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News for School and Municipal Clients

New FACTA Regulations May Apply to Employers

On December 4, 2003, President Bush signed into law the Fair and Accurate Credit Transactions Act (“FACTA”), which amended the Fair Credit Reporting Act (“FCRA”). A number of governmental agencies recently issued joint regulations implementing the provisions of FACTA in an effort to detect, prevent, and mitigate identity theft. The new regulations require financial institutions and creditors to implement identity theft detection programs, mandate credit and debit card issuers to assess the validity of an address change notification, and require the users of consumer reports to implement policies and procedures for responding to a “notice of address discrepancy” provided by a Consumer Reporting Agency (“CRA”). The majority of the new regulations apply only to financial institutions and creditors. However, effective November 1, 2008, employers that utilize consumer reports issued by a CRA must implement policies and procedures to respond to a notice of an address discrepancy in accordance with the new regulations.

A consumer report is any written, oral, or other communication by a CRA bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general

reputation, personal characteristics, or mode of living which is used as a factor in establishing the consumer's eligibility for employment. *Common examples of consumer reports include credit and background checks that employers obtain from a CRA and use for the purpose of evaluating an individual for employment.*

A notice of an address discrepancy is a notice sent by a CRA to a user of a consumer report informing the user that the address provided in the request is substantially different from the address that the CRA has on record for the consumer. For example, an employer may receive a notification of an address discrepancy if it requests a credit check or background check of a potential employee from a CRA, and the address included in the request is substantially different from the address the CRA has on file. The new FACTA regulations require employers to implement policies and procedures that will be used to fulfill their obligations in the event that the employer receives a notification of an address discrepancy in response to its request for a consumer report.

According to the regulations, when an employer receives a notification of an

address discrepancy from a CRA, the employer must use its policies and procedures to determine whether the consumer report relates to the same individual about whom the employer was seeking information. The regulations provide examples of what qualifies as a reasonable policy and procedure. The employer may verify the information in the report with the applicant, or, in the alternative, compare the information in the consumer report provided by the CRA with information the employer maintains in its own records, such as job applications, change of address notifications, or other records. The employer may also compare the information in the consumer report to information the employer obtains from a third party source.

In addition, in certain circumstances, the employer may also be required to make a reasonable effort to confirm the consumer's address and report that address to the CRA. The rules require employers to develop and implement reasonable policies and procedures for furnishing an address for the consumer to the CRA when the following three conditions have been met: (1) the employer has formed a reasonable belief that the report relates to the consumer about whom the employer requested the report; (2) the employer establishes a continuing relationship with the individual about whom the report is requested; and (3) the employer regularly, and in the ordinary course of business, furnishes information to the CRA from which it received the notice of an address discrepancy.

The regulations provide examples of reasonable methods by which the employer may confirm the address, including: (1) verifying the address with the consumer; (2) reviewing the employer's own records to verify the address of the consumer; (3) verifying the address through a third party source; or (4) using other reasonable means.

In conclusion, the new FACTA regulations require employers that use consumer reports to implement new policies and procedures to respond to notifications of address discrepancies. First, the regulations provide that employers that receive such a notification must form a reasonable belief that the report relates to the individual for whom the report was requested. Second, if the employer establishes a continuing relationship with the individual about whom the report was requested, and regularly furnishes information to the CRA from which the notification was received, the employer is obligated to reconcile the discrepancy with the CRA.

The regulations provide substantial leeway in permitting employers to implement reasonable policies to meet their obligations under the FACTA regulations. Nevertheless, because the regulations require employers to furnish the confirmed address to the CRA during the reporting period in which it establishes a relationship with the consumer, it is advisable for employers that use consumer reports to prepare policies and procedures now in order to meet their obligations under the FACTA regulations in a timely manner.

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