Prepared Statement of
THE FEDERAL TRADE COMMISSION

Before the

HOUSE BANKING AND FINANCIAL SERVICES COMMITTEE
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS
AND CONSUMER CREDIT

Washington, D.C.

May 4, 2000

Madam Chairman and members of the Subcommittee, my name is Debra Valentine, and I am General Counsel of the Federal Trade Commission. I am pleased to have this opportunity to present the Commission's views on ways to reconcile potential conflicts between the Fair Credit Reporting Act (FCRA) and other federal statutes and policy goals in the area of workplace investigations by third parties.[(1)] You have asked the Commission to comment specifically on H.R. 3408, the "Fair Credit Reporting Amendments Act of 1999," which would amend the FCRA to exempt certain workplace investigations from the Act, and you have posed a number of specific questions, which I will address in the course of my testimony.

As the Commission no2 0 0 1ae4 scTart1 sc76]TJ /CoAm o(s)-1ce12 0 012 0 0 120(e 4

contrast to the 1996 requirements) do not afford an uncooperative employee the opportunity to thwart or delay an investigation. Instead, these basic procedural protections are an appropriate balance to the need for expeditious investigations of alleged workplace misconduct, especially for those workers who may be the target of unfounded or erroneous accusations.

Accordingly, the Commission respectfully urges that Congress not exempt workplace investigation reports from all

and substance" of the information in the consumer's file.

To ensure continued fairness to employees under investigation, the Commission recommends that Congress consider an additional safeguard to the FCRA in connection with workplace investigations. Specifically, to avoid the possibility that exempting employers from the various disclosure and notice requirements could lead to unwarranted investigations, employers should be required to certify to the consumer reporting agency preparing the report that the employer has a reasonable suspicion or has received an allegation of illegal misconduct by an employee; that confidentiality of the investigation is necessary to preserve evidence and to prevent the destruction of evidence relevant to the investigation; or there is reason to believe that compliance with Section 604(b)(2) or (3) will result in the intimidation of a potential witness relevant to the investigation, or otherwise seriously jeopardize or unduly delay the investigation.

The approach recommended by the Commission leaves in place (among other provisions of the Act) Section 615 of the FCRA, which requires an employer who takes adverse action against an employee based in whole or in part on any information in a consumer report to provide to the consumer (employee) the name and other identifying information about the consumer reporting agency, and notification of the consumer's right to obtain a disclosure of the report[(19)] and the consumer's right to dispute the accuracy of the information in the report. These actions would take place after the employer's action against the employee.

In certain cases of illegal workplace conduct, however, the employer may have also referred the matter to a law enforcement agency for investigation, or may do so upon termination of the employee. In this context, some law enforcement agencies have raised the possibility that an adverse action notice under Section 615 of the FCRA might prematurely disclose the existence of a criminal or other investigation that results from the referral by an employer of allegations of illegal activity by an employee, and seriously compromise the investigation. The Commission believes that, when a consumer report has figured both in the employer's decision to refer an investigation to law enforcement action and the employer's determination to take adverse action with respect to an employee, the FCRA should make some provision for deferring the adverse action notice otherwise required by Section 615.

unduly delaying a trial or ongoing official proceeding.[(21)]

Responses to Additional Questions

You also asked us to discuss the liability provisions of the FCRA. The Act provides for civil liability for willful or negligent noncompliance.[(22)] A person who willfully fails to comply with an FCRA requirement with respect to a consumer/employee is liable to that consumer for actual damages sustained as a result of the failure or damages of not less than $100 and not more than $1000, together with such punitive damages as the court may allow. Negligent noncompliance can result in liability to the aggrieved consumer for actual damages sustained by the consumer as a result of the failure to comply. In both cases, a successful action to enforce liability can also result in the assessment of costs of the action and reasonable attorney's fees as determined by the court. Section 621 of the Act provides that, in administrative enforcement by the Commission, a knowing violation, which constitutes a pattern or practice of violations of the FCRA, can involve a civil penalty of not more than $2,500 per violation.[(23)] However, there are important limitations on liability, in particular for those employers and reporting agencies that can demonstrate that they followed reasonable procedures.[(24)]

You also asked us to address the fact that the FCRA covers workplace investigations by third-party investigators (so long as they meet the definition of a "consumer reporting agency") while internal employer reviews and reports on alleged employee misconduct are not subject to the FCRA. The Congress made a determination that consumer reports, including investigative consumer reports, prepared by outside entities are subject to safeguards that do not apply, at least as a matter of federal law, to information gathered directly by employers. The Commission believes that the distinction makes sense in the context of workplace investigations precisely because the outside investigator is hired based on considerations of independence, expertise and ability to gather information in ways or to a degree that may not be available to employers conducting their own investigation. Co-workers and other interviewees and witnesses may be more forthcoming with an independent investigator than they would be with the employer. The outside agency likely has greater investigational resources, access to data, and information-gathering expertise than does the employer. These considerations may give the resultant consumer report a greater credibility and weight than an internal report. It is appropriate that the agency that collects and maintains this sensitive information have corresponding requirements for accuracy and reasonable procedures imposed on it. The safeguards are commensurate with the heightened resources of third-party investigators, the legitimate expectations of all affected parties that the report will be a professional, high-quality product, and with the magnitude, influence and consequence of their reports.

Conclusion

In sum, the Commission agrees that the 1996 amendments to the Fair Credit Reporting Act have resulted in

investigations. We recommend that the Congress enact a targeted amendment tailored to those specific procedural provisions of the Act that may genuinely impede workplace investigations by third parties. Because accused employees should still be protected through the FCRA's reasonable procedures and accuracy safeguards, we believe that the more measured approach set out above strikes the appropriate balance.

Endnotes:

in 1970. Section 603(f) of the FCRA, 15 U.S.C. § 1681a(f).

10. Section 606 of the FCRA provides that a person may not procure an investigative consumer report on a

be divulged 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. Although such disclosure need not be so specific that it could be used to identify witnesses (with consequent risk of retaliation) or otherwise inhibit the ability of an outside party to collect the information necessary for a valid workplace investigation, we do not believe that generalized or conclusory statements would constitute a good-faith disclosure of the nature and substance of a report.

20. A useeyn 9 eg(n 9)3(7(y) T pr 9.ov(n 93(7(df 0.0d b(r)4)3(l)ET q15(ib4)3" 0.0de))-.96n)rn 9ot96n3