policy Guidance on the use of the national security exception contained in § 703(g) of Title VII of the Civil Rights Act of 1964, as amended, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, § II, Legislative History (May 1, 1989), http://www.eeoc.gov/policy/docs/national_security_exemption.html ("[N]ational security requirements must be applied equally without regard to race, sex, color, religion or national origin."); see also Jones v. Ashcroft, 321 F. Supp. 2d 1, 8 (D.D.C. 2004) (indicating that the

national security exception did not apply because there was no evidence that the government considered national security as a basis for its decision not to hire the plaintiff at any time before the commencement of the plaintiff's lawsuit, where the plaintiff had not been forthright about an arrest).

- Federal contractor employees may challenge the denial of a security clearance with the EEOC or the Office of Contract Compliance Programs when the denial is based on race, color, religion, sex, or national origin. *See generally* Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965 Comp.).
- 42 U.S.C. § 2000e-16(a).
- Robert H. Shriver, III, Written Testimony of Robert H. Shriver, III, Senior Policy Counsel for the U.S. Office of Personnel Management, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/7-26-11/shriver.cfm (last visited April 23, 2012) (stating that "with just a few exceptions, criminal convictions do not automatically disqualify an applicant from employment in the competitive civil service"); see also REENTRY MYTHBUSTER! ON FEDERAL HIRING POLICIES, supra note 16 ("The Federal Government employs people with criminal records with the requisite knowledge, skills and abilities."). But see supra note 110, listing several federal statutes that prohibit individuals with certain convictions from working as federal law enforcement officers or port workers, or with private prisoner transport companies.
- OPM has jurisdiction to establish the federal government's suitability policy for competitive service positions, certain excepted service positions, and career appointments in the Senior Executive Service. *See* 5 C.F.R. §§ 731.101(a) (stating that OPM has been directed "to examine 'suitability' for competitive Federal employment"), 731.101(b) (defining the covered positions within OPM's jurisdiction); *see also* Shriver, *supra* note 157.

OPM is also responsible for establishing standards that help agencies decide whether to grant their employees and contractor personnel long-term access to federal facilities and information systems. *See* Homeland Security Presidential Directive 12: Policy for a Common Identification Standard for Federal Employees and Contractors, 2 PUB. PAPERS 1765 (Aug. 27, 2004) ("establishing a mandatory, Government-wide standard for secure and reliable forms of identification issued by the Federal Government to its employees and contractors [including contractor employees]"); *see also* Exec. Order No. 13,467, § 2.3(b), 3 C.F.R. 196 (2009 Comp.) ("[T]he Director of [OPM] . . . [is] responsible for developing and implementing uniform and consistent policies and procedures to ensure the effective, efficient, and timely completion of investigations and adjudications relating to determinations of suitability and eligibility for logical and physical access."); *see generally* Shriver, *supra* note 157.

¹⁵⁹ 5 C.F.R. § 731.101(a).

See 5 C.F.R. §§ 731.205(a) (stating that if an agency finds applicants unsuitable based on the factors listed in 5 C.F.R. § 731.202, it may, in its discretion, bar those applicants from federal employment for three years), § 731.202(b) (disqualifying factors from federal civilian

employment may include: misconduct or negligence in employment; material, intentional false statement, or deception or fraud in examination or appointment; refusal to furnish testimony as required by 5 C.F.R. § 5.4; alcohol abuse without evidence of substantial rehabilitation; illegal use of narcotics, drugs, or other controlled substances; and knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force).

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<sup>161</sup> See id. § 731.202(c).
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- See generally EEOC Informal Discussion Letter (March 19, 2007), http://www.eeoc.gov/eeoc/foia/letters/2007/arrest_and_conviction_records.html#N1 (discussing the EEOC's concerns with changes to OPM's suitability regulations at 5 CFR part 731).
- See Stephen Saltzburg, Transcript of 7-26-11 Meeting, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#saltzburg (last visited April 23, 2012) (discussing the findings from the American Bar Association's (ABA) Collateral Consequences of Conviction Project, which found that in 17 states that it has examined to date, 84% of the collateral sanctions against ex-offenders relate to employment). For more information about the ABA's project, visit: Janet Levine, ABA Criminal Justice Section Collateral Consequences Project, INST. FOR SURVEY RESEARCH, TEMPLE UNIV., http://isrweb.isr.temple.edu/projects/accproject/ (last visited April 20, 2012). In April 2011, Attorney General Holder sent a letter to every state Attorney General, with a copy to every Governor, asking them to "evaluate the collateral consequences" of criminal convictions in their state, such as employment-related restrictions on ex-offenders, and "to determine whether those [consequences] that impose burdens on individuals . . . without increasing public safety should be eliminated." Letter from Eric H. Holder, Jr., Att'y Gen., Dep't of Justice, to state Attorney Generals and Governors (April 18, 2011),

http://www.nationalreentryresourcecenter.org/documents/0000/1088/Reentry_Council_AG_Lett er.pdf.

Most states regulate occupations that involve responsibility for vulnerable citizens such as the elderly and children. *See* STATE CRIMINAL HISTORY, *supra* note 37, at 10 ("Fifty states and the District of Columbia reported that criminal history background checks are legally required" for several occupations such as nurses/elder caregivers, daycare providers, caregivers in residential facilities, school teachers, and nonteaching school employees). For example, Hawaii's Department of Human Services may deny applicants licensing privileges to operate a childcare facility if: (1) the applicant or any prospective employee has been convicted of a crime other than a minor traffic violation or has been confirmed to have abused or neglected a child or threatened harm; and (2) the department finds that the criminal history or child abuse record of

¹⁶² *Id.*

See generally Shriver, supra note 157. See also REENTRY MYTHBUSTER! ON FEDERAL HIRING POLICIES, supra note 16 ("Consistent with Merit System Principles, [federal] agencies [and departments] are required to consider people with criminal records when filling positions if they are the best candidates and can comply with requirements.").

the applicant or prospective employee may pose a risk to the health, safety, or well-being of children. *See* HAW. REV. STAT. § 346-154(e)(1)–(2).

⁴² U.S.C. § 2000e-7.

See Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 210 (1991) (noting that "[i]f state tort law furthers discrimination in the workplace and prevents employers from hiring women who are capable of manufacturing the product as efficiently as men, then it will impede the accomplishment of Congress' goals in enacting Title VII"); Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 380 (2d Cir. 2006) (affirming the district court's conclusion that "the mandates of state law are no defense to Title VII liability").

THE FAIR CREDIT REPORTING ACT

As a public service, the staff of the Federal Trade Commission (FTC) has prepared the following complete text of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 et seq. Although staff generally followed the format of the U.S. Code as published by the Government Printing Office, the format of this text does differ in minor ways from the Code (and from West's U.S. Code Annotated). For example, this version uses FCRA section numbers (§§ 601-629) in the headings. (The relevant U.S. Code citation is included with each section heading and each reference to the FCRA in the text.) Although the staff has made every effort to transcribe the statutory material accurately, this compendium is intended only as a convenience for the public and not a substitute for the text in the U.S. Code.

This version of the FCRA includes the amendments to the FCRA set forth in the Consumer Credit Reporting Reform Act of 1996 (Public Law 104-208, the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Title II, Subtitle D, Chapter 1), Section 311 of the Intelligence Authorization for Fiscal Year 1998 (Public Law 105-107), the Consumer Reporting Employment Clarification Act of 1998 (Public Law 105-347), Section 506 of the Gramm-Leach-Bliley Act (Public Law 106-102), Sections 358(g) and 505(c) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) (Public Law 107-56), the Fair and Accurate Credit Transactions Act of 2003 (FACT Act) (Public Law 108-159), Section 719 of the Financial Services Regulatory Relief Act of 2006 (Public Law 109-351), Section 743 (Div. D, Title VII) of the Consolidated Appropriations Act of 2008 (Public Law 110-161), the Credit and Debit Card Receipt Clarification Act of 2007 (Public Law 110-241), and Sections 205 and 302 of the Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009 (Public Law 111-24), the Consumer Financial Protection Act of 2010 (CFPA) (Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203), and the Red Flag Program Clarification Act of 2010 (Public Law 111-203). The Commission website posted this document on September 1, 2011.

The provisions added to the FCRA by the FACT Act became effective at different times. In some cases, the provision includes its own effective date. In other cases, the FACT Act provides that the effective dates be prescribed by the FTC and Federal Reserve Board. See 16 CFR Part 602 (69 Fed. Reg. 6526; February 11, 2004) (69 Fed. Reg. 29061; May 20, 2004).

The provisions added to the FCRA by the CFPA became effective on July 21, 2011, the "designated transfer date" on which the Bureau of Consumer Financial Protection assumed certain duties specified by the CFPA. See 75 Fed. Reg. 57252 (Sept. 20, 2010).

TABLE OF CONTENTS

§ 601	Short title
§ 602	Congressional findings and statement of purpose
§ 603	Definitions; rules of construction
§ 604	Permissible purposes of consumer reports
§ 605	Requirements relating to information contained in consumer reports
§ 605A	Identity theft prevention; fraud alerts and active duty alerts
§ 605B	Block of information resulting from identity theft
§ 606	Disclosure of investigative consumer reports
§ 607	Compliance procedures
§ 608	Disclosures to governmental agencies
§ 609	Disclosures to consumers
§ 610	Conditions and form of disclosure to consumers
§ 611	Procedure in case of disputed accuracy
§ 612	Charges for certain disclosures
§ 613	Public record information for employment purposes
§ 614	Restrictions on investigative consumer reports
§ 615	Requirements on users of consumer reports
§ 616	Civil liability for willful noncompliance
§ 617	Civil liability for negligent noncompliance
§ 618	Jurisdiction of courts; limitation of actions
§ 619	Obtaining information under false pretenses
§ 620	Unauthorized disclosures by officers or employees
§ 621	Administrative enforcement
§ 622	Information on overdue child support obligations
§ 623	Responsibilities of furnishers of information to consumer reporting agencies
§ 624	Affiliate sharing
§ 625	Relation to state laws
§ 626	Disclosures to FBI for counterintelligence purposes
§ 627	Disclosures to governmental agencies for counterterrorism purposes
§ 628	Disposal of records
§ 629	Corporate and technological circumvention prohibited

§ 601. Short title

This title may be cited as the "Fair Credit Reporting Act".

§ 602. Congressional findings and statement of purpose [15 U.S.C. § 1681]

- (a) Accuracy and fairness of credit reporting. The Congress makes the following findings:
 - (1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.
 - (2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.
 - (3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.
 - (4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.
- (b) Reasonable procedures. It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

§ 603. Definitions; rules of construction [15 U.S.C. § 1681a]

- (a) Definitions and rules of construction set forth in this section are applicable for the purposes of this title.
- (b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.
- (c) The term "consumer" means an individual.
- (d) Consumer Report
 - (1) *In general.* The term "consumer report" 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

- (A) credit or insurance to be used primarily for personal, family, or household purposes;
- (B) employment purposes; or
- (C) any other purpose authorized under section 604 [§ 1681b].
- (2) *Exclusions*. Except as provided in paragraph (3), the term "consumer report" does not include
 - (A) subject to section 624, any
 - (i) report containing information solely as to transactions or experiences between the consumer and the person making the report;
 - (ii) communication of that information among persons related by common ownership or affiliated by corporate control; or
 - (iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;
 - (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;
 - (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 615 [§ 1681m]; or
 - (D) a communication described in subsection (o) or (x).
- (3) Restriction on sharing of medical information. Except for information or any communication of information disclosed as provided in section 604(g)(3), the exclusions in paragraph (2) shall not apply with respect to information disclosed to any person related by common ownership or affiliated by corporate control, if the information is—
 - (A) medical information;

¹ Should be read as "(o) or (y)" because section 603(x) was re-designated as 603(y) in 2010 by the CFPA.

- (B) an individualized list or description based on the payment transactions of the consumer for medical products or services; or
- (C) an aggregate list of identified consumers based on payment transactions for medical products or services.
- (e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.
- (f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.
- (g) The term "file," when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.
- (h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.
- (i) The term "medical information"
 - (1) means information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to
 - (A) the past, present, or future physical, mental, or behavioral health or condition of an individual:
 - (B) the provision of health care to an individual; or
 - (C) the payment for the provision of health care to an individual.
 - (2) does not include the age or gender of a consumer, demographic information about the consumer, including a consumer's residence address or e-mail address, or any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.
- (j) Definitions Relating to Child Support Obligations

- (1) The "overdue support" has the meaning given to such term in section 666(e) of title 42 [Social Security Act, 42 U.S.C. § 666(e)].
- (2) The term "State or local child support enforcement agency" means a State or local agency which administers a State or local program for establishing and enforcing child support obligations.

(k) Adverse Action

- (1) Actions included. The term "adverse action"
 - (A) has the same meaning as in section 701(d)(6) of the Equal Credit Opportunity Act; and
 - (B) means
 - (i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;
 - (ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;
 - (iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 604(a)(3)(D) [§ 1681b]; and
 - (iv) an action taken or determination that is
 - (I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 604(a)(3)(F)(ii)[§ 1681b]; and
 - (II) adverse to the interests of the consumer.
- (2) Applicable findings, decisions, commentary, and orders. For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 701(d)(6) of the Equal Credit Opportunity Act by the Bureau or any court shall apply.
- (*l*) The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:

- (1) The consumer being determined, based on information in the consumer's application for the credit or insurance, to meet specific criteria bearing on credit worthiness or insurability, as applicable, that are established
 - (A) before selection of the consumer for the offer; and
 - (B) for the purpose of determining whether to extend credit or insurance pursuant to the offer.

(2) Verification

- (A) that the consumer continues to meet the specific criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit or insurance, or other information bearing on the credit worthiness or insurability of the consumer; or
- (B) of the information in the consumer's application for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness or insurability.
- (3) The consumer furnishing any collateral that is a requirement for the extension of the credit or insurance that was
 - (A) established before selection of the consumer for the offer of credit or insurance; and
 - (B) disclosed to the consumer in the offer of credit or insurance.
- (m) The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of
 - (1) reviewing the account or insurance policy; or
 - (2) collecting the account.
- (n) The term "State" means any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.
- (o) Excluded communications. A communication is described in this subsection if it is a communication
 - (1) that, but for subsection (d)(2)(D), would be an investigative consumer report;
 - (2) that is made to a prospective employer for the purpose of
 - (A) procuring an employee for the employer; or
 - (B) procuring an opportunity for a natural person to work for the employer;

- (3) that is made by a person who regularly performs such procurement;
- (4) that is not used by any person for any purpose other than a purpose described in subparagraph (A) or (B) of paragraph (2); and
- (5) with respect to which
 - (A) the consumer who is the subject of the communication
 - (i) consents orally or in writing to the nature and scope of the communication, before the collection of any information for the purpose of making the communication:
 - (ii) consents orally or in writing to the making of the communication to a prospective employer, before the making of the communication; and
 - (iii) in the case of consent under clause (i) or (ii) given orally, is provided written confirmation of that consent by the person making the communication, not later than 3 business days after the receipt of the consent by that person;
 - (B) the person who makes the communication does not, for the purpose of making the communication, make any inquiry that if made by a prospective employer of the consumer who is the subject of the communication would violate any applicable Federal or State equal employment opportunity law or regulation; and
 - (C) the person who makes the communication
 - (i) discloses in writing to the consumer who is the subject of the communication, not later than 5 business days after receiving any request from the consumer for such disclosure, the nature and substance of all information in the consumer's file at the time of the request, except that the sources of any information that is acquired solely for use in making the communication and is actually used for no other purpose, need not be disclosed other than under appropriate discovery procedures in any court of competent jurisdiction in which an action is brought; and
 - (ii) notifies the consumer who is the subject of the communication, in writing, of the consumer's right to request the information described in clause (i).
- (p) The term "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" means a consumer reporting agency that regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's credit worthiness, credit standing, or credit capacity, each of the following regarding consumers residing nationwide:
 - (1) Public record information.
 - (2) Credit account information from persons who furnish that information regularly and in the ordinary course of business.

- (q) Definitions relating to fraud alerts.
 - (1) The term "active duty military consumer" means a consumer in military service who-
 - (A) is on active duty (as defined in section 101(d)(1) of title 10, United States Code) or is a reservist performing duty under a call or order to active duty under a provision of law referred to in section 101(a)(13) of title 10, United States Code; and
 - (B) is assigned to service away from the usual duty station of the consumer.
 - (2) The terms "fraud alert" and "active duty alert" mean a statement in the file of a consumer that
 - (A) notifies all prospective users of a consumer report relating to the consumer that the consumer may be a victim of fraud, including identity theft, or is an active duty military consumer, as applicable; and
 - (B) is presented in a manner that facilitates a clear and conspicuous view of the statement described in subparagraph (A) by any person requesting such consumer report.
 - (3) The term "identity theft" means a fraud committed using the identifying information of another person, subject to such further definition as the Bureau may prescribe, by regulation.

 See also 16 CFR Part 603.2
 69 Fed. Reg. 63922 (11/03/04)
 - (4) The term "identity theft report" has the meaning given that term by rule of the Bureau, and means, at a minimum, a report
 - (A) that alleges an identity theft;

See also 16 CFR Part 603.3 69 Fed. Reg. 63922 (11/03/04)

- (B) that is a copy of an official, valid report filed by a consumer with an appropriate Federal, State, or local law enforcement agency, including the United States Postal Inspection Service, or such other government agency deemed appropriate by the Bureau; and
- (C) the filing of which subjects the person filing the report to criminal penalties relating to the filing of false information if, in fact, the information in the report is false.
- (5) The term "new credit plan" means a new account under an open end credit plan (as defined in section 103(i) of the Truth in Lending Act) or a new credit transaction not under an open end credit plan.
- (r) Credit and Debit Related Terms
 - (1) The term "card issuer" means –

- (A) a credit card issuer, in the case of a credit card; and
- (B) a debit card issuer, in the case of a debit card.
- (2) The term "credit card" has the same meaning as in section 103 of the Truth in Lending Act.
- (3) The term "debit card" means any card issued by a financial institution to a consumer for use in initiating an electronic fund transfer from the account of the consumer at such financial institution, for the purpose of transferring money between accounts or obtaining money, property, labor, or services.
- (4) The terms "account" and "electronic fund transfer" have the same meanings as in section 903 of the Electronic Fund Transfer Act.
- (5) The terms "credit" and "creditor" have the same meanings as in section 702 of the Equal Credit Opportunity Act.
- (s) The term "Federal banking agency" has the same meaning as in section 3 of the Federal Deposit Insurance Act.
- (t) The term "financial institution" means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds a transaction account (as defined in section 19(b) of the Federal Reserve Act) belonging to a consumer.
- (u) The term "reseller" means a consumer reporting agency that-
 - (1) assembles and merges information contained in the database of another consumer reporting agency or multiple consumer reporting agencies concerning any consumer for purposes of furnishing such information to any third party, to the extent of such activities; and
 - (2) does not maintain a database of the assembled or merged information from which new consumer reports are produced.
- (v) The term "Commission" means the Federal Trade Commission.
- (w) The term "Bureau" means the Bureau of Consumer Financial Protection.
- (x) The term "nationwide specialty consumer reporting agency" means a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis relating to-
 - (1) medical records or payments;
 - (2) residential or tenant history;
 - (3) check writing history;

- (4) employment history; or
- (5) insurance claims.
- (y) Exclusion of Certain Communications for Employee Investigations
 - (1) A communication is described in this subsection if--
 - (A) but for subsection (d)(2)(D), the communication would be a consumer report;
 - (B) the communication is made to an employer in connection with an investigation of—
 - (i) suspected misconduct relating to employment; or
 - (ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer;
 - (C) the communication is not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity; and
 - (D) the communication is not provided to any person except--
 - (i) to the employer or an agent of the employer;
 - (ii) to any Federal or State officer, agency, or department, or any officer, agency, or department of a unit of general local government;
 - (iii) to any self-regulatory organization with regulatory authority over the activities of the employer or employee;
 - (iv) as otherwise required by law; or
 - (v) pursuant to section 608.
 - (2) Subsequent disclosure. After taking any adverse action based in whole or in part on a communication described in paragraph (1), the employer shall disclose to the consumer a summary containing the nature and substance of the communication upon which the adverse action is based, except that the sources of information acquired solely for use in preparing what would be but for subsection (d)(2)(D) an investigative consumer report need not be disclosed.
 - (3) For purposes of this subsection, the term "self-regulatory organization" includes any self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act of 1934), any entity established under title I of the Sarbanes-Oxley Act of 2002, any board of trade designated by the Commodity Futures Trading Commission, and any futures association registered with such Commission.

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

- (a) *In general*. Subject to subsection (c), any consumer reporting agency may furnish a consumer report under the following circumstances and no other:
 - (1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.
 - (2) In accordance with the written instructions of the consumer to whom it relates.
 - (3) To a person which it has reason to believe
 - (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
 - (B) intends to use the information for employment purposes; or
 - (C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
 - (D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
 - (E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or
 - (F) otherwise has a legitimate business need for the information
 - (i) in connection with a business transaction that is initiated by the consumer; or
 - (ii) to review an account to determine whether the consumer continues to meet the terms of the account.²
 - (G) executive departments and agencies in connection with the issuance of government-sponsored individually-billed travel charge cards.¹

² As written in the poorly drafted 2007 amendment that added section 604(a)(3)(G). Subsection (F)(ii) should end with "; or" instead of a period, and the text of subsection (G) should conform to the style of the rest of section 604(a)(3). An alternative would have been to add a new section 604(a)(7) allowing a permissible purpose for a consumer report "To executive departments and agencies ..."

- (4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that
 - the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;
 - (B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);
 - (C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and
 - (D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.
- (5) To an agency administering a State plan under Section 454 of the Social Security Act (42 U.S.C. § 654) for use to set an initial or modified child support award.
- (6) To the Federal Deposit Insurance Corporation or the National Credit Union Administration as part of its preparation for its appointment or as part of its exercise of powers, as conservator, receiver, or liquidating agent for an insured depository institution or insured credit union under the Federal Deposit Insurance Act or the Federal Credit Union Act, or other applicable Federal or State law, or in connection with the resolution or liquidation of a failed or failing insured depository institution or insured credit union, as applicable.
- (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).
- (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).³
- (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

³ 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).

- (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.
- (4) Exception for national security investigations.
 - (A) In general. In the case of an agency or department of the United States Government which seeks to obtain and use a consumer report for employment purposes, paragraph (3) shall not apply to any adverse action by such agency or department which is based in part on such consumer report, if the head of such agency or department makes a written finding that—
 - (i) the consumer report is relevant to a national security investigation of such agency or department;
 - (ii) the investigation is within the jurisdiction of such agency or department;
 - (iii) there is reason to believe that compliance with paragraph (3) will
 - (I) endanger the life or physical safety of any person;
 - (II) result in flight from prosecution;
 - (III) result in the destruction of, or tampering with, evidence relevant to the investigation;
 - (IV) result in the intimidation of a potential witness relevant to the investigation;
 - (V) result in the compromise of classified information; or
 - (VI) otherwise seriously jeopardize or unduly delay the investigation or another official proceeding.
 - (B) Notification of consumer upon conclusion of investigation. Upon the conclusion of a national security investigation described in subparagraph (A), or upon the determination that the exception under subparagraph (A) is no longer required for the reasons set forth in such subparagraph, the official exercising the authority in such subparagraph shall provide to the consumer who is the subject of the consumer report with regard to which such finding was made
 - (i) a copy of such consumer report with any classified information redacted as necessary;
 - (ii) notice of any adverse action which is based, in part, on the consumer report; and
 - (iii) the identification with reasonable specificity of the nature of the investigation for which the consumer report was sought.

- (C) Delegation by head of agency or department. For purposes of subparagraphs (A) and (B), the head of any agency or department of the United States Government may delegate his or her authorities under this paragraph to an official of such agency or department who has personnel security responsibilities and is a member of the Senior Executive Service or equivalent civilian or military rank.
- (D) Report to the Congress. Not later than January 31 of each year, the head of each agency and department of the United States Government that exercised authority under this paragraph during the preceding year shall submit a report to the Congress on the number of times the department or agency exercised such authority during the year.
- (E) *Definitions*. For purposes of this paragraph, the following definitions shall apply:
 - (i) The term "classified information" means information that is protected from unauthorized disclosure under Executive Order No. 12958 or successor orders.
 - (ii) The term "national security investigation" means any official inquiry by an agency or department of the United States Government to determine the eligibility of a consumer to receive access or continued access to classified information or to determine whether classified information has been lost or compromised.
- (c) Furnishing reports in connection with credit or insurance transactions that are not initiated by the consumer.
 - (1) *In general*. A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) in connection with any credit or insurance transaction that is not initiated by the consumer only if
 - (A) the consumer authorizes the agency to provide such report to such person; or
 - (B) (i) the transaction consists of a firm offer of credit or insurance;
 - (ii) the consumer reporting agency has complied with subsection (e);
 - (iii) there is not in effect an election by the consumer, made in accordance with subsection (e), to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph; and
 - (iv) the consumer report does not contain a date of birth that shows that the consumer has not attained the age of 21, or, if the date of birth on the consumer report shows that the consumer has not attained the age of 21, such consumer consents to the consumer reporting agency to such furnishing.
 - (2) Limits on information received under paragraph (1)(B). A person may receive pursuant to paragraph (1)(B) only

- (A) the name and address of a consumer;
- (B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and
- (C) other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.
- (3) *Information regarding inquiries*. Except as provided in section 609(a)(5) [§1681g], a consumer reporting agency shall not furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.
- (d) Reserved.
- (e) Election of consumer to be excluded from lists.
 - (1) In general. A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) in connection with a credit or insurance transaction that is not initiated by the consumer, by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.
 - (2) *Manner of notification*. A consumer shall notify a consumer reporting agency under paragraph (1)
 - (A) through the notification system maintained by the agency under paragraph (5); or
 - (B) by submitting to the agency a signed notice of election form issued by the agency for purposes of this subparagraph.
 - (3) Response of agency after notification through system. Upon receipt of notification of the election of a consumer under paragraph (1) through the notification system maintained by the agency under paragraph (5), a consumer reporting agency shall
 - (A) inform the consumer that the election is effective only for the 5-year period following the election if the consumer does not submit to the agency a signed notice of election form issued by the agency for purposes of paragraph (2)(B); and
 - (B) provide to the consumer a notice of election form, if requested by the consumer, not later than 5 business days after receipt of the notification of the election through the system established under paragraph (5), in the case of a request made at the time the consumer provides notification through the system.
 - (4) Effectiveness of election. An election of a consumer under paragraph (1)
 - (A) shall be effective with respect to a consumer reporting agency beginning 5 business days after the date on which the consumer notifies the agency in accordance with paragraph (2);

- (B) shall be effective with respect to a consumer reporting agency
 - (i) subject to subparagraph (C), during the 5-year period beginning 5 business days after the date on which the consumer notifies the agency of the election, in the case of an election for which a consumer notifies the agency only in accordance with paragraph (2)(A); or
 - (ii) until the consumer notifies the agency under subparagraph (C), in the case of an election for which a consumer notifies the agency in accordance with paragraph (2)(B);
- (C) shall not be effective after the date on which the consumer notifies the agency, through the notification system established by the agency under paragraph (5), that the election is no longer effective; and
- (D) shall be effective with respect to each affiliate of the agency.

(5) Notification System

- (A) In general. Each consumer reporting agency that, under subsection (c)(1)(B), furnishes a consumer report in connection with a credit or insurance transaction that is not initiated by a consumer, shall
 - (i) establish and maintain a notification system, including a toll-free telephone number, which permits any consumer whose consumer report is maintained by the agency to notify the agency, with appropriate identification, of the consumer's election to have the consumer's name and address excluded from any such list of names and addresses provided by the agency for such a transaction; and
 - (ii) publish by not later than 365 days after the date of enactment of the Consumer Credit Reporting Reform Act of 1996, and not less than annually thereafter, in a publication of general circulation in the area served by the agency
 - (I) a notification that information in consumer files maintained by the agency may be used in connection with such transactions; and
 - (II) the address and toll-free telephone number for consumers to use to notify the agency of the consumer's election under clause (I).
- (B) Establishment and maintenance as compliance. Establishment and maintenance of a notification system (including a toll-free telephone number) and publication by a consumer reporting agency on the agency's own behalf and on behalf of any of its affiliates in accordance with this paragraph is deemed to be compliance with this paragraph by each of those affiliates.
- (6) Notification system by agencies that operate nationwide. Each consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall

- establish and maintain a notification system for purposes of paragraph (5) jointly with other such consumer reporting agencies.
- (f) Certain use or obtaining of information prohibited. A person shall not use or obtain a consumer report for any purpose unless
 - (1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and
 - (2) the purpose is certified in accordance with section 607 [§ 1681e] by a prospective user of the report through a general or specific certification.

(g) Protection of Medical Information

- (1) Limitation on consumer reporting agencies. A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction, a consumer report that contains medical information (other than medical contact information treated in the manner required under section 605(a)(6)) about a consumer, unless
 - (A) if furnished in connection with an insurance transaction, the consumer affirmatively consents to the furnishing of the report;
 - (B) if furnished for employment purposes or in connection with a credit transaction
 - (i) the information to be furnished is relevant to process or effect the employment or credit transaction; and
 - (ii) the consumer provides specific written consent for the furnishing of the report that describes in clear and conspicuous language the use for which the information will be furnished; or
 - (C) the information to be furnished pertains solely to transactions, accounts, or balances relating to debts arising from the receipt of medical services, products, or devises, where such information, other than account status or amounts, is restricted or reported using codes that do not identify, or do not provide information sufficient to infer, the specific provider or the nature of such services, products, or devices, as provided in section 605(a)(6).
- (2) Limitation on creditors. Except as permitted pursuant to paragraph (3)(C) or regulations prescribed under paragraph (5)(A), a creditor shall not obtain or use medical information (other than medical contact information treated in the manner required under section 605(a)(6)) pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit.
- (3) Actions authorized by federal law, insurance activities and regulatory determinations. Section 603(d)(3) shall not be construed so as to treat information or any communication of information as a consumer report if the information or communication is disclosed –

- (A) in connection with the business of insurance or annuities, including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners (as in effect on January 1, 2003);
- (B) for any purpose permitted without authorization under the Standards for Individually Identifiable Health Information promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996, or referred to under section 1179 of such Act, or described in section 502(e) of Public Law 106-102; or
- (C) as otherwise determined to be necessary and appropriate, by regulation or order, by the Bureau or the applicable State insurance authority (with respect to any person engaged in providing insurance or annuities).
- (4) Limitation on redisclosure of medical information. Any person that receives medical information pursuant to paragraph (1) or (3) shall not disclose such information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.
- (5) Regulations and Effective Date for Paragraph (2)
 - (A)⁴ Regulations required. The Bureau may, after notice and opportunity for comment, prescribe regulations that permit transactions under paragraph (2) that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (and which shall include permitting actions necessary for administrative verification purposes), consistent with the intent of paragraph (2) to restrict the use of medical information for inappropriate purposes.

 See also 12 CFR Parts 41/222/232/334/571/717 70 Fed. Reg. 70664 (11/22/05)
- (6) *Coordination with other laws*. No provision of this subsection shall be construed as altering, affecting, or superseding the applicability of any other provision of Federal law relating to medical confidentiality.

§ 605. Requirements relating to information contained in consumer reports [15 U.S.C. §1681c]

- (a) *Information excluded from consumer reports*. Except as authorized under subsection (b) of this section, no consumer reporting agency may make any consumer report containing any of the following items of information:
 - (1) Cases under title 11 [United States Code] or under the Bankruptcy Act that, from the date of entry of the order for relief or the date of adjudication, as the case may be, antedate the report by more than 10 years.

⁴ As written in section 1088(a)(4)(B) of the CFPA in 2010. The previous version of section 604(b)(5), added in 2003 by the FACT Act, contained two subsections (A) and (B). The latter stated that the rules required to be prescribed by the Federal financial agencies (not including the Commission) be finalized by June 4, 2004.

- (2) Civil suits, civil judgments, and records of arrest that from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.
- (3) Paid tax liens which, from date of payment, antedate the report by more than seven years.
- (4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.⁵
- (5) Any other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.⁵
- (6) The name, address, and telephone number of any medical information furnisher that has notified the agency of its status, unless--
 - (A) such name, address, and telephone number are restricted or reported using codes that do not identify, or provide information sufficient to infer, the specific provider or the nature of such services, products, or devices to a person other than the consumer; or
 - (B) the report is being provided to an insurance company for a purpose relating to engaging in the business of insurance other than property and casualty insurance.
- (b) *Exempted cases*. The provisions of paragraphs (1) through (5) of subsection (a) of this section are not applicable in the case of any consumer credit report to be used in connection with
 - (1) a credit transaction involving, or which may reasonably be expected to involve, a principal amount of \$150,000 or more;
 - (2) the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of \$150,000 or more; or
 - (3) the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal \$75,000, or more.

(c) Running of Reporting Period

(1) *In general*. The 7-year period referred to in paragraphs (4) and (6)⁶ of subsection (a) shall begin, with respect to any delinquent account that is placed for collection (internally or by referral to a third party, whichever is earlier), charged to profit and loss, or

⁵ The reporting periods have been lengthened for certain adverse information pertaining to U.S. Government insured or guaranteed student loans, or pertaining to national direct student loans. See sections 430A(f) and 463(c)(3) of the Higher Education Act of 1965, 20 U.S.C. 1080a(f) and 20 U.S.C. 1087cc(c)(3), respectively.

⁶ This provision, added in September 1996, should read "paragraphs (4) and (5)...." Prior Section 605(a)(6) was amended and re-designated as Section 605(a)(5) in November 1998. The current Section 605(a)(6), added in December 2003 and now containing no reference to any 7-year period, is obviously inapplicable.

- subjected to any similar action, upon the expiration of the 180-day period beginning on the date of the commencement of the delinquency which immediately preceded the collection activity, charge to profit and loss, or similar action.
- (2) Effective date. Paragraph (1) shall apply only to items of information added to the file of a consumer on or after the date that is 455 days after the date of enactment of the Consumer Credit Reporting Reform Act of 1996.

(d) Information Required to be Disclosed

- (1) *Title 11 information*. Any consumer reporting agency that furnishes a consumer report that contains information regarding any case involving the consumer that arises under title 11, United States Code, shall include in the report an identification of the chapter of such title 11 under which such case arises if provided by the source of the information. If any case arising or filed under title 11, United States Code, is withdrawn by the consumer before a final judgment, the consumer reporting agency shall include in the report that such case or filing was withdrawn upon receipt of documentation certifying such withdrawal.
- (2) Key factor in credit score information. Any consumer reporting agency that furnishes a consumer report that contains any credit score or any other risk score or predictor on any consumer shall include in the report a clear and conspicuous statement that a key factor (as defined in section 609(f)(2)(B)) that adversely affected such score or predictor was the number of enquiries, if such a predictor was in fact a key factor that adversely affected such score. This paragraph shall not apply to a check services company, acting as such, which issues authorizations for the purpose of approving or processing negotiable instruments, electronic fund transfers, or similar methods of payments, but only to the extent that such company is engaged in such activities.
- (e) *Indication of closure of account by consumer*. If a consumer reporting agency is notified pursuant to section 623(a)(4) [§ 1681s-2] that a credit account of a consumer was voluntarily closed by the consumer, the agency shall indicate that fact in any consumer report that includes information related to the account.
- (f) *Indication of dispute by consumer*. If a consumer reporting agency is notified pursuant to section 623(a)(3) [§ 1681s-2] that information regarding a consumer who was furnished to the agency is disputed by the consumer, the agency shall indicate that fact in each consumer report that includes the disputed information.

(g) Truncation of Credit Card and Debit Card Numbers

- (1) In *general*. Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.
- (2) *Limitation*. This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.

- (3) Effective date. This subsection shall become effective
 - (A) 3 years after the date of enactment of this subsection, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is in use before January 1, 2005; and
 - (B) 1 year after the date of enactment of this subsection, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is first put into use on or after January 1, 2005.

(h) Notice of Discrepancy in Address

(1) *In general*. If a person has requested a consumer report relating to a consumer from a consumer reporting agency described in section 603(p), the request includes an address for the consumer that substantially differs from the addresses in the file of the consumer, and the agency provides a consumer report in response to the request, the consumer reporting agency shall notify the requester of the existence of the discrepancy.

(2) Regulations

See also 16 CFR Part 641 72 Fed. Reg. 63771-72 (11/09/07) 74 Fed. Reg. 22640-41 (05/14/09)

- (A) Regulations required. The Bureau shall, in consultation with the Federal banking agencies, the National Credit Union Administration, and the Federal Trade Commission, prescribe regulations providing guidance regarding reasonable policies and procedures that a user of a consumer report should employ when such user has received a notice of discrepancy under paragraph (1).
- (B) Policies and procedures to be included. The regulations prescribed under subparagraph (A) shall describe reasonable policies and procedures for use by a user of a consumer report--
 - (i) to form a reasonable belief that the user knows the identity of the person to whom the consumer report pertains; and
 - (ii) if the user establishes a continuing relationship with the consumer, and the user regularly and in the ordinary course of business furnishes information to the consumer reporting agency from which the notice of discrepancy pertaining to the consumer was obtained, to reconcile the address of the consumer with the consumer reporting agency by furnishing such address to such consumer reporting agency as part of information regularly furnished by the user for the period in which the relationship is established.

§ 605A. Identity theft prevention; fraud alerts and active duty alerts [15 U.S.C. §1681c-1]

(a) One-call Fraud Alerts

(1) *Initial alerts*. Upon the direct request of a consumer, or an individual acting on behalf of or as a personal representative of a consumer, who asserts in good faith a suspicion that the consumer has been or is about to become a victim of fraud or related crime, including identity theft, a consumer reporting agency described in

section 603(p) that maintains a file on the consumer and has received appropriate proof of the identity of the requester shall –

- (A) include a fraud alert in the file of that consumer, and also provide that alert along with any credit score generated in using that file, for a period of not less than 90 days, beginning on the date of such request, unless the consumer or such representative requests that such fraud alert be removed before the end of such period, and the agency has received appropriate proof of the identity of the requester for such purpose; and
- (B) refer the information regarding the fraud alert under this paragraph to each of the other consumer reporting agencies described in section 603(p), in accordance with procedures developed under section 621(f).
- (2) Access to free reports. In any case in which a consumer reporting agency includes a fraud alert in the file of a consumer pursuant to this subsection, the consumer reporting agency shall
 - (A) disclose to the consumer that the consumer may request a free copy of the file of the consumer pursuant to section 612(d); and
 - (B) provide to the consumer all disclosures required to be made under section 609, without charge to the consumer, not later than 3 business days after any request described in subparagraph (A).

(b) Extended Alerts

- (1) *In general*. Upon the direct request of a consumer, or an individual acting on behalf of or as a personal representative of a consumer, who submits an identity theft report to a consumer reporting agency described in section 603(p) that maintains a file on the consumer, if the agency has received appropriate proof of the identity of the requester, the agency shall
 - (A) include a fraud alert in the file of that consumer, and also provide that alert along with any credit score generated in using that file, during the 7-year period beginning on the date of such request, unless the consumer or such representative requests that such fraud alert be removed before the end of such period and the agency has received appropriate proof of the identity of the requester for such purpose;
 - (B) during the 5-year period beginning on the date of such request, exclude the consumer from any list of consumers prepared by the consumer reporting agency and provided to any third party to offer credit or insurance to the consumer as part of a transaction that was not initiated by the consumer, unless the consumer or such representative requests that such exclusion be rescinded before the end of such period; and
 - (C) refer the information regarding the extended fraud alert under this paragraph to each of the other consumer reporting agencies described in section 603(p), in accordance with procedures developed under section 621(f).

- (2) Access to free reports. In any case in which a consumer reporting agency includes a fraud alert in the file of a consumer pursuant to this subsection, the consumer reporting agency shall
 - (A) disclose to the consumer that the consumer may request 2 free copies of the file of the consumer pursuant to section 612(d) during the 12-month period beginning on the date on which the fraud alert was included in the file; and
 - (B) provide to the consumer all disclosures required to be made under section 609, without charge to the consumer, not later than 3 business days after any request described in subparagraph (A).
- (c) *Active duty alerts*. Upon the direct request of an active duty military consumer, or an individual acting on behalf of or as a personal representative of an active duty military consumer, a consumer reporting agency described in section 603(p) that maintains a file on the active duty military consumer and has received appropriate proof of the identity of the requester shall
 - (1) include an active duty alert in the file of that active duty military consumer, and also provide that alert along with any credit score generated in using that file, during a period of not less than 12 months, or such longer period as the Bureau shall determine, by regulation, beginning on the date of the request, unless the active duty military consumer or such representative requests that such fraud alert be removed before the end of such period, and the agency has received appropriate proof of the identity of the requester for such purpose;
 - (2) during the 2-year period beginning on the date of such request, exclude the active duty military consumer from any list of consumers prepared by the consumer reporting agency and provided to any third party to offer credit or insurance to the consumer as part of a transaction that was not initiated by the consumer, unless the consumer requests that such exclusion be rescinded before the end of such period; and
 - (3) refer the information regarding the active duty alert to each of the other consumer reporting agencies described in section 603(p), in accordance with procedures developed under section 621(f).

 See also 16 CFR Part 613.1
 69 Fed. Reg. 63922 (11/03/04)
- (d) *Procedures*. Each consumer reporting agency described in section 603(p) shall establish policies and procedures to comply with this section, including procedures that inform consumers of the availability of initial, extended, and active duty alerts and procedures that allow consumers and active duty military consumers to request initial, extended, or active duty alerts (as applicable) in a simple and easy manner, including by telephone.
- (e) *Referrals of alerts*. Each consumer reporting agency described in section 603(p) that receives a referral of a fraud alert or active duty alert from another consumer reporting agency pursuant to this section shall, as though the agency received the request from the consumer directly, follow the procedures required under
 - (1) paragraphs (1)(A) and (2) of subsection (a), in the case of a referral under subsection (a)(1)(B);

- (2) paragraphs (1)(A), (1)(B), and (2) of subsection (b), in the case of a referral under subsection (b)(1)(C); and
- (3) paragraphs (1) and (2) of subsection (c), in the case of a referral under subsection (c)(3).
- (f) *Duty of reseller to reconvey alert.* A reseller shall include in its report any fraud alert or active duty alert placed in the file of a consumer pursuant to this section by another consumer reporting agency.
- (g) Duty of other consumer reporting agencies to provide contact information. If a consumer contacts any consumer reporting agency that is not described in section 603(p) to communicate a suspicion that the consumer has been or is about to become a victim of fraud or related crime, including identity theft, the agency shall provide information to the consumer on how to contact the Bureau and the consumer reporting agencies described in section 603(p) to obtain more detailed information and request alerts under this section.
- (h) Limitations on Use of Information for Credit Extensions
 - (1) Requirements for initial and active duty alerts
 - (A) Notification. Each initial fraud alert and active duty alert under this section shall include information that notifies all prospective users of a consumer report on the consumer to which the alert relates that the consumer does not authorize the establishment of any new credit plan or extension of credit, other than under an open-end credit plan (as defined in section 103(i)), in the name of the consumer, or issuance of an additional card on an existing credit account requested by a consumer, or any increase in credit limit on an existing credit account requested by a consumer, except in accordance with subparagraph (B).

(B) Limitation on Users

- (i) In general. No prospective user of a consumer report that includes an initial fraud alert or an active duty alert in accordance with this section may establish a new credit plan or extension of credit, other than under an open-end credit plan (as defined in section 103(i)), in the name of the consumer, or issue an additional card on an existing credit account requested by a consumer, or grant any increase in credit limit on an existing credit account requested by a consumer, unless the user utilizes reasonable policies and procedures to form a reasonable belief that the user knows the identity of the person making the request.
- (ii) Verification. If a consumer requesting the alert has specified a telephone number to be used for identity verification purposes, before authorizing any new credit plan or extension described in clause (i) in the name of such consumer, a user of such consumer report shall contact the consumer using that telephone number or take reasonable steps to verify the consumer's identity and confirm that the application for a new credit plan is not the result of identity theft.

- (2) Requirements for Extended Alerts
 - (A) *Notification*. Each extended alert under this section shall include information that provides all prospective users of a consumer report relating to a consumer with
 - (i) notification that the consumer does not authorize the establishment of any new credit plan or extension of credit described in clause (i), other than under an open-end credit plan (as defined in section 103(i)), in the name of the consumer, or issuance of an additional card on an existing credit account requested by a consumer, or any increase in credit limit on an existing credit account requested by a consumer, except in accordance with subparagraph (B); and
 - (ii) a telephone number or other reasonable contact method designated by the consumer.
 - (B) Limitation on users. No prospective user of a consumer report or of a credit score generated using the information in the file of a consumer that includes an extended fraud alert in accordance with this section may establish a new credit plan or extension of credit, other than under an open-end credit plan (as defined in section 103(i)), in the name of the consumer, or issue an additional card on an existing credit account requested by a consumer, or any increase in credit limit on an existing credit account requested by a consumer, unless the user contacts the consumer in person or using the contact method described in subparagraph (A)(ii) to confirm that the application for a new credit plan or increase in credit limit, or request for an additional card is not the result of identity theft.

§ 605B. Block of information resulting from identity theft [15 U.S.C. §1681c-2]

- (a) *Block*. Except as otherwise provided in this section, a consumer reporting agency shall block the reporting of any information in the file of a consumer that the consumer identifies as information that resulted from an alleged identity theft, not later than 4 business days after the date of receipt by such agency of
 - (1) appropriate proof of the identity of the consumer;
 - (2) a copy of an identity theft report;
 - (3) the identification of such information by the consumer; and
 - (4) a statement by the consumer that the information is not information relating to any transaction by the consumer.
- (b) *Notification*. A consumer reporting agency shall promptly notify the furnisher of information identified by the consumer under subsection (a)--
 - (1) that the information may be a result of identity theft;

- (2) that an identity theft report has been filed;
- (3) that a block has been requested under this section; and
- (4) of the effective dates of the block.

(c) Authority to Decline or Rescind

- (1) *In general.* A consumer reporting agency may decline to block, or may rescind any block, of information relating to a consumer under this section, if the consumer reporting agency reasonably determines that
 - (A) the information was blocked in error or a block was requested by the consumer in error;
 - (B) the information was blocked, or a block was requested by the consumer, on the basis of a material misrepresentation of fact by the consumer relevant to the request to block; or
 - (C) the consumer obtained possession of goods, services, or money as a result of the blocked transaction or transactions.
- (2) *Notification to consumer*. If a block of information is declined or rescinded under this subsection, the affected consumer shall be notified promptly, in the same manner as consumers are notified of the reinsertion of information under section 611(a)(5)(B).
- (3) Significance of block. For purposes of this subsection, if a consumer reporting agency rescinds a block, the presence of information in the file of a consumer prior to the blocking of such information is not evidence of whether the consumer knew or should have known that the consumer obtained possession of any goods, services, or money as a result of the block.

(d) Exception for Resellers

- (1) *No reseller file*. This section shall not apply to a consumer reporting agency, if the consumer reporting agency
 - (A) is a reseller;
 - (B) is not, at the time of the request of the consumer under subsection (a), otherwise furnishing or reselling a consumer report concerning the information identified by the consumer; and
 - (C) informs the consumer, by any means, that the consumer may report the identity theft to the Bureau to obtain consumer information regarding identity theft.
- (2) Reseller with file. The sole obligation of the consumer reporting agency under this section, with regard to any request of a consumer under this section, shall be to block

the consumer report maintained by the consumer reporting agency from any subsequent use, if –

- (A) the consumer, in accordance with the provisions of subsection (a), identifies, to a consumer reporting agency, information in the file of the consumer that resulted from identity theft; and
- (B) the consumer reporting agency is a reseller of the identified information.
- (3) *Notice*. In carrying out its obligation under paragraph (2), the reseller shall promptly provide a notice to the consumer of the decision to block the file. Such notice shall contain the name, address, and telephone number of each consumer reporting agency from which the consumer information was obtained for resale.
- (e) Exception for verification companies. The provisions of this section do not apply to a check services company, acting as such, which issues authorizations for the purpose of approving or processing negotiable instruments, electronic fund transfers, or similar methods of payments, except that, beginning 4 business days after receipt of information described in paragraphs (1) through (3) of subsection (a), a check services company shall not report to a national consumer reporting agency described in section 603(p), any information identified in the subject identity theft report as resulting from identity theft.
- (f) Access to blocked information by law enforcement agencies. No provision of this section shall be construed as requiring a consumer reporting agency to prevent a Federal, State, or local law enforcement agency from accessing blocked information in a consumer file to which the agency could otherwise obtain access under this title.

§ 606. Disclosure of investigative consumer reports [15 U.S.C. § 1681d]

- (a) *Disclosure of fact of preparation*. A person may not procure or cause to be prepared an investigative consumer report on any consumer unless
 - (1) it is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics and mode of living, whichever are applicable, may be made, and such disclosure
 - (A) is made in a writing mailed, or otherwise delivered, to the consumer, not later than three days after the date on which the report was first requested, and
 - (B) includes a statement informing the consumer of his right to request the additional disclosures provided for under subsection (b) of this section and the written summary of the rights of the consumer prepared pursuant to section 609(c) [§ 1681g]; and
 - (2) the person certifies or has certified to the consumer reporting agency that
 - (A) the person has made the disclosures to the consumer required by paragraph (1); and
 - (B) the person will comply with subsection (b).

- (b) Disclosure on request of nature and scope of investigation. Any person who procures or causes to be prepared an investigative consumer report on any consumer shall, upon written request made by the consumer within a reasonable period of time after the receipt by him of the disclosure required by subsection (a)(1) of this section, make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure shall be made in a writing mailed, or otherwise delivered, to the consumer not later than five days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is the later.
- (c) Limitation on liability upon showing of reasonable procedures for compliance with provisions. No person may be held liable for any violation of subsection (a) or (b) of this section if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with subsection (a) or (b) of this section

(d) Prohibitions

- (1) Certification. A consumer reporting agency shall not prepare or furnish investigative consumer report unless the agency has received a certification under subsection (a)(2) from the person who requested the report.
- (2) *Inquiries*. A consumer reporting agency shall not make an inquiry for the purpose of preparing an investigative consumer report on a consumer for employment purposes if the making of the inquiry by an employer or prospective employer of the consumer would violate any applicable Federal or State equal employment opportunity law or regulation.
- (3) Certain public record information. Except as otherwise provided in section 613 [§ 1681k], a consumer reporting agency shall not furnish an investigative consumer report that includes information that is a matter of public record and that relates to an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment, unless the agency has verified the accuracy of the information during the 30-day period ending on the date on which the report is furnished.
- (4) Certain adverse information. A consumer reporting agency shall not prepare or furnish an investigative consumer report on a consumer that contains information that is adverse to the interest of the consumer and that is obtained through a personal interview with a neighbor, friend, or associate of the consumer or with another person with whom the consumer is acquainted or who has knowledge of such item of information, unless
 - (A) the agency has followed reasonable procedures to obtain confirmation of the information, from an additional source that has independent and direct knowledge of the information; or
 - (B) the person interviewed is the best possible source of the information.

§ 607. Compliance procedures [15 U.S.C. § 1681e]

- (a) *Identity and purposes of credit users*. Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 605 [§ 1681c] and to limit the furnishing of consumer reports to the purposes listed under section 604 [§ 1681b] of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 604 [§ 1681b] of this title.
- (b) *Accuracy of report*. Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.
- (c) Disclosure of consumer reports by users allowed. A consumer reporting agency may not prohibit a user of a consumer report furnished by the agency on a consumer from disclosing the contents of the report to the consumer, if adverse action against the consumer has been taken by the user based in whole or in part on the report.
- (d) Notice to Users and Furnishers of Information
 - (1) Notice requirement. A consumer reporting agency shall provide to any person
 - (A) who regularly and in the ordinary course of business furnishes information to the agency with respect to any consumer; or
 - (B) to whom a consumer report is provided by the agency;

a notice of such person's responsibilities under this title.

See also 16 CFR 698, App G-H
69 Fed. Reg. 69776 (11/30/04)

- (2) *Content of notice*. The Bureau shall prescribe the content of notices under paragraph (1), and a consumer reporting agency shall be in compliance with this subsection if it provides a notice under paragraph (1) that is substantially similar to the Bureau prescription under this paragraph.
- (e) Procurement of Consumer Report for Resale
 - (1) *Disclosure*. A person may not procure a consumer report for purposes of reselling the report (or any information in the report) unless the person discloses to the consumer reporting agency that originally furnishes the report
 - (A) the identity of the end-user of the report (or information); and
 - (B) each permissible purpose under section 604 [§ 1681b] for which the report is furnished to the end-user of the report (or information).

- (2) Responsibilities of procurers for resale. A person who procures a consumer report for purposes of reselling the report (or any information in the report) shall
 - (A) establish and comply with reasonable procedures designed to ensure that the report (or information) is resold by the person only for a purpose for which the report may be furnished under section 604 [§ 1681b], including by requiring that each person to which the report (or information) is resold and that resells or provides the report (or information) to any other person
 - (i) identifies each end user of the resold report (or information);
 - (ii) certifies each purpose for which the report (or information) will be used; and
 - (iii) certifies that the report (or information) will be used for no other purpose; and
 - (B) before reselling the report, make reasonable efforts to verify the identifications and certifications made under subparagraph (A).
- (3) Resale of consumer report to a federal agency or department. Notwithstanding paragraph (1) or (2), a person who procures a consumer report for purposes of reselling the report (or any information in the report) shall not disclose the identity of the end-user of the report under paragraph (1) or (2) if
 - (A) the end user is an agency or department of the United States Government which procures the report from the person for purposes of determining the eligibility of the consumer concerned to receive access or continued access to classified information (as defined in section 604(b)(4)(E)(i)); and
 - (B) the agency or department certifies in writing to the person reselling the report that nondisclosure is necessary to protect classified information or the safety of persons employed by or contracting with, or undergoing investigation for work or contracting with the agency or department.

§ 608. Disclosures to governmental agencies [15 U.S.C. § 1681f]

Notwithstanding the provisions of section 604 [§ 1681b] of this title, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency.

§ 609. Disclosures to consumers [15 U.S.C. § 1681g]

- (a) *Information on file; sources; report recipients*. Every consumer reporting agency shall, upon request, and subject to 610(a)(1) [§ 1681h], clearly and accurately disclose to the consumer:
 - (1) All information in the consumer's file at the time of the request except that-
 - (A) if the consumer to whom the file relates requests that the first 5 digits of the social security number (or similar identification number) of the consumer not

- be included in the disclosure and the consumer reporting agency has received appropriate proof of the identity of the requester, the consumer reporting agency shall so truncate such number in such disclosure; and
- (B) nothing in this paragraph shall be construed to require a consumer reporting agency to disclose to a consumer any information concerning credit scores or any other risk scores or predictors relating to the consumer.
- (2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually use for no other purpose need not be disclosed: Provided, That in the event an action is brought under this title, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.
- (3) (A) Identification of each person (including each end-user identified under section 607(e)(1) [§ 1681e]) that procured a consumer report
 - (i) for employment purposes, during the 2-year period preceding the date on which the request is made; or
 - (ii) for any other purpose, during the 1-year period preceding the date on which the request is made.
 - (B) An identification of a person under subparagraph (A) shall include
 - (i) the name of the person or, if applicable, the trade name (written in full) under which such person conducts business; and
 - (ii) upon request of the consumer, the address and telephone number of the person.
 - (C) Subparagraph (A) does not apply if
 - (i) the end user is an agency or department of the United States Government that procures the report from the person for purposes of determining the eligibility of the consumer to whom the report relates to receive access or continued access to classified information (as defined in section 604(b)(4)(E)(i)); and
 - (ii) the head of the agency or department makes a written finding as prescribed under section 604(b)(4)(A).
- (4) The dates, original payees, and amounts of any checks upon which is based any adverse characterization of the consumer, included in the file at the time of the disclosure.
- (5) A record of all inquiries received by the agency during the 1-year period preceding the request that identified the consumer in connection with a credit or insurance transaction that was not initiated by the consumer.

- (6) If the consumer requests the credit file and not the credit score, a statement that the consumer may request and obtain a credit score.
- (b) *Exempt information*. The requirements of subsection (a) of this section respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this title except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.
- (c) Summary of Rights to Obtain and Dispute Information in Consumer Reports and to Obtain Credit Scores

See also 16 CFR Part 698, App F 69 Fed. Reg. 69776 (11/30/04)

- (1) Bureau Summary of Rights Required
 - (A) *In general*. The Bureau shall prepare a model summary of the rights of consumers under this title.
 - (B) *Content of summary*. The summary of rights prepared under subparagraph (A) shall include a description of
 - (i) the right of a consumer to obtain a copy of a consumer report under subsection (a) from each consumer reporting agency;
 - (ii) the frequency and circumstances under which a consumer is entitled to receive a consumer report without charge under section 612;
 - (iii) the right of a consumer to dispute information in the file of the consumer under section 611;
 - (iv) the right of a consumer to obtain a credit score from a consumer reporting agency, and a description of how to obtain a credit score;
 - (v) the method by which a consumer can contact, and obtain a consumer report from, a consumer reporting agency without charge, as provided in the regulations of the Bureau prescribed under section 211(c) of the Fair and Accurate Credit Transactions Act of 2003; and
 - (vi) the method by which a consumer can contact, and obtain a consumer report from, a consumer reporting agency described in section 603(w), as provided in the regulations of the Bureau prescribed under section 612(a)(1)(C).
 - (C) Availability of summary of rights. The Bureau shall
 - (i) actively publicize the availability of the summary of rights prepared under this paragraph;
 - (ii) conspicuously post on its Internet website the availability of such summary of rights; and

- (iii) promptly make such summary of rights available to consumers, on request.
- (2) Summary of rights required to be included with agency disclosures. A consumer reporting agency shall provide to a consumer, with each written disclosure by the agency to the consumer under this section
 - (A) the summary of rights prepared by the Bureau under paragraph (1);
 - (B) in the case of a consumer reporting agency described in section 603(p), a toll-free telephone number established by the agency, at which personnel are accessible to consumers during normal business hours;
 - (C) a list of all Federal agencies responsible for enforcing any provision of this title, and the address and any appropriate phone number of each such agency, in a form that will assist the consumer in selecting the appropriate agency;
 - (D) a statement that the consumer may have additional rights under State law, and that the consumer may wish to contact a State or local consumer protection agency or a State attorney general (or the equivalent thereof) to learn of those rights; and
 - (E) a statement that a consumer reporting agency is not required to remove accurate derogatory information from the file of a consumer, unless the information is outdated under section 605 or cannot be verified.

(d) Summary of Rights of Identity Theft Victims

See also 16 CFR Part 698, App E 69 Fed. Reg. 69776 (11/30/04)

- (1) *In general*. The Bureau, in consultation with the Federal banking agencies and the National Credit Union Administration, shall prepare a model summary of the rights of consumers under this title with respect to the procedures for remedying the effects of fraud or identity theft involving credit, an electronic fund transfer, or an account or transaction at or with a financial institution or other creditor.
- (2) Summary of rights and contact information. Beginning 60 days after the date on which the model summary of rights is prescribed in final form by the Bureau pursuant to paragraph (1), if any consumer contacts a consumer reporting agency and expresses a belief that the consumer is a victim of fraud or identity theft involving credit, an electronic fund transfer, or an account or transaction at or with a financial institution or other creditor, the consumer reporting agency shall, in addition to any other action that the agency may take, provide the consumer with a summary of rights that contains all of the information required by the Bureau under paragraph (1), and information on how to contact the Bureau to obtain more detailed information.

(e) Information Available to Victims

(1) *In general*. For the purpose of documenting fraudulent transactions resulting from identity theft, not later than 30 days after the date of receipt of a request from a victim in accordance with paragraph (3), and subject to verification of the identity of the victim and the claim of identity theft in accordance with paragraph (2), a business entity that has provided credit to, provided for consideration products, goods, or services to,

accepted payment from, or otherwise entered into a commercial transaction for consideration with, a person who has allegedly made unauthorized use of the means of identification of the victim, shall provide a copy of application and business transaction records in the control of the business entity, whether maintained by the business entity or by another person on behalf of the business entity, evidencing any transaction alleged to be a result of identity theft to –

- (A) the victim;
- (B) any Federal, State, or local government law enforcement agency or officer specified by the victim in such a request; or
- (C) any law enforcement agency investigating the identity theft and authorized by the victim to take receipt of records provided under this subsection.
- (2) *Verification of identity and claim.* Before a business entity provides any information under paragraph (1), unless the business entity, at its discretion, otherwise has a high degree of confidence that it knows the identity of the victim making a request under paragraph (1), the victim shall provide to the business entity
 - (A) as proof of positive identification of the victim, at the election of the business entity
 - (i) the presentation of a government-issued identification card;
 - (ii) personally identifying information of the same type as was provided to the business entity by the unauthorized person; or
 - (iii) personally identifying information that the business entity typically requests from new applicants or for new transactions, at the time of the victim's request for information, including any documentation described in clauses (i) and (ii); and
 - (B) as proof of a claim of identity theft, at the election of the business entity
 - (i) a copy of a police report evidencing the claim of the victim of identity theft; and
 - (ii) a properly completed
 - (I) copy of a standardized affidavit of identity theft developed and made available by the Bureau; or
 - (II) an affidavit of fact that is acceptable to the business entity for that purpose.
- (3) *Procedures*. The request of a victim under paragraph (1) shall
 - (A) be in writing;
 - (B) be mailed to an address specified by the business entity, if any; and

- (C) if asked by the business entity, include relevant information about any transaction alleged to be a result of identity theft to facilitate compliance with this section including
 - (i) if known by the victim (or if readily obtainable by the victim), the date of the application or transaction; and
 - (ii) if known by the victim (or if readily obtainable by the victim), any other identifying information such as an account or transaction number.
- (4) *No charge to victim.* Information required to be provided under paragraph (1) shall be so provided without charge.
- (5) Authority to decline to provide information. A business entity may decline to provide information under paragraph (1) if, in the exercise of good faith, the business entity determines that
 - (A) this subsection does not require disclosure of the information;
 - (B) after reviewing the information provided pursuant to paragraph (2), the business entity does not have a high degree of confidence in knowing the true identity of the individual requesting the information;
 - (C) the request for the information is based on a misrepresentation of fact by the individual requesting the information relevant to the request for information; or
 - (D) the information requested is Internet navigational data or similar information about a person's visit to a website or online service.
- (6) *Limitation on liability*. Except as provided in section 621, sections 616 and 617 do not apply to any violation of this subsection.
- (7) *Limitation on civil liability*. No business entity may be held civilly liable under any provision of Federal, State, or other law for disclosure, made in good faith pursuant to this subsection.
- (8) *No new recordkeeping obligation*. Nothing in this subsection creates an obligation on the part of a business entity to obtain, retain, or maintain information or records that are not otherwise required to be obtained, retained, or maintained in the ordinary course of its business or under other applicable law.

(9) Rule of Construction

(A) In general. No provision of subtitle A of title V of Public Law 106-102, prohibiting the disclosure of financial information by a business entity to third parties shall be used to deny disclosure of information to the victim under this subsection.

- (B) Limitation. Except as provided in subparagraph (A), nothing in this subsection permits a business entity to disclose information, including information to law enforcement under subparagraphs (B) and (C) of paragraph (1), that the business entity is otherwise prohibited from disclosing under any other applicable provision of Federal or State law.
- (10) Affirmative defense. In any civil action brought to enforce this subsection, it is an affirmative defense (which the defendant must establish by a preponderance of the evidence) for a business entity to file an affidavit or answer stating that—
 - (A) the business entity has made a reasonably diligent search of its available business records; and
 - (B) the records requested under this subsection do not exist or are not reasonably available.
- (11) *Definition of victim*. For purposes of this subsection, the term "victim" means a consumer whose means of identification or financial information has been used or transferred (or has been alleged to have been used or transferred) without the authority of that consumer, with the intent to commit, or to aid or abet, an identity theft or a similar crime.
- (12) *Effective date*. This subsection shall become effective 180 days after the date of enactment of this subsection.
- (13) *Effectiveness study*. Not later than 18 months after the date of enactment of this subsection, the Comptroller General of the United States shall submit a report to Congress assessing the effectiveness of this provision.

(f) Disclosure of Credit Scores

- (1) *In general*. Upon the request of a consumer for a credit score, a consumer reporting agency shall supply to the consumer a statement indicating that the information and credit scoring model may be different than the credit score that may be used by the lender, and a notice which shall include
 - (A) the current credit score of the consumer or the most recent credit score of the consumer that was previously calculated by the credit reporting agency for a purpose related to the extension of credit;
 - (B) the range of possible credit scores under the model used;
 - (C) all of the key factors that adversely affected the credit score of the consumer in the model used, the total number of which shall not exceed 4, subject to paragraph (9);
 - (D) the date on which the credit score was created; and
 - (E) the name of the person or entity that provided the credit score or credit file upon which the credit score was created.

- (2) Definitions. For purposes of this subsection, the following definitions shall apply:
 - (A) The term "credit score"
 - (i) means a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors, including default (and the numerical value or the categorization derived from such analysis may also be referred to as a "risk predictor" or "risk score"); and
 - (ii) does not include
 - (I) any mortgage score or rating of an automated underwriting system that considers one or more factors in addition to credit information, including the loan to value ratio, the amount of down payment, or the financial assets of a consumer; or
 - (II) any other elements of the underwriting process or underwriting decision.
 - (B) The term "key factors" means all relevant elements or reasons adversely affecting the credit score for the particular individual, listed in the order of their importance based on their effect on the credit score.
- (3) *Timeframe and manner of disclosure*. The information required by this subsection shall be provided in the same timeframe and manner as the information described in subsection (a).
- (4) *Applicability to certain uses.* This subsection shall not be construed so as to compel a consumer reporting agency to develop or disclose a score if the agency does not
 - (A) distribute scores that are used in connection with residential real property loans; or
 - (B) develop scores that assist credit providers in understanding the general credit behavior of a consumer and predicting the future credit behavior of the consumer.
- (5) Applicability to credit scores developed by another person.
 - (A) In general. This subsection shall not be construed to require a consumer reporting agency that distributes credit scores developed by another person or entity to provide a further explanation of them, or to process a dispute arising pursuant to section 611, except that the consumer reporting agency shall provide the consumer with the name and address and website for contacting the person or entity who developed the score or developed the methodology of the score.
 - (B) *Exception*. This paragraph shall not apply to a consumer reporting agency that develops or modifies scores that are developed by another person or entity.

- (6) *Maintenance of credit scores not required*. This subsection shall not be construed to require a consumer reporting agency to maintain credit scores in its files.
- (7) *Compliance in certain cases*. In complying with this subsection, a consumer reporting agency shall
 - (A) supply the consumer with a credit score that is derived from a credit scoring model that is widely distributed to users by that consumer reporting agency in connection with residential real property loans or with a credit score that assists the consumer in understanding the credit scoring assessment of the credit behavior of the consumer and predictions about the future credit behavior of the consumer; and
 - (B) a statement indicating that the information and credit scoring model may be different than that used by the lender.
- (8) Fair and reasonable fee. A consumer reporting agency may charge a fair and reasonable fee, as determined by the Bureau, for providing the information required under this subsection.

 See also 69 Fed. Reg. 64698 (11/08/04)
- (9) Use of enquiries as a key factor. If a key factor that adversely affects the credit score of a consumer consists of the number of enquiries made with respect to a consumer report, that factor shall be included in the disclosure pursuant to paragraph (1)(C) without regard to the numerical limitation in such paragraph.
- (g) Disclosure of Credit Scores by Certain Mortgage Lenders
 - (1) *In general*. Any person who makes or arranges loans and who uses a consumer credit score, as defined in subsection (f), in connection with an application initiated or sought by a consumer for a closed end loan or the establishment of an open end loan for a consumer purpose that is secured by 1 to 4 units of residential real property (hereafter in this subsection referred to as the "lender") shall provide the following to the consumer as soon as reasonably practicable:
 - (A) Information Required under Subsection (f)
 - (i) In general. A copy of the information identified in subsection (f) that was obtained from a consumer reporting agency or was developed and used by the user of the information.
 - (ii) Notice under subparagraph (D). In addition to the information provided to it by a third party that provided the credit score or scores, a lender is only required to provide the notice contained in subparagraph (D).
 - (B) Disclosures in Case of Automated Underwriting System
 - (i) In general. If a person that is subject to this subsection uses an automated underwriting system to underwrite a loan, that person may satisfy the obligation to provide a credit score by disclosing a credit score and associated key factors supplied by a consumer reporting agency.

- (ii) Numerical credit score. However, if a numerical credit score is generated by an automated underwriting system used by an enterprise, and that score is disclosed to the person, the score shall be disclosed to the consumer consistent with subparagraph (c).
- (iii) Enterprise defined. For purposes of this subparagraph, the term "enterprise" has the same meaning as in paragraph (6) of section 1303 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.
- (C) Disclosures of credit scores not obtained from a consumer reporting agency. A person that is subject to the provisions of this subsection and that uses a credit score, other than a credit score provided by a consumer reporting agency, may satisfy the obligation to provide a credit score by disclosing a credit score and associated key factors supplied by a consumer reporting agency.
- (D) *Notice to home loan applicants.* A copy of the following notice, which shall include the name, address, and telephone number of each consumer reporting agency providing a credit score that was used:

"Notice To The Home Loan Applicant

"In connection with your application for a home loan, the lender must disclose to you the score that a consumer reporting agency distributed to users and the lender used in connection with your home loan, and the key factors affecting your credit scores.

"The credit score is a computer generated summary calculated at the time of the request and based on information that a consumer reporting agency or lender has on file. The scores are based on data about your credit history and payment patterns. Credit scores are important because they are used to assist the lender in determining whether you will obtain a loan. They may also be used to determine what interest rate you may be offered on the mortgage. Credit scores can change over time, depending on your conduct, how your credit history and payment patterns change, and how credit scoring technologies change.

"Because the score is based on information in your credit history, it is very important that you review the credit-related information that is being furnished to make sure it is accurate. Credit records may vary from one company to another.

"If you have questions about your credit score or the credit information that is furnished to you, contact the consumer reporting agency at the address and telephone number provided with this notice, or contact the lender, if the lender developed or generated the credit score. The consumer reporting agency plays no part in the decision to take any action on the loan application and is unable to provide you with specific reasons for the decision on a loan application.

"If you have questions concerning the terms of the loan, contact the lender."

- (E) Actions not required under this subsection. This subsection shall not require any person to
 - (i) explain the information provided pursuant to subsection (f);
 - (ii) disclose any information other than a credit score or key factors, as defined in subsection (f);
 - (iii) disclose any credit score or related information obtained by the user after a loan has closed:
 - (iv) provide more than 1 disclosure per loan transaction; or
 - (v) provide the disclosure required by this subsection when another person has made the disclosure to the consumer for that loan transaction.

(F) No Obligation for Content

- (i) In general. The obligation of any person pursuant to this subsection shall be limited solely to providing a copy of the information that was received from the consumer reporting agency.
- (ii) *Limit on liability*. No person has liability under this subsection for the content of that information or for the omission of any information within the report provided by the consumer reporting agency.
- (G) Person defined as excluding enterprise. As used in this subsection, the term "person" does not include an enterprise (as defined in paragraph (6) of section 1303 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992).

(2) Prohibition on Disclosure Clauses Null and Void

- (A) *In general*. Any provision in a contract that prohibits the disclosure of a credit score by a person who makes or arranges loans or a consumer reporting agency is void.
- (B) No liability for disclosure under this subsection. A lender shall not have liability under any contractual provision for disclosure of a credit score pursuant to this subsection.

§ 610. Conditions and form of disclosure to consumers [15 U.S.C. § 1681h]

(a) In General

- (1) *Proper identification*. A consumer reporting agency shall require, as a condition of making the disclosures required under section 609 [§ 1681g], that the consumer furnish proper identification.
- (2) *Disclosure in writing*. Except as provided in subsection (b), the disclosures required to be made under section 609 [§ 1681g] shall be provided under that section in writing.

(b) Other Forms of Disclosure

- (1) *In general*. If authorized by a consumer, a consumer reporting agency may make the disclosures required under 609 [§ 1681g]
 - (A) other than in writing; and
 - (B) in such form as may be
 - (i) specified by the consumer in accordance with paragraph (2); and
 - (ii) available from the agency.
- (2) Form. A consumer may specify pursuant to paragraph (1) that disclosures under section 609 [§ 1681g] shall be made
 - (A) in person, upon the appearance of the consumer at the place of business of the consumer reporting agency where disclosures are regularly provided, during normal business hours, and on reasonable notice;
 - (B) by telephone, if the consumer has made a written request for disclosure by telephone;
 - (C) by electronic means, if available from the agency; or
 - (D) by any other reasonable means that is available from the agency.
- (c) *Trained personnel*. Any consumer reporting agency shall provide trained personnel to explain to the consumer any information furnished to him pursuant to section 609 [§ 1681g] of this title.
- (d) *Persons accompanying consumer*. The consumer shall be permitted to be accompanied by one other person of his choosing, who shall furnish reasonable identification. A consumer reporting agency may require the consumer to furnish a written statement granting permission to the consumer reporting agency to discuss the consumer's file in such person's presence.
- (e) Limitation of liability. Except as provided in sections 616 and 617 [§§1681n and 1681o] of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 609, 610, or 615 [§§ 1681g, 1681h, or 1681m] of this title or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report, except as to false information furnished with malice or willful intent to injure such consumer.

§ 611. Procedure in case of disputed accuracy [15 U.S.C. § 1681i]

(a) Reinvestigations of Disputed Information

(1) Reinvestigation Required

- (A) In general. Subject to subsection (f), if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer or reseller.
- (B) Extension of period to reinvestigate. Except as provided in subparagraph (c), the 30-day period described in subparagraph (A) may be extended for not more than 15 additional days if the consumer reporting agency receives information from the consumer during that 30-day period that is relevant to the reinvestigation.
- (C) Limitations on extension of period to reinvestigate. Subparagraph (B) shall not apply to any reinvestigation in which, during the 30-day period described in subparagraph (A), the information that is the subject of the reinvestigation is found to be inaccurate or incomplete or the consumer reporting agency determines that the information cannot be verified.

(2) Prompt Notice of Dispute to Furnisher of Information

- (A) In general. Before the expiration of the 5-business-day period beginning on the date on which a consumer reporting agency receives notice of a dispute from any consumer or a reseller in accordance with paragraph (1), the agency shall provide notification of the dispute to any person who provided any item of information in dispute, at the address and in the manner established with the person. The notice shall include all relevant information regarding the dispute that the agency has received from the consumer or reseller.
- (B) Provision of other information. The consumer reporting agency shall promptly provide to the person who provided the information in dispute all relevant information regarding the dispute that is received by the agency from the consumer or the reseller after the period referred to in subparagraph (A) and before the end of the period referred to in paragraph (1)(A).

(3) Determination That Dispute Is Frivolous or Irrelevant

(A) In general. Notwithstanding paragraph (1), a consumer reporting agency may terminate a reinvestigation of information disputed by a consumer under that paragraph if the agency reasonably determines that the dispute by the consumer is frivolous or irrelevant, including by reason of a failure by a consumer to provide sufficient information to investigate the disputed information.

- (B) Notice of determination. Upon making any determination in accordance with subparagraph (A) that a dispute is frivolous or irrelevant, a consumer reporting agency shall notify the consumer of such determination not later than 5 business days after making such determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the agency.
- (C) Contents of notice. A notice under subparagraph (B) shall include
 - (i) the reasons for the determination under subparagraph (A); and
 - (ii) identification of any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of such information.
- (4) Consideration of consumer information. In conducting any reinvestigation under paragraph (1) with respect to disputed information in the file of any consumer, the consumer reporting agency shall review and consider all relevant information submitted by the consumer in the period described in paragraph (1)(A) with respect to such disputed information.
- (5) Treatment of Inaccurate or Unverifiable Information
 - (A) In general. If, after any reinvestigation under paragraph (1) of any information disputed by a consumer, an item of the information is found to be inaccurate or incomplete or cannot be verified, the consumer reporting agency shall—
 - (i) promptly delete that item of information from the file of the consumer, or modify that item of information, as appropriate, based on the results of the reinvestigation; and
 - (ii) promptly notify the furnisher of that information that the information has been modified or deleted from the file of the consumer.
 - (B) Requirements Relating to Reinsertion of Previously Deleted Material
 - (i) Certification of accuracy of information. If any information is deleted from a consumer's file pursuant to subparagraph (A), the information may not be reinserted in the file by the consumer reporting agency unless the person who furnishes the information certifies that the information is complete and accurate.
 - (ii) Notice to consumer. If any information that has been deleted from a consumer's file pursuant to subparagraph (A) is reinserted in the file, the consumer reporting agency shall notify the consumer of the reinsertion in writing not later than 5 business days after the reinsertion or, if authorized by the consumer for that purpose, by any other means available to the agency.

- (iii) Additional information. As part of, or in addition to, the notice under clause (ii), a consumer reporting agency shall provide to a consumer in writing not later than 5 business days after the date of the reinsertion
 - (I) a statement that the disputed information has been reinserted;
 - (II) the business name and address of any furnisher of information contacted and the telephone number of such furnisher, if reasonably available, or of any furnisher of information that contacted the consumer reporting agency, in connection with the reinsertion of such information; and
 - (III) a notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the disputed information.
- (C) Procedures to prevent reappearance. A consumer reporting agency shall maintain reasonable procedures designed to prevent the reappearance in a consumer's file, and in consumer reports on the consumer, of information that is deleted pursuant to this paragraph (other than information that is reinserted in accordance with subparagraph (B)(i)).
- (D) Automated reinvestigation system. Any consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall implement an automated system through which furnishers of information to that consumer reporting agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer's file to other such consumer reporting agencies.

(6) Notice of Results of Reinvestigation

- (A) *In general.* A consumer reporting agency shall provide written notice to a consumer of the results of a reinvestigation under this subsection not later than 5 business days after the completion of the reinvestigation, by mail or, if authorized by the consumer for that purpose, by other means available to the agency.
- (B) Contents. As part of, or in addition to, the notice under subparagraph (A), a consumer reporting agency shall provide to a consumer in writing before the expiration of the 5-day period referred to in subparagraph (A)
 - (i) a statement that the reinvestigation is completed;
 - (ii) a consumer report that is based upon the consumer's file as that file is revised as a result of the reinvestigation;
 - (iii) a notice that, if requested by the consumer, a description of the procedure used to determine the accuracy and completeness of the information shall be provided to the consumer by the agency, including the business name and address of any furnisher of information contacted in connection with such information and the telephone number of such furnisher, if reasonably available;

- (iv) a notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the information; and
- (v) a notice that the consumer has the right to request under subsection (d) that the consumer reporting agency furnish notifications under that subsection.
- (7) Description of reinvestigation procedure. A consumer reporting agency shall provide to a consumer a description referred to in paragraph (6)(B)(iii) by not later than 15 days after receiving a request from the consumer for that description.
- (8) Expedited dispute resolution. If a dispute regarding an item of information in a consumer's file at a consumer reporting agency is resolved in accordance with paragraph (5)(A) by the deletion of the disputed information by not later than 3 business days after the date on which the agency receives notice of the dispute from the consumer in accordance with paragraph (1)(A), then the agency shall not be required to comply with paragraphs (2), (6), and (7) with respect to that dispute if the agency
 - (A) provides prompt notice of the deletion to the consumer by telephone;
 - (B) includes in that notice, or in a written notice that accompanies a confirmation and consumer report provided in accordance with subparagraph (C), a statement of the consumer's right to request under subsection (d) that the agency furnish notifications under that subsection; and
 - (C) provides written confirmation of the deletion and a copy of a consumer report on the consumer that is based on the consumer's file after the deletion, not later than 5 business days after making the deletion.
- (b) *Statement of dispute*. If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.
- (c) Notification of consumer dispute in subsequent consumer reports. Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.
- (d) *Notification of deletion of disputed information*. Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) of this section to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information.

- (e) Treatment of Complaints and Report to Congress
 - (1) *In general*. The Bureau shall
 - (A) compile all complaints that it receives that a file of a consumer that is maintained by a consumer reporting agency described in section 603(p) contains incomplete or inaccurate information, with respect to which, the consumer appears to have disputed the completeness or accuracy with the consumer reporting agency or otherwise utilized the procedures provided by subsection (a); and
 - (B) transmit each such complaint to each consumer reporting agency involved.
 - (2) *Exclusion*. Complaints received or obtained by the Bureau pursuant to its investigative authority under the Consumer Financial Protection Act of 2010 shall not be subject to paragraph (1).
 - (3) Agency responsibilities. Each consumer reporting agency described in section 603(p) that receives a complaint transmitted by the Bureau pursuant to paragraph (1) shall
 - (A) review each such complaint to determine whether all legal obligations imposed on the consumer reporting agency under this title (including any obligation imposed by an applicable court or administrative order) have been met with respect to the subject matter of the complaint;
 - (B) provide reports on a regular basis to the Bureau regarding the determinations of and actions taken by the consumer reporting agency, if any, in connection with its review of such complaints; and
 - (C) maintain, for a reasonable time period, records regarding the disposition of each such complaint that is sufficient to demonstrate compliance with this subsection.
 - (4) *Rulemaking authority*. The Bureau may prescribe regulations, as appropriate to implement this subsection.
 - (5) Annual report. The Bureau shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives an annual report regarding information gathered by the Bureau under this subsection.
- (f) Reinvestigation Requirement Applicable to Resellers
 - (1) Exemption from general reinvestigation requirement. Except as provided in paragraph (2), a reseller shall be exempt from the requirements of this section.
 - (2) Action required upon receiving notice of a dispute. If a reseller receives a notice from a consumer of a dispute concerning the completeness or accuracy of any item of information contained in a consumer report on such consumer produced by the

reseller, the reseller shall, within 5 business days of receiving the notice, and free of charge –

- (A) determine whether the item of information is incomplete or inaccurate as a result of an act or omission of the reseller; and
- (B) (i) if the reseller determines that the item of information is incomplete or inaccurate as a result of an act or omission of the reseller, not later than 20 days after receiving the notice, correct the information in the consumer report or delete it; or
 - (ii) if the reseller determines that the item of information is not incomplete or inaccurate as a result of an act or omission of the reseller, convey the notice of the dispute, together with all relevant information provided by the consumer, to each consumer reporting agency that provided the reseller with the information that is the subject of the dispute, using an address or a notification mechanism specified by the consumer reporting agency for such notices.
- (3) Responsibility of consumer reporting agency to notify consumer through reseller. Upon the completion of a reinvestigation under this section of a dispute concerning the completeness or accuracy of any information in the file of a consumer by a consumer reporting agency that received notice of the dispute from a reseller under paragraph (2)
 - (A) the notice by the consumer reporting agency under paragraph (6), (7), or (8) of subsection (a) shall be provided to the reseller in lieu of the consumer; and
 - (B) the reseller shall immediately reconvey such notice to the consumer, including any notice of a deletion by telephone in the manner required under paragraph (8)(A).
- (4) Reseller reinvestigations. No provision of this subsection shall be construed as prohibiting a reseller from conducting a reinvestigation of a consumer dispute directly.

§ 612. Charges for certain disclosures [15 U.S.C. § 1681j]

See also 16 CFR Part 610 69 Fed. Reg. 35467 (06/24/04) 75 Fed. Reg. 9726 (03/03/10)

- (a) Free Annual Disclosure
 - (1) Nationwide Consumer Reporting Agencies
 - (A) In general. All consumer reporting agencies described in subsections (p) and (w) of section 603 shall make all disclosures pursuant to section 609 once during any 12-month period upon request of the consumer and without charge to the consumer.
 - (B) Centralized source. Subparagraph (A) shall apply with respect to a consumer reporting agency described in section 603(p) only if the request from the consumer is made using the centralized source established for such purpose in

accordance with section 211(c) of the Fair and Accurate Credit Transactions Act of 2003.

- (C) Nationwide Specialty Consumer Reporting Agency
 - (i) In general. The Bureau shall prescribe regulations applicable to each consumer reporting agency described in section 603(w) to require the establishment of a streamlined process for consumers to request consumer reports under subparagraph (A), which shall include, at a minimum, the establishment by each such agency of a toll-free telephone number for such requests.
 - (ii) *Considerations*. In prescribing regulations under clause (i), the Bureau shall consider—
 - (I) the significant demands that may be placed on consumer reporting agencies in providing such consumer reports;
 - (II) appropriate means to ensure that consumer reporting agencies can satisfactorily meet those demands, including the efficacy of a system of staggering the availability to consumers of such consumer reports; and
 - (III) the ease by which consumers should be able to contact consumer reporting agencies with respect to access to such consumer reports.
 - (iii)⁷ Date of issuance. The Bureau shall issue the regulations required by this subparagraph in final form not later than 6 months after the date of enactment of the Fair and Accurate Credit Transactions Act of 2003.
 - (iv)⁷ Consideration of ability to comply. The regulations of the Bureau under this subparagraph shall establish an effective date by which each nation-wide specialty consumer reporting agency (as defined in section 603(w)) shall be required to comply with subsection (a), which effective date
 - (I) shall be established after consideration of the ability of each nationwide specialty consumer reporting agency to comply with subsection (a); and
 - (II) shall be not later than 6 months after the date on which such regulations are issued in final form (or such additional period not to exceed 3 months, as the Bureau determines appropriate).
- (2) *Timing*. A consumer reporting agency shall provide a consumer report under paragraph (1) not later than 15 days after the date on which the request is received under paragraph (1).

⁷ Subsections 612(a)(1)(C)(iii) and (iv) are obsolete. They relate to the to the issuance and effective dates of the "free report" rules that the 2003 FACT Act required the <u>Commission</u> to publish. The rules were published on time in June 2004 and updated in March 2010. The subsections appear as written, including 2010 amendments to the FCRA that changed "Commission" to "Bureau" (effective July 21, 2011) in several places in the FCRA.

- (3) Reinvestigations. Notwithstanding the time periods specified in section 611(a)(1), a reinvestigation under that section by a consumer reporting agency upon a request of a consumer that is made after receiving a consumer report under this subsection shall be completed not later than 45 days after the date on which the request is received.
- (4) Exception for first 12 months of operation. This subsection shall not apply to a consumer reporting agency that has not been furnishing consumer reports to third parties on a continuing basis during the 12-month period preceding a request under paragraph (1), with respect to consumers residing nationwide.
- (b) Free disclosure after adverse notice to consumer. Each consumer reporting agency that maintains a file on a consumer shall make all disclosures pursuant to section 609 [§ 1681g] without charge to the consumer if, not later than 60 days after receipt by such consumer of a notification pursuant to section 615 [§ 1681m], or of a notification from a debt collection agency affiliated with that consumer reporting agency stating that the consumer's credit rating may be or has been adversely affected, the consumer makes a request under section 609 [§ 1681g].
- (c) Free disclosure under certain other circumstances. Upon the request of the consumer, a consumer reporting agency shall make all disclosures pursuant to section 609 [§ 1681g] once during any 12-month period without charge to that consumer if the consumer certifies in writing that the consumer
 - (1) is unemployed and intends to apply for employment in the 60-day period beginning on the date on which the certification is made;
 - (2) is a recipient of public welfare assistance; or
 - (3) has reason to believe that the file on the consumer at the agency contains inaccurate information due to fraud.
- (d) Free disclosures in connection with fraud alerts. Upon the request of a consumer, a consumer reporting agency described in section 603(p) shall make all disclosures pursuant to section 609 without charge to the consumer, as provided in subsections (a)(2) and (b)(2) of section 605A, as applicable.
- (e) Other charges prohibited. A consumer reporting agency shall not impose any charge on a consumer for providing any notification required by this title or making any disclosure required by this title, except as authorized by subsection (f).
- (f) Reasonable Charges Allowed for Certain Disclosures
 - (1) *In general*. In the case of a request from a consumer other than a request that is covered by any of subsections (a) through (d), a consumer reporting agency may impose a reasonable charge on a consumer
 - (A) for making a disclosure to the consumer pursuant to section 609 [§ 1681g], which charge

- (i) shall not exceed \$8;8 and
- (ii) shall be indicated to the consumer before making the disclosure; and
- (B) for furnishing, pursuant to 611(d) [§ 1681i], following a reinvestigation under section 611(a) [§ 1681i], a statement, codification, or summary to a person designated by the consumer under that section after the 30-day period beginning on the date of notification of the consumer under paragraph (6) or (8) of section 611(a) [§ 1681i] with respect to the reinvestigation, which charge
 - (i) shall not exceed the charge that the agency would impose on each designated recipient for a consumer report; and
 - (ii) shall be indicated to the consumer before furnishing such information.
- (2) *Modification of amount*. The Bureau shall increase the amount referred to in paragraph (1)(A)(i) on January 1 of each year, based proportionally on changes in the Consumer Price Index, with fractional changes rounded to the nearest fifty cents.⁸
- (g) Prevention of Deceptive Marketing of Credit Reports
 - (1) *In general*. Subject to rulemaking pursuant to section 205(b) of the Credit CARD Act of 2009, any advertisement for a free credit report in any medium shall prominently disclose in such advertisement that free credit reports are available under Federal law at AnnualCreditReport.com (or such other source as may be authorized under Federal law).
 - (2) *Television and radio advertisement*. In the case of an advertisement broadcast by television, the disclosures required under paragraph (1) shall be included in the audio and visual part of such advertisement. In the case of an advertisement broadcast by televison or radio, the disclosure required under paragraph (1) shall consist only of the following: "This is not the free credit report provided for by Federal law."

§ 613. Public record information for employment purposes [15 U.S.C. § 1681k]

- (a) *In general*. A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall
 - (1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or
 - (2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment

⁸ Pursuant to Section 612(f)(2), the Federal Trade Commission set the maximum charge at \$11.00, effective January 1, 2011. See 75 Fed. Reg. 80817 (Dec. 23, 2010). The Bureau will set the charge for 2012 and later years.

is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.

(b) Exemption for national security investigations. Subsection (a) does not apply in the case of an agency or department of the United States Government that seeks to obtain and use a consumer report for employment purposes, if the head of the agency or department makes a written finding as prescribed under section 604(b)(4)(A).

§ 614. Restrictions on investigative consumer reports [15 U.S.C. § 1681*l*]

Whenever a consumer reporting agency prepares an investigative consumer report, no adverse information in the consumer report (other than information which is a matter of public record) may be included in a subsequent consumer report unless such adverse information has been verified in the process of making such subsequent consumer report, or the adverse information was received within the three-month period preceding the date the subsequent report is furnished.

§ 615. Requirements on users of consumer reports [15 U.S.C. § 1681m]

- (a) Duties of users taking adverse actions on the basis of information contained in consumer reports. If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall
 - (1) provide oral, written, or electronic notice of the adverse action to the consumer;
 - (2) provide to the consumer written or electronic disclosure
 - (A) of a numerical credit score as defined in section 609(f)(2)(A) used by such person in taking any adverse action based in whole or in part on any information in a consumer report; and
 - (B) of the information set forth in subparagraphs (B) through (E) of section 609(f)(1);
 - (3) provide to the consumer orally, in writing, or electronically
 - (A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and
 - (B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and
 - (4) provide to the consumer an oral, written, or electronic notice of the consumer's right
 - (A) to obtain, under section 612 [§ 1681j], a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (3),

- which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and
- (B) to dispute, under section 611 [§ 1681i], with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.
- (b) Adverse Action Based on Information Obtained from Third Parties Other than Consumer Reporting Agencies
 - (1) *In general.* Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.
 - (2) Duties of Person Taking Certain Actions Based on Information Provided by Affiliate
 - (A) Duties, generally. If a person takes an action described in subparagraph (B) with respect to a consumer, based in whole or in part on information described in subparagraph (c), the person shall
 - (i) notify the consumer of the action, including a statement that the consumer may obtain the information in accordance with clause (ii); and
 - (ii) upon a written request from the consumer received within 60 days after transmittal of the notice required by clause (i), disclose to the consumer the nature of the information upon which the action is based by not later than 30 days after receipt of the request.
 - (B) Action described. An action referred to in subparagraph (A) is an adverse action described in section 603(k)(1)(A) [§ 1681a], taken in connection with a transaction initiated by the consumer, or any adverse action described in clause (i) or (ii) of section 603(k)(1)(B) [§ 1681a].
 - (C) Information described. Information referred to in subparagraph (A)
 - (i) except as provided in clause (ii), is information that
 - (I) is furnished to the person taking the action by a person related by common ownership or affiliated by common corporate control to the person taking the action; and

- (II) bears on the credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living of the consumer; and
- (ii) does not include
 - (I) information solely as to transactions or experiences between the consumer and the person furnishing the information; or
 - (II) information in a consumer report.
- (c) *Reasonable procedures to assure compliance*. No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.
- (d) Duties of Users Making Written Credit or Insurance Solicitations on the Basis of Information Contained in Consumer Files
 - (1) *In general*. Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, that is provided to that person under section 604(c)(1)(B) [§ 1681b], shall provide with each written solicitation made to the consumer regarding the transaction a clear and conspicuous statement that
 - (A) information contained in the consumer's consumer report was used in connection with the transaction;
 - (B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer;
 - (C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or insurability or does not furnish any required collateral;
 - (D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and
 - (E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 604(e) [§ 1681b].
 - (2) *Disclosure of address and telephone number; format.* A statement under paragraph (1) shall
 - (A) include the address and toll-free telephone number of the appropriate notification system established under section 604(e); and

- (B) be presented in such format and in such type size and manner as to be simple and easy to understand, as established by the Bureau, by rule, in consultation with the Federal Trade Commission, Federal banking agencies and the National Credit Union Administration.

 See also 16 CFR Part 642

 16 CFR Part 698 App A
 70 Fed. Reg. 5022 (01/31/05)
- (3) *Maintaining criteria on file*. A person who makes an offer of credit or insurance to a consumer under a credit or insurance transaction described in paragraph (1) shall maintain on file the criteria used to select the consumer to receive the offer, all criteria bearing on credit worthiness or insurability, as applicable, that are the basis for determining whether or not to extend credit or insurance pursuant to the offer, and any requirement for the furnishing of collateral as a condition of the extension of credit or insurance, until the expiration of the 3-year period beginning on the date on which the offer is made to the consumer.
- (4) Authority of federal agencies regarding unfair or deceptive acts or practices not affected. This section is not intended to affect the authority of any Federal or State agency to enforce a prohibition against unfair or deceptive acts or practices, including the making of false or misleading statements in connection with a credit or insurance transaction that is not initiated by the consumer.

(e) Red Flag Guidelines and Regulations Required

See also 16 CFR Part 681 72 Fed. Reg. 63772-74 (11/09/07) 74 Fed. Reg. 22640-41 (05/14/09)

- (1) *Guidelines*. The Federal banking agencies, the National Credit Union Administration, the Federal Trade Commission, the Commodity Futures Trading Commission, and the Securities and Exchange Commission shall jointly, with respect to the entities that are subject to their respective enforcement authority under section 621
 - (A) establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary;
 - (B) prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A), to identify possible risks to account holders or customers or to the safety and soundness of the institution or customers; and
 - (C) prescribe regulations applicable to card issuers to ensure that, if a card issuer receives notification of a change of address for an existing account, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account, the card issuer may not issue the additional or replacement card, unless the card issuer, in accordance with reasonable policies and procedures
 - (i) notifies the cardholder of the request at the former address of the cardholder and provides to the cardholder a means of promptly reporting incorrect address changes;

- (ii) notifies the cardholder of the request by such other means of communication as the cardholder and the card issuer previously agreed to; or
- (iii) uses other means of assessing the validity of the change of address, in accordance with reasonable policies and procedures established by the card issuer in accordance with the regulations prescribed under subparagraph (B).

(2) Criteria

- (A) In general. In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft.
- (B) Inactive accounts. In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall consider including reasonable guidelines providing that when a transaction occurs with respect to a credit or deposit account that has been inactive for more than 2 years, the creditor or financial institution shall follow reasonable policies and procedures that provide for notice to be given to a consumer in a manner reasonably designed to reduce the likelihood of identity theft with respect to such account.
- (3) Consistency with verification requirements. Guidelines established pursuant to paragraph (1) shall not be inconsistent with the policies and procedures required under section 5318(l) of title 31, United States Code.
- (4) Definitions. As used in this subsection, the term "creditor"
 - (A) means a creditor, as defined in section 702 of the Equal Credit Opportunity Act (15 U.S.C. 1691a), that regularly and in the ordinary course of business
 - (i) obtains or uses consumer reports, directly or indirectly, in connection with a credit transaction;
 - (ii) furnishes information to consumer reporting agencies, as described in section 623, in connection with a credit transaction; or
 - (iii) advances funds to or on behalf of a person, based on an obligation of the person to repay the funds or repayable from specific property pledged by or on behalf of the person;
 - (B) does not include a creditor described in subparagraph (A)(iii) that advances funds on behalf of a person for expenses incidental to a service provided by the creditor to that person; and
 - (C) includes any other type of creditor, as defined in that section 702, as the agency described in paragraph (1) having authority over that creditor may determine appropriate by rule promulgated by that agency, based on a determination that such creditor offers or maintains accounts that are subject to a reasonably foreseeable risk of identity theft.

- (f) Prohibition on Sale or Transfer of Debt Caused by Identity Theft
 - (1) *In general*. No person shall sell, transfer for consideration, or place for collection a debt that such person has been notified under section 605B has resulted from identity theft.
 - (2) *Applicability*. The prohibitions of this subsection shall apply to all persons collecting a debt described in paragraph (1) after the date of a notification under paragraph (1).
 - (3) Rule of construction. Nothing in this subsection shall be construed to prohibit
 - (A) the repurchase of a debt in any case in which the assignee of the debt requires such repurchase because the debt has resulted from identity theft;
 - (B) the securitization of a debt or the pledging of a portfolio of debt as collateral in connection with a borrowing; or
 - (C) the transfer of debt as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the assets of an entity.
- (g) *Debt collector communications concerning identity theft.* If a person acting as a debt collector (as that term is defined in title VIII) on behalf of a third party that is a creditor or other user of a consumer report is notified that any information relating to a debt that the person is attempting to collect may be fraudulent or may be the result of identity theft, that person shall
 - (1) notify the third party that the information may be fraudulent or may be the result of identity theft; and
 - (2) upon request of the consumer to whom the debt purportedly relates, provide to the consumer all information to which the consumer would otherwise be entitled if the consumer were not a victim of identity theft, but wished to dispute the debt under provisions of law applicable to that person.

(h) Duties of Users in Certain Credit Transactions

- (1) *In general*. Subject to rules prescribed as provided in paragraph (6), if any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person, based in whole or in part on a consumer report, the person shall provide an oral, written, or electronic notice to the consumer in the form and manner required by regulations prescribed in accordance with this subsection.
- (2) *Timing*. The notice required under paragraph (1) may be provided at the time of an application for, or a grant, extension, or other provision of, credit or the time of communication of an approval of an application for, or grant, extension, or other provision of, credit, except as provided in the regulations prescribed under paragraph (6).
- (3) Exceptions. No notice shall be required from a person under this subsection if –

- (A) the consumer applied for specific material terms and was granted those terms, unless those terms were initially specified by the person after the transaction was initiated by the consumer and after the person obtained a consumer report; or
- (B) the person has provided or will provide a notice to the consumer under subsection (a) in connection with the transaction.
- (4) Other notice not sufficient. A person that is required to provide a notice under subsection (a) cannot meet that requirement by providing a notice under this subsection.
- (5) Content and delivery of notice. A notice under this subsection shall, at a minimum
 - (A) include a statement informing the consumer that the terms offered to the consumer are set based on information from a consumer report;
 - (B) identify the consumer reporting agency furnishing the report;
 - (C) include a statement informing the consumer that the consumer may obtain a copy of a consumer report from that consumer reporting agency without charge;
 - (D) include the contact information specified by that consumer reporting agency for obtaining such consumer reports (including a toll-free telephone number established by the agency in the case of a consumer reporting agency described in section 603(p)); and
 - (E) include a statement informing the consumer of
 - (i) a numerical credit score as defined in section 609(f)(2)(A), used by such person in making the credit decision described in paragraph (1) based in whole or in part on any information in a consumer report; and
 - (ii) the information set forth in subparagraphs (B) through (E) of section 609(f)(1).

See also 16 CFR Part 610 75 Fed. Reg. 2724 (01/15/10)

(6) Rulemaking

- (A) Rules required. The Bureau shall prescribe rules to carry out this subsection.
- (B) *Content.* Rules required by subparagraph (A) shall address, but are not limited to
 - (i) the form, content, time, and manner of delivery of any notice under this subsection;
 - (ii) clarification of the meaning of terms used in this subsection, including what credit terms are material, and when credit terms are materially less favorable;

- (iii) exceptions to the notice requirement under this subsection for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers;
- (iv) a model notice that may be used to comply with this subsection; and
- (v) the timing of the notice required under paragraph (1), including the circumstances under which the notice must be provided after the terms offered to the consumer were set based on information from a consumer report.
- (7) *Compliance*. A person shall not be liable for failure to perform the duties required by this section if, at the time of the failure, the person maintained reasonable policies and procedures to comply with this section.

(8) Enforcement

- (A) *No civil actions*. Sections 616 and 617 shall not apply to any failure by any person to comply with this section.
- (B) *Administrative enforcement*. This section shall be enforced exclusively under section 621 by the Federal agencies and officials identified in that section.

§ 616. Civil liability for willful noncompliance [15 U.S.C. § 1681n]

- (a) *In general*. Any person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of
 - (1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000; or
 - (B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or \$1,000, whichever is greater;
 - (2) such amount of punitive damages as the court may allow; and
 - (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.
- (b) Civil liability for knowing noncompliance. Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or \$1,000, whichever is greater.
- (c) Attorney's fees. Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(d) Clarification of willful noncompliance. For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and the date of the enactment of this subsection but otherwise complied with the requirements of section 605(g) for such receipt shall not be in willful noncompliance with section 605(g) by reason of printing such expiration date on the receipt.

§ 617. Civil liability for negligent noncompliance [15 U.S.C. § 16810]

- (a) *In general*. Any person who is negligent in failing to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of
 - (1) any actual damages sustained by the consumer as a result of the failure; and
 - (2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.
- (b) *Attorney's fees*. On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

§ 618. Jurisdiction of courts; limitation of actions [15 U.S.C. § 1681p]

An action to enforce any liability created under this title may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction, not later than the earlier of (1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or (2) 5 years after the date on which the violation that is the basis for such liability occurs.

§ 619. Obtaining information under false pretenses [15 U.S.C. § 1681q]

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under title 18, United States Code, imprisoned for not more than 2 years, or both.

§ 620. Unauthorized disclosures by officers or employees [15 U.S.C. § 1681r]

Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined under title 18, United States Code, imprisoned for not more than 2 years, or both.

§ 621. Administrative enforcement [15 U.S.C. § 1681s]

- (a) Enforcement by Federal Trade Commission.
 - (1) In General. The Federal Trade Commission shall be authorized to enforce compliance with the requirements imposed by this title under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under any of subparagraphs (A) through (G) of subsection (b)(1), and subject to subtitle B of the Consumer Financial Protection Act of 2010, subsection (b). For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this title shall constitute an unfair or deceptive act or practice in commerce, in violation of section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)), and shall be subject to enforcement by the Federal Trade Commission under section 5(b) of that Act with respect to any consumer reporting agency or person that is subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this title and to require the filing of reports, the production of documents, and the appearance of witnesses, as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title. Any person violating any of the provisions of this title shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions of such Act are part of this title.

(2) Penalties

- (A) Knowing Violations. Except as otherwise provided by subtitle B of the Consumer Financial Protection Act of 2010, in the event of a knowing violation, which constitutes a pattern or practice of violations of this title, the Federal Trade Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person that violates this title. In such action, such person shall be liable for a civil penalty of not more than \$2,500 per violation.⁹
- (B) Determining Penalty Amount. In determining the amount of a civil penalty under subparagraph (A), the court shall take into account the degree of culpability, any history of such prior conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.
- (C) Limitation. Notwithstanding paragraph (2), a court may not impose any civil penalty on a person for a violation of section 623(a)(1), unless the person has been enjoined from committing the violation, or ordered not to commit the violation, in an action or proceeding brought by or on behalf of the Federal Trade Commission, and has violated the injunction or order, and the court

⁹Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, the Federal Trade Commission increased the maximum civil penalty to \$3,500 per violation. See 74 Fed. Reg. 857 (Jan. 9, 2009).

may not impose any civil penalty for any violation occurring before the date of the violation of the injunction or order

- (b) Enforcement by Other Agencies.
 - (1) *In General*. Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with the requirements imposed under this title with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to section 615(d) shall be enforced under
 - (A) section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to
 - (i) any national bank or State savings association, and any Federal branch or Federal agency of a foreign bank;
 - (ii) any member bank of the Federal Reserve System (other than a national bank), a branch or agency of a foreign bank (other than a Federal branch, Federal agency, or insured State branch of a foreign bank), a commercial lending company owned or controlled by a foreign bank, and any organization operating under section 25 or 25A of the Federal Reserve Act; and
 - (iii) any bank or Federal savings association insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System) and any insured State branch of a foreign bank;
 - (B) the Federal Credit Union Act (12 U.S.C. 1751 et seq.), by the Administrator of the National Credit Union Administration with respect to any Federal credit union;
 - (C) subtitle IV of title 49, United States Code, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;
 - (D) the Federal Aviation Act of 1958 (49 U.S.C. App. 1301 et seq.), by the Secretary of Transportation, with respect to any air carrier or foreign air carrier subject to that Act;
 - (E) the Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.) (except as provided in section 406 of that Act), by the Secretary of Agriculture, with respect to any activities subject to that Act;
 - (F) the Commodity Exchange Act, with respect to a person subject to the jurisdiction of the Commodity Futures Trading Commission;
 - (G) the Federal securities laws, and any other laws that are subject to the jurisdiction of the Securities and Exchange Commission, with respect to a

- person that is subject to the jurisdiction of the Securities and Exchange Commission; and
- (H) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this title.
- (2) *Incorporated Definitions*. The terms used in paragraph (1) that are not defined in this title or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) have the same meanings as in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) State Action for Violations

- (1) *Authority of states*. In addition to such other remedies as are provided under State law, if the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this title, the State
 - (A) may bring an action to enjoin such violation in any appropriate United States district court or in any other court of competent jurisdiction;
 - (B) subject to paragraph (5), may bring an action on behalf of the residents of the State to recover
 - (i) damages for which the person is liable to such residents under sections 616 and 617 [§§ 1681n and 1681o] as a result of the violation;
 - (ii) in the case of a violation described in any of paragraphs (1) through (3) of section 623(c) [§ 1681s-2], damages for which the person would, but for section 623(c), be liable to such residents as a result of the violation; or
 - (iii) damages of not more than \$1,000 for each willful or negligent violation; and
- (C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.
- (2) Rights of federal regulators. The State shall serve prior written notice of any action under paragraph (1) upon the Bureau and the Federal Trade Commission or the appropriate Federal regulator determined under subsection (b) and provide the Bureau and the Federal Trade Commission or appropriate Federal regulator with a copy of its complaint, except in any case in which such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Bureau and the Federal Trade Commission or appropriate Federal regulator shall have the right
 - (A) to intervene in the action;
 - (B) upon so intervening, to be heard on all matters arising therein;
 - (C) to remove the action to the appropriate United States district court; and

- (D) to file petitions for appeal.
- (3) *Investigatory powers*. For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.
- (4) Limitation on state action while federal action pending. If the Bureau, the Federal Trade Commission, or the appropriate Federal regulator has instituted a civil action or an administrative action under section 8 of the Federal Deposit Insurance Act for a violation of this title, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Bureau, the Federal Trade Commission, or the appropriate Federal regulator for any violation of this title that is alleged in that complaint.

(5) Limitations on State Actions for Certain Violations

- (A) Violation of injunction required. A State may not bring an action against a person under paragraph (1)(B) for a violation described in any of paragraphs (1) through (3) of section 623(c), unless
 - (i) the person has been enjoined from committing the violation, in an action brought by the State under paragraph (1)(A); and
 - (ii) the person has violated the injunction.
- (B) Limitation on damages recoverable. In an action against a person under paragraph (1)(B) for a violation described in any of paragraphs (1) through (3) of section 623(c), a State may not recover any damages incurred before the date of the violation of an injunction on which the action is based.
- (d) *Enforcement under other authority*. For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this title any other authority conferred on it by law.

(e) Regulatory Authority

(1) *In General*. The Bureau shall prescribe such regulations as are necessary to carry out the purposes of this title, except with respect to sections 615(e) and 628. The Bureau may prescribe regulations as may be necessary or appropriate to administer and carry out the purposes and objectives of this title, and to prevent evasions thereof or to facilitate compliance therewith. Except as provided in section 1029(a) of the Consumer Financial Protection Act of 2010, the regulations prescribed by the Bureau under this title shall apply to any person that is subject to this title, notwithstanding the enforcement authorities granted to other agencies under this section.

(2) *Deference*. Notwithstanding any power granted to any Federal agency under this title, the deference that a court affords to a Federal agency with respect to a determination made by such agency relating to the meaning or interpretation of any provision of this title that is subject to the jurisdiction of such agency shall be applied as if that agency were the only agency authorized to apply, enforce, interpret, or administer the provisions of this title The regulations prescribed by the Bureau under this title shall apply to any person that is subject to this title, notwithstanding the enforcement authorities granted to other agencies under this section.

(f) Coordination of Consumer Complaint Investigations

- (1) *In general*. Each consumer reporting agency described in section 603(p) shall develop and maintain procedures for the referral to each other such agency of any consumer complaint received by the agency alleging identity theft, or requesting a fraud alert under section 605A or a block under section 605B.
- (2) Model form and procedure for reporting identity theft. The Bureau, in consultation with the Federal Trade Commission, the Federal banking agencies, and the National Credit Union Administration, shall develop a model form and model procedures to be used by consumers who are victims of identity theft for contacting and informing creditors and consumer reporting agencies of the fraud. See also 70 Fed.Reg. 21792 (04/27/05)
- (3) Annual summary reports. Each consumer reporting agency described in section 603(p) shall submit an annual summary report to the Bureau on consumer complaints received by the agency on identity theft or fraud alerts.
- (g) *Bureau regulation of coding of trade names*. If the Bureau determines that a person described in paragraph (9) of section 623(a) has not met the requirements of such paragraph, the Bureau shall take action to ensure the person's compliance with such paragraph, which may include issuing model guidance or prescribing reasonable policies and procedures, as necessary to ensure that such person complies with such paragraph.

§ 622. Information on overdue child support obligations [15 U.S.C. § 1681s-1]

Notwithstanding any other provision of this title, a consumer reporting agency shall include in any consumer report furnished by the agency in accordance with section 604 [§ 1681b] of this title, any information on the failure of the consumer to pay overdue support which

(1) is provided

- (A) to the consumer reporting agency by a State or local child support enforcement agency; or
- (B) to the consumer reporting agency and verified by any local, State, or Federal government agency; and
- (2) antedates the report by 7 years or less.

§ 623. Responsibilities of furnishers of information to consumer reporting agencies

[15 U.S.C. § 1681s-2]

(a) Duty of Furnishers of Information to Provide Accurate Information

(1) Prohibition

- (A) Reporting information with actual knowledge of errors. A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.
- (B) Reporting information after notice and confirmation of errors. A person shall not furnish information relating to a consumer to any consumer reporting agency if
 - (i) the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and
 - (ii) the information is, in fact, inaccurate.
- (C) No address requirement. A person who clearly and conspicuously specifies to the consumer an address for notices referred to in subparagraph (B) shall not be subject to subparagraph (A); however, nothing in subparagraph (B) shall require a person to specify such an address.
- (D) *Definition*. For purposes of subparagraph (A), the term "reasonable cause to believe that the information is inaccurate" means having specific knowledge, other than solely allegations by the consumer, that would cause a reasonable person to have substantial doubts about the accuracy of the information.
- (2) Duty to correct and update information. A person who
 - (A) regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and
 - (B) has furnished to a consumer reporting agency information that the person determines is not complete or accurate, shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate.
- (3) Duty to provide notice of dispute. If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer.

(4) Duty to provide notice of closed accounts. A person who regularly and in the ordinary course of business furnishes information to a consumer reporting agency regarding a consumer who has a credit account with that person shall notify the agency of the voluntary closure of the account by the consumer, in information regularly furnished for the period in which the account is closed.

(5) Duty to Provide Notice of Delinquency of Accounts

- (A) In general. A person who furnishes information to a consumer reporting agency regarding a delinquent account being placed for collection, charged to profit or loss, or subjected to any similar action shall, not later than 90 days after furnishing the information, notify the agency of the date of delinquency on the account, which shall be the month and year of the commencement of the delinquency on the account that immediately preceded the action.
- (B) Rule of construction. For purposes of this paragraph only, and provided that the consumer does not dispute the information, a person that furnishes information on a delinquent account that is placed for collection, charged for profit or loss, or subjected to any similar action, complies with this paragraph, if
 - (i) the person reports the same date of delinquency as that provided by the creditor to which the account was owed at the time at which the commencement of the delinquency occurred, if the creditor previously reported that date of delinquency to a consumer reporting agency;
 - (ii) the creditor did not previously report the date of delinquency to a consumer reporting agency, and the person establishes and follows reasonable procedures to obtain the date of delinquency from the creditor or another reliable source and reports that date to a consumer reporting agency as the date of delinquency; or
 - (iii) the creditor did not previously report the date of delinquency to a consumer reporting agency and the date of delinquency cannot be reasonably obtained as provided in clause (ii), the person establishes and follows reasonable procedures to ensure the date reported as the date of delinquency precedes the date on which the account is placed for collection, charged to profit or loss, or subjected to any similar action, and reports such date to the credit reporting agency.

(6) Duties of Furnishers Upon Notice of Identity Theft-Related Information

- (A) Reasonable procedures. A person that furnishes information to any consumer reporting agency shall have in place reasonable procedures to respond to any notification that it receives from a consumer reporting agency under section 605B relating to information resulting from identity theft, to prevent that person from refurnishing such blocked information.
- (B) Information alleged to result from identity theft. If a consumer submits an identity theft report to a person who furnishes information to a consumer reporting agency at the address specified by that person for receiving such

reports stating that information maintained by such person that purports to relate to the consumer resulted from identity theft, the person may not furnish such information that purports to relate to the consumer to any consumer reporting agency, unless the person subsequently knows or is informed by the consumer that the information is correct.

(7) Negative Information

(A) Notice to Consumer Required

- (i) In general. If any financial institution that extends credit and regularly and in the ordinary course of business furnishes information to a consumer reporting agency described in section 603(p) furnishes negative information to such an agency regarding credit extended to a customer, the financial institution shall provide a notice of such furnishing of negative information, in writing, to the customer.
- (ii) Notice effective for subsequent submissions. After providing such notice, the financial institution may submit additional negative information to a consumer reporting agency described in section 603(p) with respect to the same transaction, extension of credit, account, or customer without providing additional notice to the customer.

(B) Time of Notice

- (i) In general. The notice required under subparagraph (A) shall be provided to the customer prior to, or no later than 30 days after, furnishing the negative information to a consumer reporting agency described in section 603(p).
- (ii) Coordination with new account disclosures. If the notice is provided to the customer prior to furnishing the negative information to a consumer reporting agency, the notice may not be included in the initial disclosures provided under section 127(a) of the Truth in Lending Act.
- (C) Coordination with other disclosures. The notice required under subparagraph (A)
 - (i) may be included on or with any notice of default, any billing statement, or any other materials provided to the customer; and
 - (ii) must be clear and conspicuous.

(D) Model Disclosure

See also 12 CFR Part 222, App B 70 Fed. Reg. 33281 (06/15/04)

(i) Duty of Bureau. The Bureau shall prescribe a brief model disclosure that a financial institution may use to comply with subparagraph (A), which shall not exceed 30 words.

- (ii) *Use of model not required.* No provision of this paragraph may be construed to require a financial institution to use any such model form prescribed by the Bureau.
- (iii) Compliance using model. A financial institution shall be deemed to be in compliance with subparagraph (A) if the financial institution uses any model form prescribed by the Bureau under this subparagraph, or the financial institution uses any such model form and rearranges its format.
- (E) Use of notice without submitting negative information. No provision of this paragraph shall be construed as requiring a financial institution that has provided a customer with a notice described in subparagraph (A) to furnish negative information about the customer to a consumer reporting agency.
- (F) Safe harbor. A financial institution shall not be liable for failure to perform the duties required by this paragraph if, at the time of the failure, the financial institution maintained reasonable policies and procedures to comply with this paragraph or the financial institution reasonably believed that the institution is prohibited, by law, from contacting the consumer.
- (G) Definitions. For purposes of this paragraph, the following definitions shall apply:
 - (i) The term "negative information" means information concerning a customer's delinquencies, late payments, insolvency, or any form of default.
 - (ii) The terms "customer" and "financial institution" have the same meanings as in section 509 Public Law 106-102.
- (8) Ability of Consumer to Dispute Information Directly with Furnisher

 See also 16 CFR Part 660.4
 74 Fed. Reg. 31484 (07/01/09)
 - (A) In general. The Bureau, in consultation with the Federal Trade Commission, the Federal banking agencies, and the National Credit Union Administration, shall prescribe regulations that shall identify the circumstances under which a furnisher shall be required to reinvestigate a dispute concerning the accuracy of information contained in a consumer report on the consumer, based on a direct request of a consumer.
 - (B) *Considerations*. In prescribing regulations under subparagraph (A), the agencies shall weigh
 - (i) the benefits to consumers with the costs on furnishers and the credit reporting system;
 - (ii) the impact on the overall accuracy and integrity of consumer reports of any such requirements;
 - (iii) whether direct contact by the consumer with the furnisher would likely result in the most expeditious resolution of any such dispute; and

- (iv) the potential impact on the credit reporting process if credit repair organizations, as defined in section 403(3) [15 U.S.C. §1679a(3)], including entities that would be a credit repair organization, but for section 403(3)(B)(i), are able to circumvent the prohibition in subparagraph (G).
- (C) Applicability. Subparagraphs (D) through (G) shall apply in any circumstance identified under the regulations promulgated under subparagraph (A).
- (D) Submitting a notice of dispute. A consumer who seeks to dispute the accuracy of information shall provide a dispute notice directly to such person at the address specified by the person for such notices that
 - (i) identifies the specific information that is being disputed;
 - (ii) explains the basis for the dispute; and
 - (iii) includes all supporting documentation required by the furnisher to substantiate the basis of the dispute.
- (E) Duty of person after receiving notice of dispute. After receiving a notice of dispute from a consumer pursuant to subparagraph (D), the person that provided the information in dispute to a consumer reporting agency shall
 - (i) conduct an investigation with respect to the disputed information;
 - (ii) review all relevant information provided by the consumer with the notice;
 - (iii) complete such person's investigation of the dispute and report the results of the investigation to the consumer before the expiration of the period under section 611(a)(1) within which a consumer reporting agency would be required to complete its action if the consumer had elected to dispute the information under that section; and
 - (iv) if the investigation finds that the information reported was inaccurate, promptly notify each consumer reporting agency to which the person furnished the inaccurate information of that determination and provide to the agency any correction to that information that is necessary to make the information provided by the person accurate.
- (F) Frivolous or Irrelevant Dispute
 - (i) In general. This paragraph shall not apply if the person receiving a notice of a dispute from a consumer reasonably determines that the dispute is frivolous or irrelevant, including
 - (I) by reason of the failure of a consumer to provide sufficient information to investigate the disputed information; or
 - (II) the submission by a consumer of a dispute that is substantially the same as a dispute previously submitted by or for the consumer, either directly to the person or through a consumer reporting agency under

- subsection (b), with respect to which the person has already performed the person's duties under this paragraph or subsection (b), as applicable.
- (ii) Notice of determination. Upon making any determination under clause (i) that a dispute is frivolous or irrelevant, the person shall notify the consumer of such determination not later than 5 business days after making such determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the person.
- (iii) Contents of notice. A notice under clause (ii) shall include--
 - (I) the reasons for the determination under clause (i); and
 - (II) identification of any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of such information.
- (G) Exclusion of credit repair organizations. This paragraph shall not apply if the notice of the dispute is submitted by, is prepared on behalf of the consumer by, or is submitted on a form supplied to the consumer by, a credit repair organization, as defined in section 403(3), or an entity that would be a credit repair organization, but for section 403(3)(B)(i).
- (9) Duty to provide notice of status as medical information furnisher. A person whose primary business is providing medical services, products, or devices, or the person's agent or assignee, who furnishes information to a consumer reporting agency on a consumer shall be considered a medical information furnisher for purposes of this title, and shall notify the agency of such status.
- (b) Duties of Furnishers of Information upon Notice of Dispute
 - (1) *In general*. After receiving notice pursuant to section 611(a)(2) [§ 1681i] of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall
 - (A) conduct an investigation with respect to the disputed information;
 - (B) review all relevant information provided by the consumer reporting agency pursuant to section 611(a)(2) [§ 1681i];
 - (C) report the results of the investigation to the consumer reporting agency;
 - (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and

- (E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly—
 - (i) modify that item of information;
 - (ii) delete that item of information; or
 - (iii) permanently block the reporting of that item of information.
- (2) Deadline. A person shall complete all investigations, reviews, and reports required under paragraph (1) regarding information provided by the person to a consumer reporting agency, before the expiration of the period under section 611(a)(1) [§ 1681i] within which the consumer reporting agency is required to complete actions required by that section regarding that information.
- (c) *Limitation on liability*. Except as provided in section 621(c)(1)(B), sections 616 and 617 do not apply to any violation of
 - (1) subsection (a) of this section, including any regulations issued thereunder;
 - (2) subsection (e) of this section, except that nothing in this paragraph shall limit, expand, or otherwise affect liability under section 616 or 617, as applicable, for violations of subsection (b) of this section; or
 - (3) subsection (e) of section 615.
- (d) *Limitation on enforcement*. The provisions of law described in paragraphs (1) through (3) of subsection (c) (other than with respect to the exception described in paragraph (2) of subsection (c)) shall be enforced exclusively as provided under section 621 by the Federal agencies and officials and the State officials identified in section 621.
- (e) Accuracy Guidelines and Regulations Required

 See also 16 CFR Part 660
 74 Fed. Reg. 31484 (07/01/09)
 - (1) *Guidelines*. The Bureau shall, with respect to persons or entities that are subject to the enforcement authority of the Bureau under section 621
 - (A) establish and maintain guidelines for use by each person that furnishes information to a consumer reporting agency regarding the accuracy and integrity of the information relating to consumers that such entities furnish to consumer reporting agencies, and update such guidelines as often as necessary; and
 - (B) prescribe regulations requiring each person that furnishes information to a consumer reporting agency to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A).

- (2) Criteria. In developing the guidelines required by paragraph (1)(A), the Bureau shall
 - (A) identify patterns, practices, and specific forms of activity that can compromise the accuracy and integrity of information furnished to consumer reporting agencies;
 - (B) review the methods (including technological means) used to furnish information relating to consumers to consumer reporting agencies;
 - (C) determine whether persons that furnish information to consumer reporting agencies maintain and enforce policies to ensure the accuracy and integrity of information furnished to consumer reporting agencies; and
 - (D) examine the policies and processes that persons that furnish information to consumer reporting agencies employ to conduct re investigations and correct inaccurate information relating to consumers that has been furnished to consumer reporting agencies.

§ 624. Affiliate sharing [15 U.S.C. § 1681s-3]

See also 16 CFR Parts 680, 698 Appx C 72 Fed. Reg. 61455-64 (10/30/07) 74 Fed. Reg. 22639-40 (05/14/09)

- (a) Special Rule for Solicitation for Purposes of Marketing
 - (1) *Notice*. Any person that receives from another person related to it by common ownership or affiliated by corporate control a communication of information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 603(d)(2)(A), may not use the information to make a solicitation for marketing purposes to a consumer about its products or services, unless--
 - (A) it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons for purposes of making such solicitations to the consumer; and
 - (B) the consumer is provided an opportunity and a simple method to prohibit the making of such solicitations to the consumer by such person.

(2) Consumer Choice

- (A) In general. The notice required under paragraph (1) shall allow the consumer the opportunity to prohibit all solicitations referred to in such paragraph, and may allow the consumer to choose from different options when electing to prohibit the sending of such solicitations, including options regarding the types of entities and information covered, and which methods of delivering solicitations the consumer elects to prohibit.
- (B) Format. Notwithstanding subparagraph (A), the notice required under paragraph (1) shall be clear, conspicuous, and concise, and any method provided under paragraph (1)(B) shall be simple. The regulations prescribed to implement this section shall provide specific guidance regarding how to comply with such standards.

(3) Duration

- (A) In general. The election of a consumer pursuant to paragraph (1)(B) to prohibit the making of solicitations shall be effective for at least 5 years, beginning on the date on which the person receives the election of the consumer, unless the consumer requests that such election be revoked.
- (B) Notice upon expiration of effective period. At such time as the election of a consumer pursuant to paragraph (1)(B) is no longer effective, a person may not use information that the person receives in the manner described in paragraph (1) to make any solicitation for marketing purposes to the consumer, unless the consumer receives a notice and an opportunity, using a simple method, to extend the opt-out for another period of at least 5 years, pursuant to the procedures described in paragraph (1).
- (4) Scope. This section shall not apply to a person
 - (A) using information to make a solicitation for marketing purposes to a consumer with whom the person has a pre-existing business relationship;
 - (B) using information to facilitate communications to an individual for whose benefit the person provides employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan;
 - (C) using information to perform services on behalf of another person related by common ownership or affiliated by corporate control, except that this subparagraph shall not be construed as permitting a person to send solicitations on behalf of another person, if such other person would not be permitted to send the solicitation on its own behalf as a result of the election of the consumer to prohibit solicitations under paragraph (1)(B);
 - (D) using information in response to a communication initiated by the consumer;
 - (E) using information in response to solicitations authorized or requested by the consumer; or
 - (F) if compliance with this section by that person would prevent compliance by that person with any provision of State insurance laws pertaining to unfair discrimination in any State in which the person is lawfully doing business.
- (5) *No retroactivity*. This subsection shall not prohibit the use of information to send a solicitation to a consumer if such information was received prior to the date on which persons are required to comply with regulations implementing this subsection.
- (b) *Notice for other purposes permissible*. A notice or other disclosure under this section may be coordinated and consolidated with any other notice required to be issued under any other provision of law by a person that is subject to this section, and a notice or other

- disclosure that is equivalent to the notice required by subsection (a), and that is provided by a person described in subsection (a) to a consumer together with disclosures required by any other provision of law, shall satisfy the requirements of subsection (a).
- (c) *User requirements*. Requirements with respect to the use by a person of information received from another person related to it by common ownership or affiliated by corporate control, such as the requirements of this section, constitute requirements with respect to the exchange of information among persons affiliated by common ownership or common corporate control, within the meaning of section 625(b)(2).
- (d) Definitions. For purposes of this section, the following definitions shall apply:
 - (1) The term "pre-existing business relationship" means a relationship between a person, or a person's licensed agent, and a consumer, based on—
 - (A) a financial contract between a person and a consumer which is in force;
 - (B) the purchase, rental, or lease by the consumer of that person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and that person during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this section;
 - (C) an inquiry or application by the consumer regarding a product or service offered by that person, during the 3-month period immediately preceding the date on which the consumer is sent a solicitation covered by this section; or
 - (D) any other pre-existing customer relationship defined in the regulations implementing this section.
 - (2) The term "solicitation" means the marketing of a product or service initiated by a person to a particular consumer that is based on an exchange of information described in subsection (a), and is intended to encourage the consumer to purchase such product or service, but does not include communications that are directed at the general public or determined not to be a solicitation by the regulations prescribed under this section.

§ 625. Relation to State laws [15 U.S.C. § 1681t]

- (a) *In general*. Except as provided in subsections (b) and (c), this title does not annul, alter, affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency.
- (b) *General exceptions*. No requirement or prohibition may be imposed under the laws of any State
 - (1) with respect to any subject matter regulated under

- (A) subsection (c) or (e) of section 604 [§ 1681b], relating to the prescreening of consumer reports;
- (B) section 611 [§ 1681i], relating to the time by which a consumer reporting agency must take any action, including the provision of notification to a consumer or other person, in any procedure related to the disputed accuracy of information in a consumer's file, except that this subparagraph shall not apply to any State law in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996;
- (C) subsections (a) and (b) of section 615 [§ 1681m], relating to the duties of a person who takes any adverse action with respect to a consumer;
- (D) section 615(d) [§ 1681m], relating to the duties of persons who use a consumer report of a consumer in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance;
- (E) section 605 [§ 1681c], relating to information contained in consumer reports, except that this subparagraph shall not apply to any State law in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996;
- (F) section 623 [§ 1681s-2], relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply
 - (i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996); or
 - (ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996);
- (G) section 609(e), relating to information available to victims under section 609(e);
- (H) section 624, relating to the exchange and use of information to make a solicitation for marketing purposes; or
- (I) section 615(h), relating to the duties of users of consumer reports to provide notice with respect to terms in certain credit transactions;
- (2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, except that this paragraph shall not apply with respect to subsection (a) or (c)(1) of section 2480e of title 9, Vermont Statutes Annotated (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996);

- (3) with respect to the disclosures required to be made under subsection (c), (d), (e), or (g) of section 609, or subsection (f) of section 609 relating to the disclosure of credit scores for credit granting purposes, except that this paragraph
 - (A) shall not apply with respect to sections 1785.10, 1785.16, and 1785.20.2 of the California Civil Code (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003) and section 1785.15 through section 1785.15.2 of such Code (as in effect on such date);
 - (B) shall not apply with respect to sections 5-3-106(2) and 212-14.3-104.3 of the Colorado Revised Statutes (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003); and
 - (C) shall not be construed as limiting, annulling, affecting, or superseding any provision of the laws of any State regulating the use in an insurance activity, or regulating disclosures concerning such use, of a credit-based insurance score of a consumer by any person engaged in the business of insurance;
- (4) with respect to the frequency of any disclosure under section 612(a), except that this paragraph shall not apply
 - (A) with respect to section 12-14.3-105(1)(d) of the Colorado Revised Statutes (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003);
 - (B) with respect to section 10-1-393(29)(C) of the Georgia Code (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003);
 - (C) with respect to section 1316.2 of title 10 of the Maine Revised Statutes (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003);
 - (D) with respect to sections 14-1209(a)(1) and 14-1209(b)(1)(i) of the Commercial Law Article of the Code of Maryland (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003);
 - (E) with respect to section 59(d) and section 59(e) of chapter 93 of the General Laws of Massachusetts (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003);
 - (F) with respect to section 56:11-37.10(a)(1) of the New Jersey Revised Statutes (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003); or
 - (G) with respect to section 2480c(a)(1) of title 9 of the Vermont Statutes Annotated (as in effect on the date of enactment of the Fair and Accurate Credit Transactions Act of 2003); or
- (5) with respect to the conduct required by the specific provisions of –

- (A) section 605(g);
- (B) section 605A;
- (C) section 605B;
- (D) section 609(a)(1)(A);
- (E) section 612(a);
- (F) subsections (e), (f), and (g) of section 615;
- (G) section 621(f);
- (H) section 623(a)(6); or
- (I) section 628.
- (c) Definition of firm offer of credit or insurance. Notwithstanding any definition of the term "firm offer of credit or insurance" (or any equivalent term) under the laws of any State, the definition of that term contained in section 603(*l*) [§ 1681a] shall be construed to apply in the enforcement and interpretation of the laws of any State governing consumer reports.
- (d) *Limitations*. Subsections (b) and (c) do not affect any settlement, agreement, or consent judgment between any State Attorney General and any consumer reporting agency in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996.

§ 626. Disclosures to FBI for counterintelligence purposes [15 U.S.C. § 1681u]

- (a) *Identity of financial institutions.* Notwithstanding section 604 [§ 1681b] or any other provision of this title, a consumer reporting agency shall furnish to the Federal Bureau of Investigation the names and addresses of all financial institutions (as that term is defined in section 1101 of the Right to Financial Privacy Act of 1978 [12 U.S.C. § 3401]) at which a consumer maintains or has maintained an account, to the extent that information is in the files of the agency, when presented with a written request for that information, signed by the Director of the Federal Bureau of Investigation, or the Director's designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director, which certifies compliance with this section. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing, that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.
- (b) *Identifying information*. Notwithstanding the provisions of section 604 [§ 1681b] or any other provision of this title, a consumer reporting agency shall furnish identifying

information respecting a consumer, limited to name, address, former addresses, places of employment, or former places of employment, to the Federal Bureau of Investigation when presented with a written request, signed by the Director or the Director's designee, which certifies compliance with this subsection. The Director or the Director's designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director may make such a certification only if the Director or the Director's designee has determined in writing that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

- (c) Court order for disclosure of consumer reports. Notwithstanding section 604 [§ 1681b] or any other provision of this title, if requested in writing by the Director of the Federal Bureau of Investigation, or a designee of the Director in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director, a court may issue an order ex parte directing a consumer reporting agency to furnish a consumer report to the Federal Bureau of Investigation, upon a showing in camera that the consumer report is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States. The terms of an order issued under this subsection shall not disclose that the order is issued for purposes of a counterintelligence investigation.
- (d) *Confidentiality*. No consumer reporting agency or officer, employee, or agent of a consumer reporting agency shall disclose to any person, other than those officers, employees, or agents of a consumer reporting agency necessary to fulfill the requirement to disclose information to the Federal Bureau of Investigation under this section, that the Federal Bureau of Investigation has sought or obtained the identity of financial institutions or a consumer report respecting any consumer under subsection (a), (b), or (c), and no consumer reporting agency or officer, employee, or agent of a consumer reporting agency shall include in any consumer report any information that would indicate that the Federal Bureau of Investigation has sought or obtained such information or a consumer report.
- (e) Payment of fees. The Federal Bureau of Investigation shall, subject to the availability of appropriations, pay to the consumer reporting agency assembling or providing report or information in accordance with procedures established under this section a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching, reproducing, or transporting books, papers, records, or other data required or requested to be produced under this section.
- (f) Limit on dissemination. The Federal Bureau of Investigation may not disseminate information obtained pursuant to this section outside of the Federal Bureau of Investigation, except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation.

- (g) *Rules of construction*. Nothing in this section shall be construed to prohibit information from being furnished by the Federal Bureau of Investigation pursuant to a subpoena or court order, in connection with a judicial or administrative proceeding to enforce the provisions of this Act. Nothing in this section shall be construed to authorize or permit the withholding of information from the Congress.
- (h) *Reports to Congress*. On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence and the Committee on Banking, Finance and Urban Affairs of the House of Representatives, and the Select Committee on Intelligence and the Committee on Banking, Housing, and Urban Affairs of the Senate concerning all requests made pursuant to subsections (a), (b), and (c).
- (i) *Damages*. Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer to whom such consumer reports, records, or information relate in an amount equal to the sum of
 - (1) \$100, without regard to the volume of consumer reports, records, or information involved;
 - (2) any actual damages sustained by the consumer as a result of the disclosure;
 - (3) if the violation is found to have been willful or intentional, such punitive damages as a court may allow; and
 - (4) in the case of any successful action to enforce liability under this subsection, the costs of the action, together with reasonable attorney fees, as determined by the court.
- (j) Disciplinary actions for violations. If a court determines that any agency or department of the United States has violated any provision of this section and the court finds that the circumstances surrounding the violation raise questions of whether or not an officer or employee of the agency or department acted willfully or intentionally with respect to the violation, the agency or department shall promptly initiate a proceeding to determine whether or not disciplinary action is warranted against the officer or employee who was responsible for the violation.
- (k) Good-faith exception. Notwithstanding any other provision of this title, any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or identifying information pursuant to this subsection in good-faith reliance upon a certification of the Federal Bureau of Investigation pursuant to provisions of this section shall not be liable to any person for such disclosure under this title, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.
- (*l*) *Limitation of remedies*. Notwithstanding any other provision of this title, the remedies and sanctions set forth in this section shall be the only judicial remedies and sanctions for violation of this section.

(m) *Injunctive relief*. In addition to any other remedy contained in this section, injunctive relief shall be available to require compliance with the procedures of this section. In the event of any successful action under this subsection, costs together with reasonable attorney fees, as determined by the court, may be recovered.

§ 627. Disclosures to governmental agencies for counterterrorism purposes [15 U.S.C. §1681v]

- (a) *Disclosure*. Notwithstanding section 604 or any other provision of this title, a consumer reporting agency shall furnish a consumer report of a consumer and all other information in a consumer's file to a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism when presented with a written certification by such government agency that such information is necessary for the agency's conduct or such investigation, activity or analysis.
- (b) Form of certification. The certification described in subsection (a) shall be signed by a supervisory official designated by the head of a Federal agency or an officer of a Federal agency whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate.
- (c) *Confidentiality*. No consumer reporting agency, or officer, employee, or agent of such consumer reporting agency, shall disclose to any person, or specify in any consumer report, that a government agency has sought or obtained access to information under subsection (a).
- (d) *Rule of construction*. Nothing in section 626 shall be construed to limit the authority of the Director of the Federal Bureau of Investigation under this section.
- (e) *Safe harbor*. Notwithstanding any other provision of this title, any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or other information pursuant to this section in good-faith reliance upon a certification of a governmental agency pursuant to the provisions of this section shall not be liable to any person for such disclosure under this subchapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

§ 628. Disposal of records [15 U.S.C. §1681w]

(a) Regulations

See also 16 CFR Part 682 69 Fed. Reg. 68690 (11/24/04)

- (1) *In general*. The Federal Trade Commission, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal banking agencies, and the National Credit Union Administration, with respect to the entities that are subject to their respective enforcement authority under section 621, and in coordination as described in paragraph (2), shall issue final regulations requiring any person that maintains or otherwise possesses consumer information, or any compilation of consumer information, derived from consumer reports for a business purpose to properly dispose of any such information or compilation.
- (2) Coordination. Each agency required to prescribe regulations under paragraph (1) shall –

- (A) consult and coordinate with each other such agency so that, to the extent possible, the regulations prescribed by each such agency are consistent and comparable with the regulations by each such other agency; and
- (B) ensure that such regulations are consistent with the requirements and regulations issued pursuant to Public Law 106-102 and other provisions of Federal law.
- (3) *Exemption authority*. In issuing regulations under this section, the agencies identified in paragraph (1) may exempt any person or class of persons from application of those regulations, as such agency deems appropriate to carry out the purpose of this section.
- (b) Rule of construction. Nothing in this section shall be construed
 - (1) to require a person to maintain or destroy any record pertaining to a consumer that is not imposed under other law; or
 - (2) to alter or affect any requirement imposed under any other provision of law to maintain or destroy such a record.

§ 629. Corporate and technological circumvention prohibited [15 U.S.C. §1681x]

The Bureau shall prescribe regulations, to become effective not later than 90 days after the date of enactment of this section, to prevent a consumer reporting agency from circumventing or evading treatment as a consumer reporting agency described in section 603(p) for purposes of this title, including--

- (1) by means of a corporate reorganization or restructuring, including a merger, acquisition, dissolution, divestiture, or asset sale of a consumer reporting agency; or
- (2) by maintaining or merging public record and credit account information in a manner that is substantially equivalent to that described in paragraphs (1) and (2) of section 603(p), in the manner described in section 603(p).

See also 16 CFR Part 611 69 Fed. Reg. 8531 (02/24/04) 69 Fed. Reg. 29061 (05/20/04)

ILLINOIS DEPARTMENT OF HUMAN RIGHTS RELATIONSHIP TO EEOC

Michael Lieberman, Supervising Attorney (312) 814-6491 - Michael Lieberman@Illinois.gov December 12, 2012

IDHR WEB PAGE: http://www2.illinois.gov/dhr/

I. **HUMAN RIGHTS ACT (HRA)** - Prohibits discrimination on certain bases for certain issues.

A. ISSUES:

- 1- Employment (Article 2 of the HRA)
- 2- Real Estate Transactions (Housing) (Article 3 of the HRA)
- 3- Access to Financial Credit (Article 4 of the HRA)
- 4- Availability of Public Accommodation (Article 5 of the HRA)
- 5- Sexual Harassment in Education (Article 5A of the HRA)
- 6- Additional Civil Rights Violations (Article 6 of the HRA)
 - a. Retaliation
 - b. Aiding and Abetting
 - c. Coercion
 - d. Interference

B. BASES:

1-race*

2-color*

3-religion*

4-national origin*

5-ancestry* (including English only in the workplace – employment discrim, only)

6-age*

7-sex (including pregnancy related)*

8-marital status*

9-disability (four types)*

10-military status*

11-sexual orientation*

12-unfavorable discharge from military service*

13-sexual harassment (Employment discrimination only)

14-citizenship (Employment discrimination only)

15-arrest record (Employment discrimination only)

16-immigration related practice (Employment discrimination only)

17-familial status (Real Estate Transactions discrimination only))

18-order of protection status*

19-retaliation, coercion, aiding and abetting, interference

20-pregnant peace officers and fire fighters (Employment discrimination only)

*Applies to Employment, Real Estate Transactions (Housing), access to Financial Credit, and availability of Public Accommodation.

II. PROCEDURES

- A. COMPLAINANT: **180 days** for Employment, access to Financial Credit, availability of Public Accommodation, Sexual Harassment in Higher Education, and Additional Civil Rights Violations. **One year** for Real Estate Transactions (Housing).
- B. RESPONDENT: Any government entity or public contractor regardless of the number of employees; private employer with 15 or more employees in 20 consecutive weeks in the year of or before the violation. Exception: In claims of sexual harassment, disability and retaliation, Respondent can have one employee. Individuals can be respondents in claims of sexual harassment.
- C. RESPONDENT: Must file a verified response within 60 days from receipt of the charge. Late filings may be accepted upon a showing of good cause.
- D. COMPLAINANT: 30 days to reply (optional).
- E. INVESTIGATION: Must conclude investigation in 365 days (plus any agreed to extensions) (except housing) or the case expires.
 - 1. Standard of Proof: Substantial Evidence- Evidence which a reasonable mind accepts as sufficient to support a particular conclusion and which consists of more than a mere scintilla but may be somewhat less than a preponderance.
- F. INVESTIGATION REPORT: Possible outcomes: (a) Substantial Evidence (SE); (b) Lack of Substantial Evidence (LSE); (c) Lack of Jurisdiction (LOJ); (d) Default (against Respondent); and (e) Failure to Proceed (FTP) (against Complainant).

III. CROSS-FILING CHARGES FILED AT IDHR AND EEOC

- A. CHARGES FILED AT IDHR: If the charge includes a Title VII violation (sex, race, age, national origin, religion), charge is automatically cross-filed with the EEOC. At the conclusion of the Department investigation, a copy of the investigation will be sent to EEOC.
- B. CHARGES FILED AT EEOC: EEOC sends charges filed at EEOC to DHR on a monthly basis. If the charge includes a DHR violation (sex, race, age, national origin, religion), is filed within 180 days of the alleged violation and is against an Illinois employer, charge is automatically cross-filed with the DHR. DHR sends a letter to Complainant informing them that upon the conclusion of the EEOC investigation, Complainant must notify the Department within 35 days that he or she wants the Department to investigate their charge.

IV. <u>SEC. 2-103 ARREST RECORD</u> (775 ILCS 5/2-103) (formerly Ch. 68, par. 2-103)

(A) Unless otherwise authorized by law, it is a civil rights violation for any employer. employment agency or labor organization to inquire into or to use the fact of an arrest or criminal history record information ordered expunged, sealed or impounded under Section 5.2 of the Criminal Identification Act as a basis to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment. This Section does not prohibit a State agency, unit of local government or school district, or private organization from requesting or utilizing sealed felony conviction information obtained from the Department of State Police under the provisions of Section 3 of the Criminal Identification Act or under other State or federal laws or regulations that require criminal background checks in evaluating the qualifications and character of an employee or a prospective employee. (B) The prohibition against the use of the fact of an arrest contained in this Section shall not be construed to prohibit an employer, employment agency, or labor organization from obtaining or using other information which indicates that a person actually engaged in the conduct for which he or she was arrested. (Source: P.A. 96-409, eff. 1-1-10.)

IDHR ARREST RECORD STATISTICS

Fiscal Year	Employment Charges	Arrest Record Charges	Arrest Record With Other Charges			Arrest Record Charges by Issue	
			Race	Sex	Age	Hiring	Discharge
2011	2,372	22 (.9%)	4	2	warming.	5	15
2010	4,110	46 (1.1%)	14	10	2	14	31
2009	3,696	56 (1.5%)	11	3	5	16	34
2008	3,044	49 (1.6%)	11	3	2	14	27
2007	3,287	60 (1.8%)	15	5	5	19	31
2006	3,430	39 (1.1%)	3	4	2	10	22
2005	3,672	31 (.8%)	4	3	3	7	17
2004	3,682	43 (1.2%)	7	2	. 2	12	23
2003	3,670	43 (1.2%)	5	2	3	11	25
2002	3,777	38 (1%)	9	2	3	6	26
2001	3,605	54 (1.5%)	8	0	3	15	28
2000	3,631	52 (1.4%)	7	2	0	7	31
1999	3,571	31 (.9%)	2	0	0	2	22
1998	3,848	30 (.8%)	6	4	0	8	12
1997	4,092	27 (.7%)	-	-	-	-	NA.
1996	3,748	26 (.7%)	-	-	-	-	-
1995	3,878	29 (.7%)	-	-	-	-	***
1994	4,001	34 (.8%)	-	_		-	
1993	3,943	5 (.1%)	-	-	14.		-
1992	4,348	2 (0%)	-	-		-	-



December 11, 2012

Mr.	Avenue					
, IL						
Re:	V	- 1 OHR CONTROL #				
Dear Complair	nant:					

The United States Equal Employment Opportunity Commission (EEOC) and the Illinois Department of Human Rights (Department) are parties to a cooperative agreement. Under this agreement, when you filed your charge of discrimination with the EEOC, a copy of the charge was automatically filed with the Department. The Department is keeping a copy of your EEOC charge on file to preserve jurisdiction under Illinois law.

You filed your discrimination charge initially with the EEOC, however, the Department can consider investigating your charge following the EEOC's investigation. Should you want the Department to take this action, you must first wait for the EEOC to complete its investigation of your charge and send you its written findings from its investigation. Once you receive the EEOC's findings, you have 30 days to send the Department a copy of the findings. Please also submit a one sentence written statement requesting that the Department investigate your charge and include the above-referenced control number. Your copy of the EEOC's findings and your letter requesting that the Department investigate the charge may be submitted by either of the following methods:

By Mail: Your EEOC findings and written decision should be sent via U.S. Postal certified mail,

return receipt requested, to: Illinois Department of Human Rights. Attn: EEOC Referred

Charges/Intake Unit, 100 W. Randolph St., Ste. 10-100, Chicago, IL 60601.

in Person:

You must bring an original and one copy of your EEOC findings and letter. The

Department will stamp the copy and it will be returned to you for your records.

If you have already received the EEOC's findings, you should send the Department a copy of the findings along with your letter requesting that the Department investigate your EEOC charge.

Upon receipt of your documents, the Department will mail you a letter with additional information about your case. If you request the Department to investigate your EEOC charge, the Department will review evidence obtained during EEOC's investigation; that evidence may be disclosed pursuant to the Department's rules and regulations.

The 365-day time period for the Department to investigate your EEOC charge begins to run when EEOC issues its investigation findings. Your failure to timely provide the EEOC's findings to the Department will result only in the Department closing your file. This process does not affect the investigation of your charge at EEOC. If you do not wish to proceed with the Department, you do not need to take any further action.

This letter does not apply to any settlement of this charge the parties have made with the EEOC.

If you have any questions, please contact Thomas F. Roeser, Pre-Investigations Coordinator, at (312) 814-6295. Please do not contact the EEOC.

ILLINOIS DEPARTMENT OF HUMAN RIGHTS PRE1_EEOC 30/Rev: 10/11