

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

December 10, 1998

Re: Section 605(a) of the Fair Credit Reporting Act

Dear Mr. Nadell:

This is in response to your letter requesting the staff's views on a number of issues relating to the length of time that a consumer reporting agency ("CRA") may report "adverse" items of information under Section 605(a) of the Fair Credit Reporting Act ("FCRA").

We note that there has been a significant change in Section 605(a) of the FCRA since you wrote your letter. The "Consumer Reporting Clarification Act of 1998" (Senate Bill 2561, Pub. L. No. 105-347) ("CRCA"), which was signed into law by President Clinton on November 2, 1998, amended the FCRA by, inter alia, removing all restrictions in Section 605(a) on the reporting of criminal convictions by CRAs. Prior to the CRCA, convictions could in most cases be reported only for seven years (the general reporting period in Section 605(a) for non-bankruptcy items of adverse information); as a result of the CRCA, criminal convictions may now be reported regardless of the length of time that the conviction antedates the report. Our responses to your questions (summarized in italics below) incorporate this recent change in the FCRA.

1. What are the responsibilities of a CRA when an employer asks the CRA to check an applicant or employee's educational record (dates of graduation, degrees granted to the individual, etc.)?

Your first question relates in part to our staff opinion letter to Mr. Seham (April 17, 1998). Mr. Seham asked whether the seven-year time limits in Section 605(a) of the FCRA apply to the situation where a CRA verifies an applicant or employee's educational background and past employment. In our letter to Mr. Seham, we explained that the staff of the Commission does not consider graduation dates, college degrees, or dates of employment to be items of "adverse information." Since Section 605 limits only the reporting of "adverse items" of information, we stated that, in our view, there is no restriction upon the reporting of this type of information even if the information antedates the report by more than seven years.

Your inquiry asks whether we would change our analysis if an applicant falsifies his or her educational or employment background, and, thus, the information being reported by the CRA is, in fact, "adverse" to the interests of the consumer in the sense that it contradicts information provided by the applicant.

We would not change our analysis. We believe that whether information is "adverse" for FCRA purposes depends upon the nature of the information and not the use of the information. For example, tax liens, payment delinquencies, evictions, and similar information are clearly items of negative information that reflect adversely upon the

consumer. However, dates of employment and educational data (such as dates of graduation and degrees) are neither "positive" nor "negative." The information is neutral.

We believe that facially neutral information should not be considered "adverse" information because a consumer may have misrepresented the information. To take the contrary position would prohibit a CRA from performing a valuable function for its clients -- verifying employment or education data beyond seven years -- without furthering any of the goals of Section 605 of the FCRA. Accordingly, we believe that a CRA may verify education information and employment dates even where the information it provides to its customers may contradict what a consumer has listed on his or her application.

We note that if there is any mistake in the information provided by the CRA to an employer concerning a consumer's educational background or employment history, the consumer will learn about the information before any adverse action is taken by the employer. Section 604(b)(3) requires the employer to provide a copy of the consumer report containing the data about education and employment before taking any adverse employment action. Thus, if the CRA has made a mistake, the consumer will be able to point this out to the employer.

2. What are the responsibilities of a CRA if, when checking past employment information, adverse items of information are discovered that antedate the report by more than seven years?

With certain exceptions,⁽¹⁾ CRAs may not report information that they uncover if the information antedates the report by more than seven years. We note, however, that Section 605(b)(3) exempts from the general seven-year limitation the reporting of any information in connection with employment at an annual salary "which equals, or which may reasonably be expected to equal \$75,000, or more." Thus, in the case of applicants for high income jobs, a CRA may report adverse information without any time limitation.⁽²⁾

Obviously, Section 605(a) limits the reporting of many items of negative information by a CRA except where a high-salary position is involved. However, we note that checks with past employers are not covered by the FCRA when done directly by the employer. Thus, the employer may obtain adverse information about the consumer without being concerned about Section 605(a). Finally, we note that employment agencies that interview references provided by an applicant are covered by a special provision of the FCRA (Section 603(o)) and also are not bound by the reporting limitations set out in Section 605.

3. If an employment application asks whether or not an applicant has been convicted of a crime, may a CRA verify this information? Should the application be reworded? Some federal and state laws and regulations require criminal records checks covering time periods in excess of seven years. May CRAs assist in these checks?

The FCRA has never prohibited an employer from asking about criminal convictions in an employment application. Moreover, because of the recent amendment to Section 605(a) contained in the CRCA, consumer reporting agencies may now report information about criminal convictions without any limitation as to length of time that they antedate the report. As a result, CRAs may now be used by an employer to conduct comprehensive checks of the criminal histories of job applicants or employees.

I hope that this information is of assistance to you. The opinions set forth in this letter reflect the views of the staff and not necessarily those of the Commission or any individual Commissioner.

Sincerely,

William Haynes
Attorney
Division of Financial Practices

1. The exceptions are criminal convictions (which may now be reported without any time limit), bankruptcies (which may be reported for ten years), and civil suits and judgments (which may be reported for seven years or until the relevant statute of limitation expires).

2. Since your question concerns information apparently obtained through interviews with former employees, we note that these inquiries may be "investigative consumer reports" subject to the special procedures set forth in Section 606 of the FCRA.