United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Bureau of Consumer Protection
Division of Privacy and Identity Protection

September 8, 2015

BY FEDERAL EXPRESS AND EMAIL

Rod M. Fliegel
Littler Mendelson, PC
650 California Street, 20th Floor
San Francisco, CA 94108
rfliegel@littler.com

Re: California Health & Wellness, FTC File No. 152-3077

Dear Mr. Fliegel:

As you know, the staff of the Federal Trade Commission's Division of Privacy and Identity Protection has conducted an investigation into possible violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, by your client California Health & Wellness ("CHW"). The investigation considered whether CHW violated the FCRA in connection with its screening program for potential employees.

CHW, a subsidiary of diversified healthcare enterprise Centene Corporation, is a health plan based in California that offers healthcare, pharmacy, vision, and transportation services to its members. Pursuant to a contract with the California Department of Health Care Services ("CDHCS"), effective November 1, 2013, CHW serves Medicaid beneficiaries in 19 counties. As required by this contract, CHW has established a policy of conducting background checks on job applicants. In implementing this policy, CHW obtains a screening report from a consumer reporting agency for each applicant it intends to hire.

To promote the accuracy and privacy of consumer reporting information in the employment context, the FCRA imposes notice, consent, and disclosure requirements on employers using background checks in making personnel decisions. For example, a potential employer must notify a job applicant of its intent to use a background screening report, obtain the applicant's consent to obtain the report, and, if it thinks it may not hire the applicant, it must provide the applicant with a "pre-adverse action" notice to allow him or her an opportunity to review the report and explain any negative information. The company must also provide an "adverse action" notice to an applicant who is ultimately denied a job based on information in his or her report.[1] These requirements are subject to certain exceptions, including those set forth in Section 603(y) of the FCRA, entitled Exclusion of Certain Communications for Employee Investigations. Section 603(y) excludes from the definition of "consumer report" communications made to an employer in connection with an investigation of "(i) suspected misconduct relating to employment; or (ii) compliance with Federal, State, or local laws and

[1] 15 U.S.C. § 1681b(b)(2) and (b)(3); *see also* 15 U.S.C. § 1681m.

regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer."[2]

Among other things, staff's investigation examined the applicability of Section 603(y) to CHW's background screening program. Staff also examined CHW's procedures regarding the screening of potential job applicants to assess their sufficiency under the FCRA.

Based on our investigation, we do not view CHW's use of background screening reports in the hiring process as falling within the Section 603(y) exclusions. To the contrary, we view Section 603(y) as covering only investigations of current employees, rather than investigations of both current employees and job applicants. First, the language of Section 603(y) itself contemplates an existing employer/employee relationship. For example, the title of the section refers to employee investigations, rather than background screening of potential employees. Similarly, subsection 603(y)(1)(B)(i) refers to "suspected misconduct relating to employment" and subsection 603(y)(1)(B)(ii) refers to "preexisting written policies of the employer," both phrases that connote an existing employment relationship.[3] That Section 603(y) is a narrow exception is bolstered by the legislative history.[4] Finally, we note that the FCRA is "undeniably a remedial statute that must be read in a liberal manner in order to effectuate the congressional intent underlying it." *Cortez v. Trans Union, LLC*, 617 F.3d 688, 722 (3d Cir. 2010). As such, it should be broadly construed and its exceptions be narrowly applied. *See A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (construing narrowly an exception to the Fair Labor Standards Act).

Based upon our review, staff has determined that CHW's procedures are consistent with those set forth in the FCRA. Among other things, staff's investigation showed that CHW currently notifies job applicants of its intent to use a screening report and obtains an applicant's authorization before obtaining this report. CHW further provides applicants with an opportunity to review and contest the information in the screening report before making a final personnel decision, and, if the company ultimately declines the applicant, sends the applicant an "adverse action" notice.[5]

Accordingly, staff has decided not to recommend enforcement action at this time. Our decision not to pursue enforcement action should not be construed as a determination that a violation did not occur, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take further action as the public interest may warrant.

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[2] 15 U.S.C. § 1681a(y)(1)(B). Even employers who fall within the Section 603(y) exceptions are required to provide employees with an adverse action notice. *See* 15 U.S.C. § 1681a(y)(2); *see also* 15 U.S.C. § 1681m.

[3] Moreover, when read in context with other provisions of the FCRA, it is evident that Section 603(y) does not extend to the pre-employment background screening context. For example, Section 604(b), which sets forth the requirements on employers using background checks on prospective employees, refers to a "person" receiving the report, rather than an "employer," indicating a distinction between the two terms.

[4] As this history indicates, Section 603(y) was enacted to provide "a narrow technical correction" to the FCRA to address concerns that these requirements were undermining the ability of employers to conduct meaningful investigations of possible *employee* misconduct by prematurely alerting employees to the existence of an investigation. *See* 149 Cong. Rec. H8122 (daily ed. Sept. 10, 2003, Rep. Jackson-Lee).

[5] 15 U.S.C. §1681b(b)(2) and (b)(3).

Sincerely,

Maneesha Mithal
Associate Director
Division of Privacy and Identity Protection