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TECHNICAL ADVISORY

TA #202

Date: March 6, 2002

SUBJECT: Dangers of Furnishing MVRs to Commercial Insureds.

BACKGROUND:

Commercial insureds, especially those which hire drivers, often ask their insurance agent to furnish them with copies of MVRs on current or prospective employees. Under the federal Fair Credit Reporting Act (FCRA), there are strict guidelines governing the release of such information, and potentially serious penalties for violations. In addition to federal penalties, agencies can face lawsuits from people whose MVRs they furnished to the commercial insured. Agencies must therefore be aware of requirements of the FCRA, and take appropriate precautions when handling requests for MVRs from commercial insureds.

MAIN POINTS:

The FCRA was originally passed in 1970, and amended several times since, primarily for the dual purposes of protecting the *privacy* and *accuracy* of certain defined "consumer reports," which includes MVRs, and a wide variety of other information, such as credit reports, credit scores, etc. To that end, the FCRA: (1) restricts access and use of consumer report; (2) requires certain prescribed disclosures; (3) requires the written permission of the consumer under certain circumstances; (4) provides a process for the consumer to dispute inaccurate information; and (5) provides for both civil and criminal penalties for noncompliance.

When any consumer report, including an MVR, is used for *employment*, the FCRA requires that the consumer (i.e., the employee or prospective employee in this case) must first grant **written** permission before a Consumer Reporting Agency (CRA), such as Equifax, Experian, Trans Union, etc., can release the information.

The next step required under the FCRA is for the consumer (employee) to receive from the CRA a federally prescribed document titled, "Summary of Consumer Rights." This document must be provided to each consumer (employee) anytime a consumer report/MVR is used in connection with employment.

In the event a consumer (employee) receives any “adverse action” (not hired, not promoted, fired, etc.) as a result of information contained in any consumer report (including an MVR), the FCRA requires that the consumer (employee) be given a “Notice of Adverse Action” by the employer.

Another duty of a CRA is to provide to the employer a copy of the federally prescribed document, “Summary of User Responsibilities.” This document need only be provided once by a CRA to an entity requesting a consumer report/MVR (an employer, for example). Every employer who uses consumer reports/MVRs as a part of their employment screening process should carefully read this document.

Records must be maintained for two years.

If an insurance agency provides consumer reports/MVRs to commercial insureds for employment purposes, most authorities agree that the agency is functioning as a Consumer Reporting Agency, and must follow all the steps required of a CRA outlined above. Thus, while it can be “legal” for an insurance agency to provide MVRs to commercial insureds, the agency must understand and adhere to all the strict procedures required of a Consumer Reporting Agency. For in essence, the agency is acting as an employee screening service, not simply “underwriting insurance.”

Violations of the FCRA fall into two categories: (1) negligent noncompliance, and (2) willful noncompliance.

The penalties for *negligent* noncompliance include actual damages awarded by the court, attorney’s fees, and court costs.

The penalties for *willful* noncompliance, the more serious violation, include not only all three penalties assessed under negligent noncompliance, but can also include punitive damages, a fine from the Federal Trade Commission (FTC), and up to two years in prison.

Outside the myriad requirements of the FCRA, there are other restraints and concerns the agency must be aware of. First, most third-party providers of MVRs (such as ChoicePoint, etc.) strictly and expressly prohibit the agency from furnishing the MVRs to anyone other than the consumer. It is very important to note that while an agency may legally furnish MVRs to commercial insureds, provided that the agency follow all guidelines required under the FCRA, most third-party providers from whom the agency routinely obtains MVRs absolutely prohibit such practice.

Another concern agency’s must be aware of is that many insurers also prohibit disclosure of MVRs to anyone other than the subject of the MVR.

A third concern is that agencies can, and indeed some have been, sued by consumers when their protected, personal information has been furnished to others without their permission or knowledge.

While the FCRA requires that a consumer give written permission before a CRA can release any consumer report, including MVRs, that will be used for *employment*, there is no requirement for written permission if the purpose of the consumer report/MVR is for *insurance underwriting*. And herein lies a serious trap for agencies. When a commercial insured calls the agency and asks that an MVR be run on an employee/prospective employee, especially those that will be driving, the agency can do so via computer in a matter of minutes. Agencies obviously pull MVRs for insurance underwriting many times each day.

However, if the agency then *sends* the MVR to the commercial insured, that probably goes beyond the bounds of “insurance underwriting.” In fact, most authorities agree that the agency is now acting as a Consumer Reporting Agency, by supplying a consumer report that will be used for employment. And immediately the agency has a potential legal problem, since they in all likelihood don’t have the consumer’s written permission. In addition, as stated above, even obtaining written permission of the consumer is not the only requirement the agency must now meet if it provides MVRs to commercial insureds. Recall also that such practice is probably prohibited by the third-party provider from whom the agency obtained the MVR, as well as by many insurers, perhaps including the one writing the commercial auto insurance for this commercial insured.

In an attempt to side-step the FCRA requirements, some agencies might consider simply *telling* the manager or supervisor of the commercial lines insured what is on the MVR, without actually sending them a copy. Most authorities believe that this probably does not relieve the agency from meeting all its responsibilities under the FCRA, and could make the agency a target for litigation by the consumer for violation of privacy.

On the other hand, in cases where drivers will be excluded by the commercial auto insurer because of their MVR, informing the commercial insured of that fact, without revealing any specifics, probably still falls under “insurance underwriting.”

In cases where a commercial insured insists on finding out the *specifics* of why a driver will be excluded, the safest practice for the agency is to suggest that the employer obtain the MVR, and any other background information legally available, on their own. This can easily be done by the employer contacting any of the dozens of employee screening companies that provide this information for a fee.

It is vitally important that all agency staff which handle MVRs be informed about the distinction between using consumer reports/MVRs for insurance underwriting vs. employment.

While these strict guidelines and complicated procedures might seem unduly burdensome at first, keep in mind that the overall purpose of the FCRA is to protect the *privacy* and *accuracy* of consumer reports. Research suggests that there is a significant error rate found in consumer reports, and MVRs are not immune from

mistakes. So if the agency sends the commercial insured/employer *wrong* information, and the consumer/employee gets fired, or not hired, the agency could well face litigation, with little defense.

In fact, most third-party providers require that an agency hold them harmless as a condition of doing business with the agency, so the agency would probably not be able to blame the third-party provider for supplying incorrect information. (In addition to which most third-party providers don't permit the practice in the first place.)

But even if the information is *accurate*, the strict guidelines are also to protect a consumer's *privacy*. Access to a consumer's private information is restricted to very specific situations, such as credit, insurance underwriting, employment, and a few other circumstances permitted under the FCRA.

Whether or not the agency's E&O carrier will defend the agency varies with each situation. However, some E&O carriers have indicated that while the mishandling of a consumer report/MVR that takes place during *insurance underwriting* is within the scope of an agency's operations, providing MVRs to others for *employment* or other uses is not a part of an agency's normal operations, and thus might not be covered by the E&O policy.

While the focus of this article deals with *commercial lines* situations, an agency must exercise equal care in how MVRs are handled in *personal lines* situations. Several cases have been reported recently which illustrate the need for clear guidelines in the use of MVRs in personal lines.

In one case, an insured was having a custody fight with her ex-husband. He routinely showed up drunk when picking up the kids for the weekend. Fearing for her kids' safety, the woman mentioned this to the CSR handling her personal auto insurance. The woman said if she could show the court that her ex-husband was putting the kids at risk because of his drinking, she might be able to prevent him from taking them in his car unsupervised.

The CSR said she would see if the ex-husband had any drunk driving convictions on his MVR. The MVR did indeed have several drunk driving arrests and convictions, and the woman gave the court a copy of his MVR, which she had obtained from the CSR. The ex-husband was incensed, and successfully sued the agency for violations under the FCRA, winning a judgment of over \$200,000.

Clearly, agencies should develop *written* procedures for the handling of all private information. It is recommended that the agency put these procedures into the agency's procedures manual, and train all agency staff about the proper guidelines on handling all forms of protected information.

The Federal Trade Commission (FTC), which regulates the FCRA, has excellent information on its website. Of particular note are two brochures – one deals with

employment and the FCRA (“What Every Employer Should Know”), and the other with insurance and the FCRA (“What Every Insurer Should Know”).

In addition, the two required documents referenced above are available at the FTC website. The documents are the “Summary of Consumer Rights” and “Notice of User Responsibilities.” Go to www.ftc.gov.

If you have questions, or need further information, please email IIAL Education Director Mike Edwards at medwards@iial.com.

NECESSARY ACTION:

Please circulate this Technical Advisory to personnel who handle automobile insurance coverage.