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United States House of Representatives
Committee on Banking & Financial Services
1006 Congress, 2129 Rayburn House Office Building
Washington, DC 20515-6050

To The Honorable Committee:

S. J. Bashen Corporation ("SJBC") extends its gratitude to the Subcommittee on Financial Institutions and Consumer Credit ("Committee") for the opportunity to testify regarding the Fair Credit Reporting Act ("FCRA") and investigations conducted by outside consultants and attorneys ("consultants") regarding civil rights violations and employee misconduct. It is imperative to analyze the FCRA and civil rights laws collectively, rather evaluating these complex issues only in the FCRA context. After such an examination, the Committee will undoubtedly conclude that investigations regarding civil rights violations and employee misconduct must be exempt from the FCRA's required procedures.

FCRA and the FTC

It is acknowledged that the FCRA was enacted by Congress in response to the increasing public concerns about the rights of consumers and the expanding use of credit in our society. Consumer reports are completely discretionary, and have been historically designed to garner personal financial, credit, and other general information to ascertain an applicant's eligibility for employment. The FCRA, however, was not enacted to prevent, identify, and remedy workplace discrimination based on a consumer's race, color, religion, sex, national origin, or any other protected categories. None of the Federal Trade Commission's ("FTC") standard publicized literature references workplace discrimination or harassment. Nonetheless, the FTC *Vail* opinion letter has expanded the FCRA's purview to include claims of illegal discrimination and harassment in the workplace. As a result, civil rights laws that have protected employees (consumers) for 35 years are in jeopardy.

Consultants and Consumer Reporting Agencies

SJBC is the most prominent human resources consulting firm in the country and SJBC's investigates allegations of civil rights violations and employee misconduct. SJBC's consultants have collectively investigated thousands of claims involving discrimination and employee misconduct, and not one credit report has ever been requested on any complainant, the alleged offender, or witness. Credit reports and credit histories are completely irrelevant to these types of investigations. Civil rights and employee misconduct investigations examine *specific* allegations of illegal activities. Conversely, consumer reports and consumer investigative reports provide *general* information regarding a consumer's "...character, general reputation, personal characteristics, mode of living..." for "...employment purposes..." Accordingly, SJBC is clearly the exemplar consulting firm that is the antithesis of a consumer reporting agency.

Civil Rights Laws

The Federal Civil Rights Act of 1964 and 1991, and similar state and municipal laws, impose an affirmative obligation on employers to investigate discrimination complaints. Civil rights investigations are not discretionary, in contrast to investigative consumer reports. Under civil rights laws, employers risk liability for the acts of employees, vendors, and customers who discriminate against employees on the basis of race, religion, color, national origin, ancestry, disability, medical condition, marital status, sex, or age. The Supreme Court recently affirmed the duty to investigate complaints of harassment, establishing an affirmative defense to liability only when employers exercise reasonable care to "correct promptly any...harassing behavior."(1) Further, the Equal Employment Opportunity Commission ("EEOC") issued guidelines(2) that require an employer to investigate workplace harassment.

Employers that wish to assert the affirmative defense afforded by *Faragher* and *Ellerth* must a.) exercise reasonable care to prevent and correct promptly any harassing behavior, and b.) must prove that the complaining employee failed to use any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. Simply, an employer must have a widely disseminated anti-harassment policy and a complaint procedure to protect employees (consumers). Prompt, thorough, impartial, objective, confidential, and competent investigations are imperative to any effective anti-discrimination policy and complaint procedure, and are required by law and EEOC regulations. For these reasons, many employers retain independent, expert consultants to ensure that proper investigations are conducted.

Impact of *Vail* Letter/FCRA Procedures

The FTC *Vail* opinion letter potentially undermines the preventative and remedial essence of all civil rights laws by discouraging employees from complaining of harassment; by inhibiting employee witnesses from participating in harassment investigations; and by stifling witness candor. Competent discrimination investigations are the only available means to assess the allegations, issues, facts, and the appropriate remedial measures, when applicable. The opinion stated by the FTC in the *Vail* letter requires employers to garner written authorization from alleged harassers before consultants could prepare investigative reports regarding the alleged civil rights violations. There is no such requirement under any of the discrimination laws, and such a requisite would be grossly inappropriate in a civil rights framework because the purported violator would have control over the investigation. The EEOC guidelines state, "The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation."

Pursuant to the FTC *Vail* opinion letter and Section 604 of the FCRA, the employer would also be required to give the harasser a copy of the consultant's report if the allegations are substantiated and legally mandated remedial measures are implemented against the harasser. But first, the employer must wait five days before effecting remedial measures, which negates another civil rights law mandate: the remedial measures must be prompt or the employer faces greater consequences. Also, the harasser will still have contact with the complainant, which may create a volatile situation that could spark increased harassment, witness intimidation, threats, and/or violent reprisals. Giving confirmed harassers copies of consultants' reports will breach confidentiality, and the harassers will know who was interviewed and the content of their interviews. Civil rights laws and the EEOC regulations require confidentiality.

Employees will be chilled from reporting civil rights violations if they know the alleged offender will receive a copy of the report. The EEOC guidelines state, "An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible" and "information about the allegation of

harassment should be shared only with those who need to know about it." Complainants and witnesses are usually hesitant to speak with any investigator, even when reasonable confidentiality is promised. But such a promise is typically the only reason most witnesses agree to be interviewed. Breaching confidentiality to comply with the FCRA's procedures will decimate most attempts to curb workplace discrimination, and consumers will suffer the most. Imagine if the culprit is an officer, executive, a supervisor, a respected associate, a co-worker they fear, or a peer or a supervisor who has a vengeful or violent propensity. Employees will lose faith in the anti-harassment policy and the complaint procedure, and the harassment may continue unabated. According to the EEOC guidelines, a complainant may assert that he or she did not use an employer's complaint procedure because he or she perceived it as ineffective. If proven, an employer may lose the affirmative defense. This is certainly inconsistent with the spirit and the letter of civil rights laws which are to prevent, identify, and redress workplace discrimination.

Disclosing a discrimination investigative report to the harasser may also expose the employer to more retaliation claims. The complainant and witnesses adverse to the harasser may perceive that the harasser is treating them more harshly because the harasser is now able to identify them as his or her accusers. There must be an adverse employment action to sustain a viable retaliation claim, but the perception, not a genuine adverse employment action, may precipitate a retaliation claim which forces an employer to incur the time and expense to investigate and manage a complaint that could have been avoided. Civil rights investigative results must be limited to those individuals with the qualified privilege and the need to know. There is no FCRA mandate that the alleged harasser must maintain confidentiality once he or she secures a copy of an investigative report. Consequently, all employees who do not have the qualified privilege status should be precluded from reviewing any type of civil rights investigative report to assure reasonable confidentiality. This will mitigate future liabilities that are varied and potentially immense.

EEOC Guidelines

The EEOC dictates that employers should ensure that "prompt, thorough, and impartial" investigations are conducted when complaints are made. Impartial investigations are more readily attained by independent consultants who do not have personal or professional relationships with the complainants, witnesses, and the accused. Further, an independent consultant does not have a vested interest in a favorable outcome, and is often perceived as detached and neutral by the employees and the EEOC. Accurate investigative findings and conclusions afford greater protection to the consumer and the employer. Internal personnel typically have many other duties that are extraneous to the exhaustive discrimination complaint process, and they simply need a third party consultant to conduct investigations. Many companies do not have qualified internal human resources or legal personnel to investigate alleged civil rights violations, and those that do are typically inundated with complaints. Outsourcing to competent consultants solves both problems.

According to the EEOC guidelines, "The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts." Objectivity is imperative to discrimination investigations, especially in harassment cases where witnesses must be asked proper questions and credibility must be weighed. Many employers and employees are concerned that internal personnel are too familiar with the employees and the complaint circumstances to be truly objective. This potential objectivity dilemma, actual or perceived by employees, the EEOC, federal and state court judges, should never be applicable to independent consultants who report all facts; good, bad, or innocuous.

The EEOC states, "Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility." Many internal personnel may lack the necessary training and experience to adeptly investigate alleged civil rights violations or employee misconduct. Others are concerned about impartiality and objectivity. Very few from either category have the time to remain current on the continual changes in state and federal laws, which are essential to quality civil rights investigations. Consequently, employers routinely outsource this specialized task to qualified consultants who conduct timely, thorough, impartial, objective, confidential, and competent investigations. Complainants may not use a complaint procedure that they perceive as biased, subjective, and administered solely by internal personnel. They may accordingly attempt to defeat the affirmative defense by establishing that the employer's reporting procedure is defective. "Negligent investigation" is becoming an increasingly popular allegation in discrimination litigation. It is much more difficult to prove if experienced, independent consultants conduct the investigations.

Disputing Consumer Reports

Section 611 of the FCRA provides the means for a consumer to dispute the details of a consumer report, which is understandable in the fair credit reporting context; this information is most often finite and should be accurately reported. A creditor must stop reporting inaccurate information after the consumer has successfully challenged the findings as inaccurate, and a consumer reporting agency must reinvestigate the consumer's claims. Again, this seems reasonable in the measurable world of financial and credit reporting.

Harassment investigations, conversely, are typically very convoluted at the inception. These investigations are commonly fraught with innuendo and recrimination, and perhaps importantly, the perceived or actual *intent* of the harasser and the complainant. Intent is further muddled by witness statements. Under Section 611 of the FCRA, an alleged harasser could dispute the complainant's allegations as inaccurate or false, which usually happens anyway in civil rights investigations. But the FCRA gives the harasser greater dispute latitude by empowering him or her to assert that it was not his intent to harass or discriminate against another employee. Thus, he or she will assert that the reported information is inaccurate or false. How, then, could the complainant or the employer controvert the alleged harasser's dispute when intent is the issue under consideration? This is further complicated by witnesses who give similar or vastly different accounts of the alleged conduct. In this situation, which is common in discrimination investigations, should the complainant and the employer's investigating consultant be forced to stop reporting the behavior as harassment pursuant to the FCRA? Should the consultant be forced to reinvestigate, pursuant to the FCRA, simply because the harasser denies that he or she intended to harass or discriminate? What if the conduct did not constitute a civil rights violation, but violated a company policy that mandates disciplinary action? Will the harasser be able to dispute the findings as inaccurate? Should the harasser be able to sue the employer for allegedly breaching any one of the aforementioned FCRA procedures? Civil rights laws and common sense compel the obvious response: "absolutely not." However, these are genuine issues made possible by the FTC's interpretation of the FCRA in the *Vail* letter. Most employees who are accused of discrimination will initially, and instinctively, deny the charges in part or in whole. Individuals who violate civil rights laws or company policies seldom confess. Intent is not finite; it is nuance wrapped in subtle shades of gray. A competent investigator must possess the skills, impartiality, objectivity, and experience to discern truth from fiction, and then reasonably determine if some type of personnel policy breach or legal violation has occurred.

The FTC opinion would also compromise the various privileges afforded by the Federal Rules of Civil Procedure, and probably most state rules of civil procedure, such as attorney-client privilege, party communications, work-product, and reports that are prepared by consultants in anticipation of litigation. Discovery issues are decided during litigation by judges on a case-by-case basis. Judges have the wisdom and qualifications to weigh the benefits and detriments of producing pertinent documents. The FTC opinion would require employers to give the confirmed harasser a copy of the investigative report without filing a lawsuit, which would eliminate the benefit of judicial consideration that may preclude the production of the documents or portions of the documents. All of these safeguards and privileges are forfeited under the FTC's production requirement.

Internal Investigating Personnel/Outside Consultants

Like internal investigating personnel, outside consultants who conduct civil rights and employee misconduct investigations should be exempt from the FCRA procedural requirements. Employers and employees alike want the most qualified, objective professionals conducting discrimination investigations to better protect all parties. Such investigations are more readily obtained by independent consultants who specialize in these types of investigations. It is reasonable to conclude that an employee (consumer) accused of discrimination would want a competent, neutral party to investigate the allegations against him or her, rather than inexperienced internal personnel who may be perceived as having a vested interest in a particular outcome.

Failure to Comply with FCRA Requirements

Outside consultants who do not comply with the FCRA procedures are exposed to potential lawsuits by the subjects of their investigations. They may subsequently assert that they were improperly disciplined or terminated because they did not have the opportunity to respond to the investigative report that resulted in the adverse action. If the *Vail* opinion letter is adopted as policy by the courts, then the outside consultant could be accused of "willfully" violating the FCRA, thereby exposing the consultant to punitive damages.

Consultants could chose not to "regularly" conduct discrimination investigations. Of course, this means consultants will not possess the cutting-edge expertise that is

essential to analyze complex civil rights issues. This expertise is derived from knowledge of the ever-changing laws and investigative experience, and both are absolutely imperative to protect consumers. The alternative is to allow less qualified internal personnel or consultants to conduct the investigations.

The many consulting firms, law firms, partnerships, and other corporations that employ scores of professionals to conduct independent investigations could be forced out of business if the FTC's interpretation of the FCRA obligates companies to internalize employee misconduct investigations. This could result in the dissolution of an entire industry, and will have grave consequences for employees (consumers) whose discrimination claims will be controlled exclusively by internal personnel. Employers will also suffer if they are forced to internalize discrimination investigations; innumerable complaints will be mishandled and improperly investigated. Increased litigation and inflated money damages against employers under various federal and state civil rights laws will be the result. Decreased employee morale, diminished productivity, and further polarization between the races and sexes are indirect, long-term consequences of the FCRA's infringement upon civil rights laws.

H.R. 3408

H.R. 3408 provides a broad exemption for outside consultants who investigate illegal misconduct. However, H.R. 3408 may be too expansive to satisfy all concerned entities and may not be ratified as a consequence. SJBC proposes the following compromise:

> *It is recommended that Section 603 be amended by excluding from the definition of a "consumer report" certain discrimination employment-related misconduct investigations as follows:*
>
> > *Adding at the end of Section 603(d)(2):*
> >
> > > *(D) A communication described in either subsection (o) or (q).*
> >
> > *Adding at the end of Section 603 the following new subsection as (603(q):*
> >
> > > *(a) Partially Excluded Communications Used For Employment Purposes. A communication is described in this subsection if it is a communication:*
> > >
> > > > *(1) that, but for subsection (d)(2)(D) would be a Consumer report;*
> > > >
> > > > *(2) that is made to an employer for the purpose of conducting a good faith investigation of alleged misconduct related to employment or compliance with federal, state or local laws and regulations;*
> > > >
> > > > *(3) that is not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity;*
> > > >
> > > > *(4) that is not provided to any person except the employer or prospective employer of the consumer, or as required by law, or pursuant to Section 608*
> > > >
> > > > *(5) with respect to which, if adverse action is taken based in whole or in part on the communication, the employer will disclose to the consumer a Summary containing the nature and substance of the communication upon which the adverse action is based.*

Section 609, Disclosures to Consumer, requires the employer to disclose to the employee the "nature and substance of the information in the report" before effecting an adverse employment action against the employee. This provision is acceptable, provided that the nature and substance report is very brief, and only states that a third party substantiated the allegations and an adverse employment action has been administered as a result. Results of civil rights investigations are subject to privilege and privacy concerns; such investigations must remain confidential. Detailed nature and substance reports will "chill" employees from complaining of civil rights violations and deter witness participation in the investigations once it becomes common knowledge at any company that detailed nature and substance reports are given to the alleged offenders. Preparing a comprehensive nature and substance report may also cause further delays in administering the adverse action, which would violate civil rights laws and EEOC regulations that mandate immediate remedial measures. Delays also mean that a potentially volatile situation remains static, thereby increasing the opportunities for further discrimination, harassment, retaliation or workplace violence while consultants, in-house attorneys, and/or human resources personnel labor over the language in the detailed nature and substance report.

Robert Pitofsky, Chairman, FTC, suggested in a letter to the Honorable Pete Sessions that a nature and substance report, "...should allow the affected consumer to obtain a degree of meaningful, genuine disclosure of the information that served as the basis for the adverse decision..." and "...we do not believe that a generalized or conclusory statements would constitute a good-faith disclosure of the nature and substance of a report..." SJBC respectfully disagrees with Chairman Pitofsky for the aforementioned reasons.

It should be expressly stated that the nature and substance provision under this exemption to the FCRA does not subject the employer or consultant to similar provisions under the FCRA that apply to actual consumer reporting agencies. The reasons are thus: a detailed nature and substance report prepared by true consumer reporting agencies must disclose sufficient information to satisfy the accused and the FTC. Nature and substance reports prepared by consultants who investigate civil rights violations must protect the employees who participate in civil rights investigations. If the exemption is incomplete, striking the perfect balance between the FCRA requirements and the obligations of civil rights laws will be onerous if not impossible. These disputes will also give rise to additional tort litigation against employers and the litigation will involve consumers. The disciplined employee who committed an illegal act or violated a company policy could also challenge the nature and substance report as insufficient or inaccurate, which will accordingly subject the employer to other FCRA administrative procedures and/or litigation under the FCRA. The purpose of the amendment is to completely exempt employee misconduct investigations from the purview of the FCRA.

FTC's Proposed Amendment

On or about March 31, 2000, Chairman Pitofsky proposed to the Honorable Pete Sessions limited procedural FCRA exemptions for consultants, rather than suggesting total exemptions from the FCRA. The FTC clearly recognizes that the FCRA and various civil rights laws are incongruous, and the FTC's efforts to redress the problems are laudable. However, the FCRA and civil rights laws are utterly distinct and any attempts to reconcile these differences are simply futile. Disparate laws and governing agencies necessitate Congressional separation. The illustration below reflects the contradictions between the FCRA and the laws regarding illegal employment acts. It also exposes the limitations of the FTC's proposed amendment, which will still subject civil rights investigations to many FCRA procedural requirements if the FTC's proposed amendments are ratified by Congress.

Conclusion

There is absolutely no detriment to consumers when outside consultants investigate alleged civil rights violations in the workplace. Indeed, a qualified consultant will provide the necessary expertise, knowledge, and experience to conduct thorough investigations that are required by law and the EEOC guidelines. Outside consultants also afford objectivity, impartiality, timeliness, and confidentiality. All consumers are entitled to fair and complete investigations conducted by competent professionals. Expert consultants minimize the possibility of improper decisions that adversely affect consumers. The FTC's interpretation of the FCRA compromises this process, which, ironically, imperils the very consumers the FCRA was created to protect. Thus, civil rights and employee misconduct investigations must be exempt from the FCRA. We respectfully implore the Committee to amend the FCRA accordingly.

Very truly yours,

Janet Emerson Bashen
President and CEO

1. *Faragher v. City of Boca Raton,* 118 S. Ct. 2275 (1998); *Burlington Industries, Inc. v. Ellerth,* 118 S. Ct. 2257 (1998).

2. EEOC Policy Guidance on Sexual Harassment and EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors (June 18, 1999).