

The Background Screening Credentialing Council volunteer members drafted the following response to a question about end-user certifications in Clause 2.8 of the BSAAP Standard, version 2.0, effective April 6, 2018. This letter is an informal discussion of the noted issue and does not constitute a legal opinion of the BSCC.

TITLE: Clause 2.8 - Agreement from Client

Issue: I spoke with the BSAAP auditor who took the position that a CRA must have these affirmations/certifications in its contract with an End User, or else a CRA cannot be accredited by the BSCC. Presently, they are in our contract; however, I am looking to pull these out of the contract and have our End Users execute a separate free-standing instrument containing the required affirmations. I am confident that such a separate document complies with the dictates of the federal FCRA, and I don't see why the BSCC should care whether the affirmations are directly integrated into the contract as opposed to affirmed in a free-standing instrument. The statute only requires that I obtain the certification; not the vehicle by which the certification is obtained.

Response: We are in receipt of your inquiry about Clause 2.8 of the Background Screener's Accreditation Standard. Specifically, you have asked whether the end-user certifications are required to be a contractual provision of the CRA's client service agreement or are permissible in a separate certification or affirmation outside of that agreement. The short answer is that there is no specific requirement to include certifications in the service agreement itself, but they should be in writing and signed.

Section 2.8 is titled "Agreement from Client" and reads as follows:

Before providing consumer reports to clients, CRA must have and follow a procedure to obtain a signed agreement, certification, affirmation or other signed document from client (referred to as "user" in federal FCRA) in which client agrees to meet the requirements of all applicable law and regulation, specifically including but not limited to the federal FCRA.

The Attributes of and Suggestions for Onsite Audit go on to say:

CRA must provide documentation describing how signed agreements, certifications, affirmations, or other documents are obtained and retained. The agreement must meet requirements of federal FCRA, which currently include: 1) permissible purpose, 2) disclosure and authorization, 3) adverse action, 4) confidentiality, 5) compliance with all applicable laws and regulations, 6) that client will not use consumer information in violation of law. Auditor will seek evidence of adherence to policies and procedures.

Neither the Standard nor the FCRA prescribe the manner in which the certification must be presented to the user of the consumer report. The BSCC notes however that clause 2.8 requires enclosure in some

form of an "Agreement." Clause 2.8 does not specify the form of the agreement; whether it be a contractual or other signed agreement is up to the discretion of the applicant.

The BSCC notes that since the writing of the Standard, there has been litigation regarding client certifications, all of which has settled as of the date of this letter. The BSCC recommends all consumer reporting agencies seek legal counsel to review the form, format, frequency and process of obtaining certifications from clients.

As always, we note that we are not issuing an opinion that is legal in nature. The above information is general information only as it pertains to the Background Screening Agency Accreditation Program and is not legal advice, express or implied. Consultation with legal counsel is recommended in all matters of employment law.

We believe we have responded fully to your inquiry. Please let us know if you have any further questions.