Division of Financial Practices
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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 14, 2000

Dear Mr. Allan:

This responds to your letter pertaining to the adverse action notice requirements imposed on users of consumer reports by Section 615(a) of the Fair Credit Reporting Act ("FCRA"). Your company provides job applicant screening services for employers, and you understand that it is a consumer reporting agency ("CRA") as defined by Section 603(f) of the FCRA. Your inquiry is prompted by large clients who have approached you about including in your report on each applicant, along with the results of your background search, your "opinion as to whether they should hire the person or not" based on hiring criteria the client (employer) would provide to you.

Section 615(a) of the FCRA requires that an employer who rejects a job application, based on a consumer report from a CRA, must provide an "adverse action" notice to the applicant. Even if an employer delegates its hiring process to a CRA or some other third party, it would of course still have that obligation.[(1)] The issues raised by your letter concern Section 615(a)(2)(B), which states that the notice must include "a statement that the (CRA) *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" (emphasis added). In the scenario you describe, that statement would be inaccurate because the CRA is in fact included in the decision to reject the job application. The two legal issues raised by your letter are whether Section 615(a)(2)(B) should be interpreted either (1) to require an employer to include statutory language in the notice when that terminology clearly misdescribes the particular way in which the employer and CRA interact in the hiring process, or (2) to prohibit a CRA from making hiring decisions on behalf of an employer. We believe that neither interpretation is appropriate, for the reasons set forth below.

1. In our view, an employer is not required to include the statement required by Section 615(a)(2)(B) when it is factually incorrect. Section 615(a) is designed to require consumer report users to provide consumers with a notice that informs them of what has occurred, and of certain rights they have under the FCRA. As originally enacted in 1970, Section 615(a)

required only a very brief notice saying that the adverse action resulted from a CRA report, and providing the name and address of the CRA. The legislative history of the legislation that changed this provision, the Consumer Credit Reporting Reform Act of 1996,[(2)] shows that Congress considered the brief notice to be insufficient information for consumers.[(3)] Thus, it added several items to the required notice:

- The CRA's phone number (toll-free for nationwide credit bureaus)[§ 615(a)(2)(A)]
- The statement quoted in the previous paragraph, that the CRA "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," which describes the usual sequence of events where a CRA provides a report to its business client and has nothing to do with the action taken by its client [§ 615(a)(2)(B)]
- Disclosure of the most significant consumer rights provided by the FCRA (to obtain a free file disclosure from the CRA by requesting it within 60 days, and to dispute inaccurate or incomplete information it the file) [§ 615(a)(3)]

Congress therefore expanded the content of the adverse action notice to provide more information to consumers. If Section 615(a)(2)(B) is construed as requiring the report user to supply misinformation (that the CRA did not participate in the decision) about the role of the CRA, consumers would be misled rather than informed. We do not believe that Congress intended this provision, which is clearly designed to *inform* consumers, to be interpreted in a manner that causes consumers to be *misinformed*.

2. We do not believe that Section 615(a)(2)(B) should be interpreted to prohibit CRAs from making employment decisions for employers. The provision is aimed exclusively at *users* of consumer reports, requiring them to provide specific information to consumers when they take adverse action. In crafting the FCRA, Congress has included many provisions in Sections 604-614 that forbid (or require) certain specific acts by *CRAs*. In contrast, Section 615(a)(2)(B) *imposes no duties at all on CRAs.* Rather, it requires in the *user's* adverse action notice a description of the usual sequence of events, where a CRA provides a credit report to a business client and has nothing to do with the action taken by its client. Please note that we are stating here only that Section 615(a)(2)(B) should not be construed to prohibit CRAs from making employment decisions on behalf of employers, not commenting on the merits of that practice.

The opinions set forth in this informal staff letter are not binding on the Commission.

Sincerely yours,

Clarke W. Brinckerhoff

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1. See footnote 3 and accompanying text of the enclosed letter (*Schieber*, 3/3/98).

2. Title II, Subchapter D, Chapter 1, Section 2411 of Public Law 104-208 (September 30, 1996).

3. S. Rept. No. 185, 104th Cong., 1st Sess. 22 (1995); S. Rept. No. 209, 103rd Cong., 1st Sess. 46 (1993).