

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

Division of Credit Practices
Bureau of Consumer Protection

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Clarke W. Brinckerhoff
Attorney

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(202) 326-3224

March 3, 1998

Dear Mr. Schieber:

This responds to your letters dated November 28, 1997, and January 22, 1998, on behalf of the Mortgage Insurance Companies of America ("MICA"), stating your opinion that Section 615(a) of the Fair Credit Reporting Act ("FCRA") does not require a mortgage insurer to provide notice to an applicant for a residential mortgage when it refuses to insure the loan for which the consumer has applied.

You describe a common scenario in the mortgage lending industry in which a lender submits a residential loan application file to a mortgage insurer ("MI") to obtain insurance that protects the lender against the consumer's default on that loan. A credit report from a major credit bureau, which the MI may receive as part of the file or obtain on its own, is often a part of the MI's decisionmaking process. It is not uncommon for the first MI contacted by the lender to decline coverage, but for another MI subsequently to insure the transaction, with the result that the consumer obtains the loan.

Section 615(a) provides that a person that "takes adverse action with respect to any consumer that is based in whole or part on any information contained in a consumer report" must notify the consumer of the action, and provide information relating to the consumer reporting agency that provided the report and the consumer's rights under the FCRA. You support your belief that an MI should not be required to provide this notice with (1) a legal argument that the section does not apply where an MI declines to insure a consumer residential loan based on the credit report on the applicant, and (2) a policy argument that consumers will be confused or distressed by the notices. We disagree, for the reasons set forth in this letter.

In our view, the plain language of Section 615(a) requires MIs to provide the notice. First, an MI takes "adverse action" -- in both the common sense and legal definition of that term -- when it declines to extend insurance coverage that is a prerequisite for approval of the consumer's residential mortgage loan application. That term is defined broadly by Section 603(k)(1)(B)(i) to include "a denial ... in connection with the underwriting of insurance" An MI's refusal to insure a consumer loan is certainly a "denial in connection with the underwriting of insurance."

Similarly, the term "consumer report" is defined broadly in Section 603(d) of the FCRA and certainly includes the garden-variety credit report from a major credit bureau used by

lenders and their MIs. A credit report contains information "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" that the bureau "collected ... for the purpose of serving as a factor in establishing the consumer's eligibility for" credit, insurance, employment, or other purposes for which the agency is permitted to provide reports under the FCRA, and is therefore undeniably included within the definition set forth in Section 603(d).⁽¹⁾ The report's status as a "consumer report" in this case is reinforced by the fact that the critical insurance factors relate to the consumer, not the lender with which the MI does business. First, the reason the MI is allowed to obtain a report on the loan applicant is because Section 604(a)(3)(C) provides a permissible purpose "in connection with the underwriting of insurance on the *consumer*" (emphasis added).⁽²⁾ Second, the party evaluated by the MI is the *consumer*. Third, the premium when coverage is granted is paid by the *consumer*.

Finally, we are unpersuaded by your policy argument that consumers will be confused by receiving the notices required by Section 615(a) from one or more MIs, even in the case where the loan application itself is ultimately approved when a second MI agrees to provide coverage. We believe that the benefit provided by the notice -- fulfilling Section 615's critical function of informing the consumer that something in a credit bureau file caused the MI's action -- outweighs any problems that might arise when consumers get the notice. If MIs, perhaps with the assistance of lenders with which they do business (as suggested in your January 22 letter, and discussed in the following paragraph), craft the text of their notices to explain to the applicant the circumstances under which the MI has taken its action and the process involved, potential confusion can be minimized. A notice that includes the specific items set forth in Section 615(a) will comply with that provision, even with such an explanation included in the text.

An MI may meet its responsibility under Section 615(a) by contracting with a lender (or other party) to deliver the notice to the consumer.⁽³⁾ In that case, the lender may fulfill the MI's obligation by providing to the consumer either (1) a separate notice in the name of the MI, or (2) its own notice that communicates the refusal by one or more MIs to insure the loan (including, if applicable, information that the lender is required by Regulation B to disclose to the consumer if it has denied the loan application). In that way, MIs and their lender clients can arrange to comply with the FCRA without providing duplicative notices to the consumer.

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

Sincerely yours,

Clarke W. Brinckerhoff

1. Your letter's lengthy argument that the lender and MI are engaged in a "commercial transaction" -- and that the insurance is issued for a "commercial purpose" as a technical matter -- is simply not germane to the status of a report from a credit bureau as a "consumer report." That might have relevance if the report concerned the applicant's business history and was provided by an agency that compiles and provides data for commercial purposes; in that case, personal references to a corporate director or officer would not change the commercial credit report into a consumer report. Comment 603(d)-4C, Federal Trade Commission Commentary on the FCRA, 55 Fed. Reg. 18804, 18810 (May 4, 1990).

2. A commercial purpose, standing alone, would be insufficient under Section 604 to provide the MI a permissible purpose to obtain a credit report on the consumer applicant.

3. Of course, the MI would have some exposure if the lender with which it contracted failed to deliver the required notice. However, Section 615(c) specifically would allow the MI to avoid liability if it "shows, by a preponderance of the evidence that at the time of the alleged violation [the MI] maintained reasonable procedures to assure compliance with the provisions of this section." We believe that this provision would protect an MI, if it contracted with one or more responsible lenders to deliver notices required by Section 615(a) and appropriately monitored such other parties' performance of that obligation.