

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

Division of Financial Practices

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Thomas E. Kane  
Attorney

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Paula Greathouse, Esq.  
Worker's Compensation Fund  
Kansas Insurance Department  
420 SW 9th Street  
Topeka, Kansas 66612-1678

**Re:** Sections 603(h) and 603(k) of the Fair Credit Reporting Act

Dear Ms. Greathouse:

This is in response to your request for a staff opinion regarding the Fair Credit Reporting Act ("FCRA"). You ask two questions regarding investigations by your office of consumers who make claims against the Kansas Worker's Compensation Fund ("the fund"), and one question regarding your office's investigations of insurance agents. As you indicated in a recent telephone conversation, the fund provides coverage for consumers who had pre-existing injuries when they started a job and then suffered a related injury. The fund also provides coverage for employees whose employers are insolvent. I have summarized your questions in italics and added our responses below each question.

***1. When a consumer makes a claim against the fund, this office investigates the claim and, on rare occasions, obtains a consumer report regarding the consumer. The office uses the reports to prove that information provided by the claimant was incorrect or fraudulent. Does this use of consumer reports constitute "employment purposes," as defined by Section 603(h) of the FCRA, 15 U.S.C. § 1681a(h)?***

No. Section 603(h) states that "the term 'employment purposes' when used in connection with a consumer report means a report used for the purposes of evaluating a consumer for employment, promotion, reassignment or retention as an employee." In the situation you have described, the consumers are not being evaluated for any of these purposes. Instead, the consumers are being evaluated to determine whether their insurance claims should be denied because they submitted incorrect or fraudulent information.

It is not clear that your office has a permissible purpose to obtain consumer reports to determine whether consumers who submit claims to the fund should have their claims denied. Section 604 of the FCRA, 15 U.S.C. § 1681b, lists the circumstances under which a consumer reporting agency ("CRA") may furnish a consumer report to a third party such as your office. Section 604(a)(2) permits the furnishing of consumer reports "in accordance with the written instructions of the consumer to whom it relates." You informed me during our telephone conversation, however, that your office does not obtain such permission

before requesting consumer reports from CRAs. Section 604(a)(3)(B) permits the furnishing of consumer reports for "employment purposes," but as we indicated above, your office does not have such a purpose. Section 604(a)(3)(C) permits the furnishing of consumer reports "in connection with the underwriting of insurance involving the consumer." Because your office is obtaining the consumer reports to evaluate consumers' insurance claims, rather than to determine whether to underwrite the consumers' insurance in the first instance, however, the office does not have a permissible purpose to obtain consumer reports under this provision.<sup>(1)</sup>

It is possible that Section 604(a)(3)(D) gives your office a permissible purpose to obtain consumer reports on consumers who submit claims to the fund. That section permits the furnishing of consumer reports "in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status." Because your office is a governmental instrumentality, Section 604(a)(3)(D) would seem to give the office a permissible purpose to obtain consumer reports on consumers who submit claims to the fund if (1) insurance payments paid by your office constitute a "benefit" and (2) your office is "required by law to consider [the claimants'] financial responsibility or status" when deciding whether to make the payments. We are unable to provide an opinion on that issue, absent more detailed information on the statutory background and operation of the program that provides these payments to injured workers.

***2. Does this use of consumer report information fall within the definition of an "adverse action" under Section 603(k), 15 U.S.C. § 1681a(k)?***

For purposes of responding to this question, we will assume that your office has a permissible purpose under Section 604(a)(3)(D) to obtain consumer reports of consumers who submit insurance claims. Section 603(k)(1)(B)(iii) provides that the term "adverse action" means, *inter alia*, "a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 604(a)(3)(D)." Because we have assumed for purposes of responding to this question that insurance payments paid by your office constitute a "benefit," your office's denial of an insurance claim would constitute the "denial" of a "benefit" and would thus meet the definition of an "adverse action." Even if your office chooses instead to grant the claimant less than he or she claimed, such an action would constitute an "adverse change in the terms of [the] benefit" and would also meet the definition of an "adverse action." If, however, your office simply reviews the consumer report of a claimant and neither denies the claim entirely nor grants the claimant less than he or she claimed, such a review would not constitute an "adverse action."

***3. The fraud unit of the Kansas Insurance Department investigates insurance agents to determine whether their state insurance license should be revoked due to insurance fraud. During these investigations, the fraud unit sometimes obtains consumer reports on the insurance agents. Does this use of consumer reports meet the definition of "employment purposes" in Section 603(h) of the FCRA, 15 U.S.C. § 1681a(h)?***

No. As noted above, Section 603(h) states that "the term 'employment purposes' when used in connection with a consumer report means a report used for the purposes of evaluating a

consumer for employment, promotion, reassignment or retention as an employee." When your agency reviews consumer reports to determine whether insurance agents -- who perform no work at all for the agency, directly or indirectly -- have committed insurance fraud, that review is unrelated to any "employment purposes."

We note that the fraud unit may have a permissible purpose under Section 604(a)(3)(D) to obtain consumer reports on insurance agents it is investigating. The fraud unit is a governmental instrumentality determining the agents' eligibility for a license. If it is "required by law to consider [the agents'] financial responsibility or status" as part of that process, it would have a permissible purpose. Of course, the fraud unit may also have a permissible purpose to obtain consumer reports on insurance agents, under Section 604(a)(2), if it previously has obtained the agents' written authorization to do so as part of the licensing process.

The views set forth in this informal staff opinion are those of the staff and are not binding on the Commission.

Sincerely,

Thomas E. Kane

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1. *See* Comment 604(3)(C)-2 of the Federal Trade Commission Commentary on the Fair Credit Reporting Act ("FCRA Commentary"), 16 C.F.R. § 600 Appendix, 55 Fed. Reg. 18,804, 18,816 (May 4, 1990), which states that "[a]n insurer may not obtain a consumer report for the purpose of evaluating a claim (to ascertain its validity or otherwise determine what action should be taken), because permissible purposes relating to insurance are limited by this section to 'underwriting' purposes." We note that reports provided to insurers by claims investigation services solely to determine the validity of insurance claims are not consumer reports. *See* Comment 603(d)-6C of the FCRA Commentary at 18,810.