OCC ADVISORY LETTER

Comptroller of the Currency
Administrator of National Banks

Subject: Fair Credit Reporting Act

TO: Chief Executive Officers of National Banks, Federal Branches and Agencies, Department and Division Heads, and Examining Personnel

Last year, the Federal Trade Commission ("FTC") issued an informal interpretive letter dated July 26, 2000, on the application of the Fair Credit Reporting Act ("FCRA") to business loan transactions. Specifically, the FTC letter addressed the ability of a lender to obtain a credit report on an individual who is a principal of a business loan applicant, or who personally guarantees or cosigns a business loan. The FTC letter concluded that a lender would not be able to obtain a credit report in these circumstances without first obtaining the individual's written consent.

This position raised significant safety and soundness concerns, and the OCC's Chief Counsel's Office also disagreed with the interpretation. Accordingly, examiners were instructed that they should not cite violations of the FCRA in examinations of banks that do not receive consumer consent before obtaining a credit report in connection with a business loan where the consumer guarantees or is otherwise personally liable on the loan. Credit reports are important indicators of an obligor's credit record, and are regularly used by lenders in assessing the overall credit risk associated with this type of business loan transaction.

Recently, at the written request of the OCC, OTS, FDIC, and Federal Reserve Board ("the agencies"), the FTC reconsidered the position previously communicated in its July 26, 2000, informal interpretive letter. In a response dated June 22, 2001, the FTC agreed with the position previously taken by the agencies, and indicated that the FTC would consider its prior interpretive letter superseded to the extent it was inconsistent with that position.

This recent FTC action ensures uniformity among the agencies and the FTC, and confirms that a lender may obtain a credit report on an individual in connection with a business loan where the individual in question is or will be personally liable on the loan -- such as when the individual cosigns or guarantees the loan, or when the nominal credit applicant is the individual's sole proprietorship but the individual is liable on the debt. A lender in these circumstances may obtain a credit report in connection with both the underwriting of the loan and the review or collection of the account, without the prior written consent of the individual.

For further information, contact the Community & Consumer Law Division at (202) 874-5750 or the Credit Risk Division at (202) 874-5170.

Copies of the relevant letters are attached for your reference.

_____	_____
Emory W. Rushton	Julie L. Williams
Senior Deputy Comptroller	First Senior Deputy Comptroller
Bank Supervision Policy	and Chief Counsel

Attachments

Office of the Comptroller of the Currency
Federal Reserve Board
Federal Deposit Insurance Corporation
Office of Thrift Supervision

May 31, 2001

Joel Winston
Acting Associate Director
Division of Financial Practices
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Dear Mr. Winston:

This letter is to follow-up on the April 26th meeting among you, others at the Federal Trade Commission ("FTC"), and staff of the undersigned agencies. At that meeting, our agencies expressed our concerns regarding the July 26, 2000, informal interpretive letter issued by the staff of the FTC ("Tatelbaum Letter") on the application of the Fair Credit Reporting Act ("FCRA") to the extension of business credit. We greatly appreciate your and your staff's willingness to meet with our representatives and to listen to our additional thoughts, as outlined below, regarding the legal and policy concerns raised by the Tatelbaum Letter.

The Tatelbaum Letter addressed whether a lender may lawfully obtain a credit report about an individual who is a principal, owner, or officer of a business loan applicant (such as a sole proprietorship, partnership, or corporation). The Tatelbaum Letter also addressed whether a lender may lawfully obtain a credit report about an individual who signs a personal guarantee in connection with a commercial credit application by a third party.

The Tatelbaum Letter concluded that, in both circumstances, the credit report generally would constitute a "consumer report" subject to the FCRA. The letter also concluded that the lender would not have a permissible purpose under the FCRA to obtain the report, absent the "written instructions" of the consumer.

We agree with the conclusion that credit (or other) reports obtained in both of these situations generally are consumer reports within the meaning of the FCRA. However, after careful review, and for the reasons discussed below, we believe that section 604(a)(3)(A) of the FCRA authorizes lenders to obtain a consumer report in circumstances where the individual is personally liable on business credit, such as in the case of an individual proprietor, co-signer,

or guarantor.[1] Furthermore, we believe that a contrary view, as implied in the Tatelbaum Letter, raises concerns regarding safe and sound lending practices, operational efficiencies, and credit availability. Our interpretation of the FCRA, by contrast, would resolve those concerns in a manner that is fully consistent with the terms and purposes of the FCRA and that promotes prudent lending practices.

LEGAL ANALYSIS

Section 604(a)(3)(A) of the FCRA provides that a consumer reporting agency may furnish a consumer report to a person that it has reason to believe "intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer." Thus, a lender has a permissible purpose for obtaining a consumer report if it intends to use the report in connection with a credit transaction (1) involving the consumer discussed in the report, and (2) involving the extension of credit to, or the review or collection of an account of, that consumer.

If a consumer is a signatory and party to the transaction, either as legal obligor (in the case of an individual proprietorship) or joint obligor (in the case in which the individual co-signs the loan), then such a credit transaction involves an extension of credit to the consumer who is the subject of the report because that consumer is legally liable for repayment of the credit. The "extension of credit" referenced in section 604(a)(3)(A) is not confined to credit extended for "personal, family, or household" purposes; that limitation is present only in the definition of "consumer report" in section 603(d), and serves to restrict the types of credit reports subject to the FCRA's provisions. In addition, the consumer in these circumstances is a principal of the business that will use the loan proceeds, may be actively involved in the operation of the business, and may have played an important role in initiating and negotiating the credit transaction. Permitting a lender to obtain a consumer report about an individual who is obligated to repay the loan—at the outset of the transaction—is consistent with the purposes of section 604(a)(3)(A), particularly because that section provides that the lender also could obtain such a report subsequently, in connection with the "review" of the account and, ultimately, the "collection of" the debt.

In the case of guarantors, there is also a sound legal basis for concluding that the transaction involves an "extension of credit to . . . the consumer," particularly in view of the fact that this conclusion is fully consistent with the purposes of Section 604 of the FCRA. A guarantor of the credit is obligated on the extension of credit. The statutory purpose of section 604 is to promote the confidentiality of consumer report information by restricting access to those with a legitimate business purpose for obtaining the information. As in the case of

[1] We generally agree that a lender would not have a permissible purpose under section 604(a)(3)(A) of the FCRA to obtain a consumer report on an individual who will not be personally liable for repayment of the credit, such as when the individual is a shareholder, director, or officer of a corporation, but does not guarantee or co-sign the loan, and is not an individual proprietor liable for the loan. We express no views here about the interpretation of section 604(a)(3)(F)(i) of the FCRA stated in the Tatelbaum Letter.

banking laws and regulations relating to insider lending and general lending limits,[2] treating the guarantor as one to whom credit is being extended is fully consistent with this statutory purpose. The guarantor is obligated to repay the loan, and the lender is relying on the creditworthiness of the guarantor, which is precisely why the guarantee was sought. For that reason, the lender has a clearly legitimate reason to obtain the information. Moreover, the guarantor has knowingly become a party to the transaction. These considerations indicate that there is no particularly strong privacy interest at stake that warrants greater protection than that presented in a typical consumer credit transaction.[3]

With respect to existing loans under review or collection, a similar analysis of section 604(a)(3)(A) shows that a lender would have a permissible purpose to obtain a credit report about an individual who has guaranteed, or is otherwise personally obligated to repay, a business loan. As noted above, this section of the FCRA permits a lender to obtain a consumer report if it intends to use the report (1) in connection with a credit transaction involving the consumer described in the report, and (2) involving the "review" of the account and, ultimately, the "collection of" a loan on which the consumer is obligated. By referring to a "credit transaction involving the consumer … and involving … the review or collection of an account of … the consumer," section 604(a)(3)(A) provides a broad conception of the whole "credit transaction" and is not limited strictly to the formation of the loan agreement and disbursement of funds. Rather, that provision encompasses the entire, ongoing relationship between the creditor and obligor. If the consumer is personally obligated to repay the loan, then the lender would be seeking the report in connection with a credit transaction involving the consumer described in the report. With respect to the second requirement, we believe that the plain meaning of the statute permits a lender to obtain a consumer report about a consumer who has guaranteed or otherwise become personally liable on any loan (or loan account) for the purpose of "review or collection of an account of … the consumer."

Finally, we believe that the interpretations delineated above—under which a consumer report may be obtained or used for business credit purposes in certain limited circumstances—is fully consistent with the general provisions and structure of the FCRA. It is notable, for example, that in section 604(a)(3)(A), Congress did not include limiting language parallel to that used in section 603(d): there is *no* requirement in the statutory text that the lender intend to use the credit information in connection with a "personal, family, or household" credit transaction involving the consumer, or an extension of "personal, family, or household" credit to the consumer.

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[2] See 12 U.S.C. § 375b(9)(D)(I); 12 C.F.R. 215.3(a)(7); and 12 C.F.R. 32.2(a). Under each of these provisions, an extension of credit is generally deemed to be made to a guarantor of the credit (as well as to the nominal borrower). This is consistent with the purposes underlying these provisions, which is to limit a bank's credit exposure to particular obligors.

[3] The "bright line" rule that a permissible purpose exists whenever the consumer will be personally liable on the loan also reduces legal uncertainty and, thereby, both operational and compliance burdens. In addition, this rule can be applied relatively easily in the context of consumer credit transactions.

IMPLICATIONS FOR SAFETY AND SOUNDNESS POLICIES AND PRACTICES

Based on the supervisory experiences of our agencies, we believe that financial institutions have developed common practices for extending credit to individual proprietorships, closely-held corporations, and other similar businesses that typically require the individual owners, primary stockholders, or other business principals to become directly liable on, or personally guarantee, the extension of credit. Those practices are important to maintaining prudent lending standards, especially where the businesses themselves may have few resources to support the loans requested.

As discussed below, the interpretation set forth in the Tatelbaum Letter—if it were to be followed in situations where the individual in question is obligated to repay the loan—would raise serious operational difficulties for insured depository institutions supervised by our respective agencies, as well as other lenders for which the FTC has enforcement authority under the FCRA. More important, we believe that the interpretation would raise concerns regarding safe and sound lending practices and credit availability.

Impact on the Credit Underwriting Process. Under the Tatelbaum Letter, a lender would need the written instructions of each of the individuals who becomes obligated on a business loan in order to obtain their credit reports in connection with the extension of credit.[4] As a practical matter, the additional paperwork and operational procedures entailed by such a requirement could significantly impede the ability of banks, thrifts, and other lenders to respond quickly and efficiently to business credit applicants that rely on the creditworthiness of their principals and guarantors. Moreover, we believe that requiring the written instructions of each of the individuals in question would increase the costs of making such loans.

Under ordinary circumstances, a lender receives credit applications from existing and potential small and other business loan customers that require rapid responses, often on the same day. In many cases, not all of the individuals who would become liable on the requested loan (or already be liable on any loan that may be made to the business) will be available on such short notice to provide the authorization that would be necessary for the lender to obtain a credit report. In such circumstances, a lender would confront two unsatisfactory options: either fail to satisfy in a timely manner the legitimate credit needs of its business customers (particularly emerging companies without their own independent credit history), or undertake other, presumably less efficient measures to review fully each individual's creditworthiness in accordance with safe and sound lending practices.

Impact on Evaluating Existing Loan Portfolios. The interpretation stated in the Tatelbaum Letter also would appear to require a lender to receive the written instructions of individual proprietors, guarantors, and co-signers in order to obtain their credit reports in connection with the review or collection of a business loan. Such a requirement would substantially raise the costs of complying with safe and sound lending principles, and would

[4] Similarly, the Tatelbaum Letter would appear to require similar procedures in connection with routine transactions such as credit renewals and refinancings.

have an immediate and significantly adverse impact on loan collection activities and on evaluating existing loan portfolios.

As a general matter, safe and sound lending practices require a creditor to review regularly the quality of its loan portfolio. These reviews necessarily include an assessment of the financial strength of all persons who may be liable on the creditor's loans, including individual proprietors, co-signers, and guarantors. Timely access to credit reports on an individual who may be personally liable on such a loan is essential to this process.[5] The Tatelbaum Letter would create significant impediments to these safe and sound lending practices for existing loan portfolios because lenders may be blocked from obtaining or may encounter severe obstacles in trying to obtain the consent of each of the individuals who may be obligated to pay on numerous loans. Moreover, requiring written authorization to obtain a credit report would interfere with and raise the costs of establishing appropriate loan loss reserves and capital allocations for small and other business loans because lenders would be required to allocate more resources to take the necessary steps to monitor and assess the quality of their loan portfolios.

The obstacles posed by the Tatelbaum Letter for maintaining safe and sound lending practices are aggravated in situations involving loan delinquencies and other events of default. In these cases, it is imperative for the lender to assemble all relevant information in order to assess its options and act promptly to minimize losses. Ascertaining the financial strength and other potential liabilities of all parties who may be liable on a loan, including individual proprietors, co-signers, and guarantors, is integral to this process. Because it is imperative to obtain accurate information quickly, a credit report may serve as the most effective and reliable resource. In the difficult circumstances surrounding an event of default, the problem of obtaining consents that would be required from individual guarantors may be magnified substantially. Moreover, if a lender is unable to obtain a credit report about a guarantor, then its ability to invoke its rights under the guarantee may be limited, and thereby compound the risk of losses on the loan.

CONCLUSION

For the reasons outlined above, we believe that the FCRA would permit a lender to obtain a consumer report in connection with a business credit transaction where the consumer in question is or will be personally liable on the loan, such as in the case of an individual proprietor, co-signer, or guarantor. Under these circumstances, the lender has a permissible purpose to obtain a consumer report about that individual under section 604(a)(3)(A). Our agencies' enforcement policies under the FCRA with respect to the institutions under our jurisdiction will be consistent with this interpretation of the law.

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[5] The lender's ability to obtain credit reports in these circumstances may assist borrowers and guarantors themselves. For example, if a current credit report indicates that a guarantor's financial position remains strong and stable, then a lender may waive or reduce normal requirements for an updated personal financial statement. Similarly, a lender may agree to additional advances under a credit line on the basis of a sound credit report pending the preparation of an updated financial statement (which may require more time and the assistance of an accountant).

We recognize that the legal arguments and policy concerns outlined above may not have been presented to the FTC staff when it issued the Tatelbaum Letter. We appreciate your willingness to consider the important issues raised on the basis of this supplementary information. We further appreciate your willingness to take such actions as may be appropriate to clarify the scope and meaning of the Tatelbaum Letter. Among other things, such actions would help to ensure the application of consistent principles and Federal government enforcement policies to all lenders, and to the credit bureaus on which they rely.

Thank you very much for your attention to these matters.

Very truly yours,

Julie L. Williams
First Senior Deputy Comptroller
and Chief Counsel
Office of the Comptroller of the Currency

J. Virgil Mattingly
General Counsel
Board of Governors of the
Federal Reserve System

William F. Kroener, III
General Counsel
Federal Deposit Insurance Corporation

Carolyn Buck
Chief Counsel
Office of Thrift Supervision

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

June 22, 2001

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel
Office of the Comptroller of the Currency

J. Virgil Mattingly
General Counsel
Board of Governors of the Federal Reserve System

William F. Kroener, III
General Counsel
Federal Deposit Insurance Corporation

Carolyn Buck
Chief Counsel
Office of Thrift Supervision

Dear Banking Agency Counsels:

This responds to your May 31 letter concerning the Federal Trade Commission staff opinion letter dated July 26, 2000, from David Medine, former Associate Director for Financial Practices, to Charles Tatelbaum. That letter was in response to Mr. Tatelbaum's request for the Commission staff's written views on whether a permissible purpose exists under the Fair Credit Reporting Act ("FCRA") for a business credit grantor to obtain a consumer report on an individual who is a principal, owner, or officer of a commercial loan applicant (a sole proprietorship, partnership, or corporation), or who signs a personal guarantee in connection with a commercial credit application by a third party. Mr. Medine's letter set forth the position of the Commission staff that neither Section 604(a)(3)(A) nor Section 604(a)(3)(F)(i) of the FCRA provides such a purpose.

Your letter advocates an alternative interpretation of Section 604(a)(3)(A), concluding that "the FCRA would permit a lender to obtain a consumer report in connection with a business credit transaction where the consumer in question is or will be personally liable on the loan, such as in the case of an individual proprietor, co-signer, or guarantor."(1) We agree that it is reasonable to view a business transaction in which an individual has accepted personal liability for the business debt as involving the consumer, thus providing a permissible purpose for the lender to obtain a consumer report under Section 604(a)(3)(A). We understand your practical reasons for desiring that all parties be able to rely on your interpretation. Therefore, we are willing to consider the Tatelbaum letter superseded to the extent that it concludes otherwise.

This informal staff letter is not binding on the Commission.

Sincerely,

Joel Winston

Endnote:

1. However, we note that you "generally agree that a lender would not have a permissible purpose under section 604(a)(3)(A) of the FCRA to obtain a consumer report on an individual who will not be personally liable for repayment of the credit, such as when the individual is a shareholder, director, or officer of a corporation, but does not guarantee or co-sign the loan, and is not an individual proprietor liable for the loan."

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

July 26, 2000

Charles Tatelbaum, Esq.
General Counsel
National Association of Credit Management
8840 Columbia 100 Parkway
Columbia, MD 21045-2158

Dear Mr. Tatelbaum:

This responds to your letter asking for the staff's opinion on the application of the Fair Credit Reporting Act ("FCRA") to the extension of credit for commercial purposes. Specifically, you inquire whether a permissible purpose exists under the FCRA for a business credit grantor to obtain a consumer report on an individual who is a principal, owner, or officer of a commercial loan applicant (a sole proprietorship, partnership, or corporation), or who signs a personal guarantee in connection with a commercial credit application by a third party. For the reasons discussed hereafter, we answer in the negative.

1. The report on the individual is a "consumer report" subject to the FCRA.

Section 603(d)(1) of the FCRA states:

The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose under Section 604.

We understand your inquiry to mean that the credit report that the business credit grantor obtains is a report on the *personal* credit and other history of the individual who is a principal, owner, or officer of the entity that is undertaking the commercial loan (or who is serving as a guarantor). Because the information is "collected in whole or in part for the purpose of (assisting evaluation of) the consumer's eligibility for credit (or other authorized purpose)," the overwhelming weight of authority is that such a report is a "consumer report," regardless of the unauthorized purpose to which the information may in fact be used by the party procuring the report. *Yang v. Government Employees Ins. Co.*, 146 F.3d 1320, 1325 (11th Cir. 1998); *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264, 1273-74 (9th Cir. 1990); *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 884-85 (5th Cir. 1989); *Heath v. Credit Bureau of Sheridan, Inc.*, 618 F.2d 693, 696 (10th Cir. 1980); *Hansen v. Morgan*, 582 F.2d 1214, 1218 (9th Cir. 1978); *Pappas v. Calumet City*, 9 F.Supp.2d 943, 947-48 (N.D.Ill. 1998); *Boothe v. TRW Credit Data*, 523 F. Supp. 631, 634 (S.D.N.Y. 1981). The Commission's May 1990 Commentary on the Fair Credit Reporting Act,(1) is in accord.(2) Where the information concerns the subject's *business* history or status (i.e., is collected and provided by a commercial reporting agency for use in *business* transactions), of course, its communication to the user does not constitute a "consumer report" under Section 603(d). *Wrigley v. Dun & Bradstreet, Inc.*, 375 F. Supp. 969 (N.D. Ga. 1974); *Boothe*, 523 F. Supp. at 633.(3)

We recognize there is some authority to the contrary. See *Matthews v. Worthen Bank & Trust Co.*, 741 F.2d 217, 219 (8th Cir. 1984), where the court cites a comment by Representative Sullivan to the effect that the

FCRA "does not apply to reports used for business, commercial, or professional purposes."(4) While this piece of legislative history is intriguing, we interpret it to mean that reports to business lenders by commercial reporting services such as Dun & Bradstreet, which compile data and provide reports only for commercial purposes, are not covered by the FCRA. It is highly unlikely that Rep. Sullivan's comments were intended to negate Section 603(d)'s specific application to a report made by a credit bureau that "collected (the information) . . . for the purpose of serving as a factor in establishing the consumer's eligibility" for credit or other purposes authorized by the FCRA, by focusing instead solely on the purpose of the user. Emphasizing only the user's purpose emasculates the statute, as articulated by the court in the St. Paul case:

To illustrate the untenable nature of St. Paul's construction of the FCRA in this context, suppose X secured Y's credit report for the sole purpose of disclosing it to embarrass Y. Under St. Paul's reasoning, focusing solely on X's "use" of the report, the report would not be a credit report under the FCRA and thus Y would not be afforded FCRA protections. Not only would this run contrary to congressional intent, it would render meaningless (Section 604) which allows for the release of credit reports only for certain purposes.

Under St. Paul's reasoning, credit reports would be releasable under all circumstances. If used for non-FCRA purposes, a credit report would be releasable because in did not fall within the FCRA definition of a consumer report. If used for FCRA purposes, a credit report would likewise be releasable because it would meet the definition of a consumer report. We simply cannot conclude that Congress intended such an illogical result."

884 F.2d at 884-85.

We believe the majority view is clearly the correct one,(5) and that a report by a credit bureau on an individual based on information that was collected for the purpose of reporting on that individual does not lose its character as a consumer report because of an impermissible purpose of the user.

2. A commercial transaction does not provide a "permissible purpose" for a consumer report

Your letter shows that you clearly understand that the lender may always assure a permissible purpose pursuant to Section 604(a)(2), which authorizes a report to be supplied pursuant to the written instructions of the consumer. We disagree, however, with your position that a permissible purpose exists under Section 604(a)(3)(A) or (F)(i). Those subsections provide such a purpose only where the recipient of the report:

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to ... the *consumer*; or ... (F) otherwise has a legitimate business need for the information (i) in connection with a business transaction that is initiated by the *consumer*. (Emphasis added)

Section 604(c) states, "The term 'consumer' means an individual." Your letter states specifically that the "credit process is initiated *by the company* seeking the business or trade credit." When a corporation, partnership, or other business entity -- rather than an individual -- applies for commercial credit, there is thus neither an "extension of credit to (a) consumer" or "a business transaction that is initiated by a consumer" to provide a permissible purpose under either Section 604(a)(3)(A) or (3)(F)(i).

Because "extension of credit to ... the *consumer*" (emphasis added) is a prerequisite to the application of Section 604(a)(3)(A), where the application is made by a business entity, the provision does not provide a permissible purpose for a lender to obtain a consumer report on a guarantor or co-signer for -- or a principal, owner, or officer of -- the commercial credit applicant.

Section 604(a)(3)(F)(i), which provides a permissible purpose only for a "transaction that is initiated by the consumer," is also inapplicable to a credit transaction initiated by a business entity. The provision does not encompass commercial or credit purposes; rather, is designed to provide a permissible purpose to a business that is considering a *consumer* application for a purpose *other than* credit, employment, or insurance set forth in Sections 604(a)(3)(A), (3)(B), or (3)(C).(6) For example, a landlord to whom a consumer applies to rent an apartment, a bank to which a consumer applies to open a checking or savings account, or a merchant to whom a consumer offers a personal check as payment for goods or services has a "permissible purpose" to obtain a consumer report under this provision.(7) Section 604(a)(3)(F)(i) thus provides no authority for a lender to obtain a consumer report in connection with a credit application for any commercial purpose.

The court authorities are generally in accord. A "*consumer* relationship must exist between the party requesting the report and the subject of the report." *Houghton v. New Jersey Manufacturers Ins. Co.*, 795 F.2d 1144, 1149 (3d Cir. 1986) (emphasis added). Thus, there is no permissible purpose to obtain a consumer report on a corporate principal to evaluate the capacity of the company to pay a judgment. *Mone v. Dranow*, 945 F. 2d 306, 308 (9th Cir. 1991). Similarly, "evaluating prospective franchisees does not fall within one of the consumer purposes set forth in the FCRA." *Ippolito v. WNS, Inc.*, 864 F.2d 440, 452 (7th Cir. 1988). Other courts have held that a city had no permissible purpose to obtain a consumer report on the proprietor of a towing company that removed illegally parked cars on request from the police department, regardless of whether the municipality had a contract with the towing company, *Pappas v. Calumet City*, 9 F.Supp.2d 943, 950 (N.D.Ill. 1998); a company had no legitimate "business need" purpose to obtain a consumer report on a former employee who had suddenly resigned and was suspected of embezzlement, *Russell v. Shelter Financial Services*, 604 F. Supp. 201 (W.D. Mo. 1984); and a manufacturer had no "business need" purpose to obtain a consumer report on an individual who operated a mail order business that sold its products among others. *Boothe v. TRW Credit Data*, 523 F. Supp. 631 (S.D.N.Y. 1981).

Again, we acknowledge that the reported cases are not unanimous on the point. In *Advanced Conservation Systems, Inc. v. Long Island Lighting Co.*, 934 F. Supp 53 (E.D.N.Y. 1996), *aff'd without opinion*, 113 F.2d 1229 (2d Cir. 1997), the court found a permissible "business need" purpose for a consumer report on a corporate principal. If that view had any force at some point, it disappeared with enactment of the Consumer Credit Reporting Reform Act of 1996 ("the 1996 amendments") that revised Section 604 any many other sections of the FCRA.(8) The predecessor to Section 604(a)(3)(F)(i), quoted in the foregoing case,(9) provided a permissible purpose if the party "otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer."(10) Because the 1996 amendments abandoned the "involving the consumer" formulation and replaced it with "initiated by the consumer,"(11) it is now clear that there is no permissible purpose unless a consumer (an individual) rather than a business entity initiates the transaction. Thus, in *Pappas v. Calumet City*, 9 F.Supp.2d 943, 950 (N.D.Ill. 1998), a court applying the amended FCRA found no permissible purpose to obtain a consumer report on the corporate principal based on the report user's dealings with the company operated by that individual.

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

Yours truly,

David Medine

Endnotes:

1. 16 CFR § 600 Appendix; 55 Fed. Reg. 18804-18828 (May 4, 1990). In this letter, specific sections are cited as "FCRA Commentary, comment . . ." with the latter part of the citation reflecting the applicable comment.

2. See FCRA Commentary, comment 604(3)(E)-2, revised by the Commission from an earlier draft to clarify this point. 55 Fed. Reg. at 18805, 18816.

3. FCRA Commentary, comments 603(d)-2 and 603(d)-3C, 55 Fed. Reg. at 18810.

4. 116 Cong. Rec. 36572 (1970) (Conf. Report on H.R. 15073). Citations from Rep. Sullivan also were featured in lower court decisions that preceded the Matthews decision in taking the minority view. Henry v. Forbes, 433 F. Supp. 5, 9 (D. Minn. 1976); Sizemore v. Bambi Leasing Corp., 360 F. Supp. 252, 254 (N.D. Ga. 1973); Fernandez v. Retail Credit Co., 349 F. Supp. 652, 654 (E.D. La. 1972).

5. In fact, it is not clear that even the Eight Circuit continues to follow the Matthews case, which is the linchpin of the minority view cited at the beginning of this paragraph. In Bakker v, McKinnon, 152 F.3d 1007, 1012 (8th Cir. 1998), that court ignored Matthews and instead quoted St. Paul approvingly stating, "Under the FCRA whether a credit report is a consumer report does not depend solely upon the ultimate use (of the report), but instead, it is governed by the purpose for which the information was originally collected in whole or in part by the consumer reporting agency."

6. FCRA Commentary, comment 604-1D; 55 Fed. Reg. at 18814.

7. Estiverne v. Saks Fifth Avenue, 9 F.3d 1171, 1173-74 (5th Cir. 1993).

8. Title II, Subtitle D, Chapter 1 of Public Law 104-208, the Omnibus Consolidated Appropriations Act for Fiscal Year 1997.

9. 934 F. Supp. at 55.

10. In the original FCRA, this provision was Section 604(3)(E). Because Subsections (a)(3)(E), (b), (c), (d), (e), (f), and (g) were added to Section 604 by the 1996 amendments that also revised this portion of the FCRA, it was re-designated Section 604(a)(3)(F) at that time.

11. The change "restricts the scope of the business need exception by further defining the circumstances in which it applies." Duncan v. Handmaker, 149 F.3d 424, 427n3 (6th Cir. 1998).