

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

June 11, 1998

Re: Sections 603(d) and 604(b) of the Fair Credit Reporting Act

Dear Mr. Lewis:

This is in response to your letter concerning the application of the recently amended Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, to various situations. The questions that you raise are summarized below. Our views on each issue follow.

***1. When an employer contemplates taking an adverse action based on a consumer report, how long must the employer wait after providing a copy of the report before taking the adverse action?***

Section 604(b) sets forth specific procedures that must be followed before an employer takes an adverse action -- such as denying an application for employment or failing to promote an existing employee -- which is influenced in any way by a consumer report. Section 604(b)(3) requires the employer to provide a copy of the report and a copy of the summary of consumer rights (as prescribed by the Federal Trade Commission) to the affected consumer *"before taking adverse action"* based on the report. The statute does not specify how long an employer must wait, after providing the required disclosures, before taking the adverse action. The amount of time that an employer should wait before taking adverse action will vary depending upon the circumstances, such as the nature of the job involved and the way that the employer does business. Employers may wish to consult with their counsel in order to develop procedures that are appropriate, keeping in mind the purpose of the provisions to allow consumers to discuss the report with employers before adverse action is taken.

***2. Are criminal background and driving record checks performed by a third party on behalf of an employer "consumer reports" for FCRA purposes?***

A report concerning an individual's driving record or criminal record constitutes information about the "character, general reputation, personal characteristics, or mode of living" of the individual and thus meets the definition of a "consumer report" under Section 603(d)(1). Accordingly, the answer to your question is "yes" if the third party performing the checks qualifies as a "consumer reporting agency" (CRA) as the term is defined in Section 603(f) of the FCRA.

***3. Are criminal records obtained directly by the employer from a police department or local law enforcement agency "consumer reports" covered by the FCRA?***

When an employer obtains information that is available to the public from a local law enforcement agency or police department, the employer's actions are not covered by the FCRA. We do not believe that courts and law enforcement entities that are required to make

records available to the public are CRAs, or that the information they provide to the public are "consumer reports" under the applicable definitions set forth in the FCRA. Attached is a staff opinion letter (*Goeke*, 6/9/98) that discusses this issue in more detail.

***4. When a consultant coordinates drug testing and reports the results of the tests to the employer, is the consultant a "consumer reporting agency" for FCRA purposes and are the results of the drug test a "consumer report"?***

We would need to review all the consultant's procedures to provide a reasoned opinion. If a consultant or other intermediary does nothing more than perform mechanical functions such as arranging for a laboratory to conduct a drug test, collecting samples, forwarding them to the laboratory, and transmitting the test results to the employer, it probably will not be a CRA making a consumer report. Attached is a staff opinion letter that discusses this issue in some detail (*Islinger*, 6/9/98).

I hope that this information is helpful to you. The views that are expressed above are those of the Commission's staff and are not the views of the Commission itself or any particular Commissioner.

Sincerely,

William Haynes  
Attorney  
Division of Credit Practices

Enclosure