IN THE MATTER OF

TRANS UNION CORPORATION

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FAIR CREDIT REPORTING ACT

Docket 9255. Complaint, Dec. 15, 1992--Final Order, Sept. 28, 1994*

This final order prohibits the Illinois-based credit bureau from distributing or selling target marketing lists based on consumer credit data, except under specific circumstances permitted by federal law. In addition, the final order requires the respondent to deliver a copy of this order to all present and future management officials having responsibilities with respect to the subject matter of this order.

Appearances

For the Commission: *Arthur B. Levin, Stephanie Flanigan* and *Donald E. D'Entremont.*

For the respondent: *Roger L. Longtin, Stephen L. Agin, Sharon R. Barner* and *Tracy E. Donner, Keck, Mahin & Cate*, Chicago, IL.

SUMMARY DECISION

BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE
SEPTEMBER 20, 1993

I. HISTORY OF THE PROCEEDING

On December 15, 1992, the Commission issued a complaint charging respondent Trans Union Corporation ("Trans Union") with violating the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681 *et seq*.

The complaint alleges that Trans Union is a consumer reporting agency as defined in Section 603(f) of the FCRA, that it regularly provides consumer reports in the form of prescreened lists to credit grantors, that it fails to require or monitor that credit grantors that receive such lists make a firm offer of credit to each person on the list (para. 3), and that it has therefore violated Sections 604 and 607 of the FCRA by furnishing consumer reports to persons it did not have

* Complaint previously published at 116 FTC 1334 (1993).

reason to believe intended to use the reports for a Permissible Purpose under Section 604 (para. 4).

The complaint also alleges that Trans Union illegally furnishes consumer reports in the form of target marketing lists to persons who do not intend to make a firm offer of credit to all those consumers on the list and who intend to use the information for purposes not authorized by Section 604 of the Act (para. 5).

On June 1, 1993, the portion of this matter relating to Trans Union's prescreening service was certified to the Secretary for withdrawal from adjudication so that the Commission could consider a consent agreement settling the charges in paragraphs three and four of the complaint. The Secretary did so on June 3, 1993.

Complaint counsel have now moved for summary decision as to that portion of the complaint challenging Trans Union's sale of its target marketing lists, and they have filed documents and a memorandum in support of their motion.[1] Respondent has filed a response, together with supporting affidavits, in opposition to this motion.

After analyzing the documents filed by the parties, I find that no genuine issue exists with respect to the findings of fact adopted in this decision. Rules of Practice, Section 3.24.

II. FINDINGS OF FACT

A. *Trans Union's Business*

1. Trans Union is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 555 West Adams Street, Chicago, Illinois (Cplt paragraph 1; Ans paragraph 1).[2]

2. Trans Union is, and has been, regularly engaged in the practice of procuring and assembling information on consumers for the purpose of furnishing, for monetary fees, consumer reports to subscribers

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[1] Although the parties have filed *in camera* versions of their memoranda, I have ignored this designation since the parties did not seek, and I did not grant, *in camera* status to any documents. Rules of Practice, Section 3.45(b). *See* Order Adopting Respondent's Protective Order dated April 6, 1993.

[2] Abbreviations used in this decision are:

Cplt:	Complaint
Ans:	Answer
Tr.:	Transcript of testimony given in investigational hearings
HX:	Investigational Hearing Exhibit
Aff.:	Respondent's Affidavits
F.:	Finding

and consumers. Trans Union furnishes these consumer reports through the means and facilities of interstate commerce. Thus, Trans Union is a consumer reporting agency, as defined in Section 603(f) of the FCRA (Cplt paragraph 2; Ans paragraph 2; Botruff Aff., paragraph 4).

3. TransMark is a division of Trans Union and is engaged in the business of target marketing, a field which it entered in 1987 (Frank Tr. 11, 15).

4. In connection with its target marketing business, TransMark rents computer tapes for one-time use which contain computerized data on consumers to users who market goods or services through direct mail or telemarketing. The tapes contain coded information on individual consumers which, when translated by a computer, reveal their names and addresses. TransMark's customers are not permitted to use the computer tapes and the information contained thereon for any other purpose (Frank Aff., paragraphs 6 & 7).

5. The average computer tape leased by TransMark contains the names and addresses of 30,000 customers and TransMark will not lease a computer tape unless there are a minimum of 5,000 consumers who meet the criteria selected by its customers (Frank Aff., paragraphs 15, 17).

6. TransMark's target marketing lists do not involve, as does credit reporting, consumer-initiated transactions; rather, these lists are sold to users who do not intend to make a firm offer of credit to all consumers on the lists (Frank Tr. 15; Trans Union's Response to Complaint Counsel's First Request For Admissions ("First Request") No. 8).

B. Trans Union's Credit Reporting Database

7. Trans Union creates and maintains a consumer reporting database named CRONUS for use in its credit reporting business. CRONUS contains numerous individual files on consumers and the information it contains is reported by credit grantors, collection agencies, governmental agencies and utilities, or is obtained from public records (Botruff Aff., paragraph 6).

8. Credit grantors generally provide credit information on individual consumers to Trans Union in the form of accounts receivable tapes which usually contain the name, address, zip code, social secu-

rity number, account number and account activity for each consumer account (Botruff Aff., paragraph 7).

9. CRONUS compiles identifying information on consumers from multiple files, assigns the information to a new or existing file on the consumer, and adds credit-related information to the file. The account number and credit information appended to this number is called either a "tradeline" or a public record set (Botruff Aff., paragraphs 8, 9, 10).

10. A tradeline is identified in CRONUS by the name of the credit grantor and the account number and has appended to it credit information relating to a particular account; it reveals credit limits, payment patterns, payment history, and the present status of the account, *i.e.*, the balance owing and the amount past due (Botruff Aff., paragraph 11).

11. Trans Union's credit report customers access individual consumer files by providing the name, zip code and address of an individual consumer. Trans Union then transmits the consumer's complete credit report to its customer (Botruff Aff., paragraph 13).

12. A credit report consists of sections containing demographic information (name, address, social security number, etc.), tradeline information, public record information, and inquiries (Botruff Aff., paragraph 14, Ex. A).

13. The tradeline section of the credit report is divided into three parts. The first part includes the following: (a) the credit grantor's name and code; (b) the date the account was opened; (c) the account number; (d) the terms of sale -- number of payments, payment frequency and dollar amount due each payment; (e) ECOA code; and (f) collateral (Botruff Aff., paragraph 16).

14. The second part of the tradeline section of a credit report includes the following information for each tradeline: (a) the high credit amount (highest amount ever owed) and the date it was verified; (b) the maximum amount of credit approved by the creditor; (c) the date the account was closed; (d) the present status of the account, *i.e.*, the balance owing and amount past due; (e) the maximum delinquency -- date, amount and manner of payment; (f) remarks; and (g) type of loan (Botruff Aff., paragraph 17).

15. The third portion of the tradeline section of a credit report includes the following information for each tradeline: (a) the payment pattern, *i.e.*, 1-12 months or 13-24 months; (b) the historical status in number of months, *i.e.*, either 30-59, 60-89 or 90+; and (c) the type

of account and manner of payment, *e.g.*, current, 30 days past due, bankrupt, etc. (Botruff Aff., paragraph 18).

16. The public record section of a credit report includes the following information for each public record: (a) the location of the court where the public record was recorded; (b) the court type; (c) the date the public record was reported; (d) the ECOA code; (e) any assets or liabilities; (f) the type of public record; (g) the date paid, if applicable; (h) the docket number; and (i) the plaintiff and attorney involved in the case (Botruff Aff., paragraph 19).

17. The inquiry section of a credit report includes the following information for each inquiry on a consumer's credit file: (a) the date of the inquiry; (b) the ECOA code; (c) the Trans Union subscriber inquiry code; and (d) the subscriber short name (Botruff Aff., paragraph 20).

C. TransMark's Target Marketing List Databases

18. TransMark creates and maintains a number of separate databases for use in its target marketing business ("list databases"). The information contained in the list databases is derived from CRONUS and outside sources (Frank Aff., paragraph 33) and is moved quarterly from these sources to the target marketing database, although certain "hotline" information is moved monthly (Frank Tr. at 22).

19. The accounts receivable tapes provided by credit grantors to Trans Union for use in its credit reporting business are provided under agreements that do not prevent their use for target marketing (Weckman Aff., paragraph 3).

20. TransMark creates and maintains the following list databases: (a) Base List; (b) Homeowners; (c) Automobile Owners; (d) Students; (e) Puerto Rico; (f) New Issues; (g) New Homeowners; (h) New Movers; and (i) Reverse Append (consumers who have either a bankcard or a travel and entertainment card) (Weckman Aff., paragraphs 5, 54).

21. The Base List database is created by selecting from CRONUS only those consumers who have at least two tradelines. The information extracted from CRONUS is then separated into various segments in the Base List database (Weckman Aff., paragraph 6).

22. Trans Union promotional material entitled "Direct Marketing Lists" discloses to its clients that it uses two-tradeline selections to compile its target marketing base:

Consumers on each quarterly updated list must possess a minimum of two tradelines and have activity in past 90 days on one account

(HX 1; *see also* Second Response No. 61).

23. The demographic information extracted from CRONUS reveals: a) the consumer's name, address, social security number, date of birth and telephone number (the "standard segment"); b) whether the consumer is the head of household, his or her ethnic background and marital status (the "household segment"); and, c) the consumer's occupation (the "employment segment") (Weckman Aff., paragraphs 6, 7, 8, 9).

24. The tradeline information extracted from CRONUS is separated into five segments in the Base List database: (a) bankcard; (b) premium bankcard; (c) retail; (d) upscale retail; and (e) finance loan (Weckman Aff., paragraph 10; First Response Nos. 11-23).

25. The information extracted from CRONUS and included in each of these five segments of the Base List database is: a) a yes or no indication as to whether the consumer has one or more of the type of accounts included in that segment; b) the open date of the oldest tradeline; and c) the open date of the newest tradeline (Weckman Aff., paragraph 11).

26. The Base List database does not include the identity of the credit grantor, the terms, collateral, the high credit amount, the credit limit, the payment status or pattern, delinquency or derogatory information, or any other comparable information included in CRONUS (Weckman Aff., paragraph 13).

27. The Homeowners, Automobile Owners, Students, Puerto Rico, New Issues, New Homeowners, and Reverse Append databases do not include the identity of the credit grantor, the terms, collateral, the payment status or pattern, delinquency or derogatory information, or any other comparable information included in CRONUS (Weckman Aff., paragraphs 24, 31, 39, 44, 48, 53, 69, 74).

28. TransMark describes the features of its base list and segments in brochures directed to its customers; it notes that the "Bankcard" segment of its base list names 104.4 million consumers who have a bank credit card (HX 2).

29. The "Upscale Retail" segment of the base list, which names 36.2 million consumers, is described in a marketing brochure as offering:

direct marketers the opportunity to reach America's retail shopping elite. The Upscale file has been developed from TransMark's list of retailers that cater to consumers with discriminating taste. These individuals have high discretionary income and are used to paying more than the average consumer to purchase quality products

(HX 2).

30. A customer purchasing a segment can further refine the list by choosing "selects," or additional criteria to select certain characteristics of the consumers on the list (First Response Nos. 26, 34, 43, 51, 59, 68, and 76).

31. Examples of the "selects" offered by Trans Union include: bankcard or retailer; "hotline" consumers; age; estimated household income; children; working women; length of residence; zip code; and persons who have responded to mail order solicitations (Kiska Tr. 37, 59-60; HX 2). Much of the information for selects is derived from Trans Union's consumer reporting database (Frank Tr. 40).

32. For each base list segment, there is a brochure which describes its core population, the available "selects," the file size (the number of consumers on the list), a description of the list, and the list's purchase price. The source of all five segments is identified in the brochure as "Trans Union consumer database" (HX 2; First Response Nos. 15, 17, 19, 21, and 23).

33. Trans Union also offers other target marketing lists from more specific databases. These include "new issues," a monthly compilation of consumers who have responded via mail to a credit card solicitation, "Hispanics," "singles," "college students," "homeowners," "new movers," and "automobile owners" (Weckman Tr. 83-84. *See also* Kiska Tr. 37, 59-60; HX 2).

34. One of the selects offered for many of the base lists is labeled "hotline," a compilation of those consumers who have appeared on a credit grantor's tape within the prior 30-90 days (Respondent's Answers to Complaint Counsel's First Set of Interrogatories No. 10).

35. Trans Union has recently introduced additions to its base lists. One is the TransMark Income Estimator ("TIE"), which is described in one of its brochures:

TIE evaluates individual consumer income based upon a mix of credit data from Trans Union's database and census demographic data . . . . TIE . . . is based on the notion that consumer spending and payment behavior is closely related to income.

(HX 1).

36. The information created by the TIE model is based in whole or in part on information contained in Trans Union's consumer reporting database. TIE contains information on consumers who have at least two tradelines (First Response Nos. 90, 92).

37. Another enhancement recently introduced by TransMark is "SOLO," described in a brochure, along with a companion program known as SILHOUETTE (offered only for prescreened lists (Kiska Tr. 51; Frank Tr. 32-33)), as follows:

> Both products provide a consistent and effective way to develop qualified prospects based upon similar credit behavior (SILHOUETTE) and credit behavior overlaid with demographic data (SOLO) . . . [T]he products evaluate individual behavior and establish tendencies.

(HX 1).

38. SOLO is based upon information contained in Trans Union's consumer reporting database (First Response No. 96).

39. TransMark sends its target marketing lists directly to its clients. TransMark does not require its clients to use third party mailers although it sometimes sends the lists to third party mailers on behalf of its clients (First Response Nos. 110, 112).

40. TransMark advertisements emphasize that its lists are: "Not just ordinary lists but lists of people who are active users of credit." (DM News, May 18, 1992, at p. 12. *See also* Second Response No. 65.) Nevertheless, Mr. Hopfensperger, TransMark's Director of Marketing, Central Region, has filed an affidavit asserting that he is familiar with the type of information on consumers which is contained in TransMark's list databases and that they do not contain any information upon which a credit grantor can make a judgment as to a consumer's eligibility for credit (Hopfensperger Aff., paragraph 7).

41. The computer tapes leased by TransMark are rented for one-time use--to produce mailing labels to mail the customer's material to consumers. TransMark's customers are not allowed to put the computerized information into a database to access the information contained on the tape, or use the tape for any other purpose (Frank Aff., paragraph 6, 7).

42. TransMark does not allow access to its list databases to anyone seeking information on identified individual consumers (Frank Aff., paragraph 8).

43. Prior to sending out a computer tape, TransMark deletes the name and address of each consumer who satisfies the criteria selected

by the customer but whose name and address appears in the Opt Out Database to ensure that each consumer who has chosen not to have his or her name and address used for target marketing purposes does not receive a mail piece (Frank Aff., paragraph 18).

44. The process used to mail the materials of TransMark's customers is automated. The computer tape is sent to either an independent mailing house or one run by TransMark's customer. Approximately 90% of the computer tapes leased by TransMark are sent directly to mail houses that are independent of its customers (Frank Aff., paragraph 20).

45. TransMark's customers use the computer tapes to mail offers to consumers to enter into credit, insurance or business transactions. For example, TransMark has leased computer tapes to:

(a) Colonial Penn Auto Insurance, to mail consumers material about "The Experienced Driver Program";
(b) Citibank, to mail consumers an offer to apply for home equity financing;
(c) Publishers Clearing House, to mail consumers notification of their Finalist status in its Ten Million Dollar Sweepstakes;
(d) Columbia House, to mail consumers an offer to become a member of the Columbia House Video Club;
(e) Ross-Simons, to mail its catalog to consumers;
(f) Fingerhut, to mail its catalog to consumers; and
(g) Phillips Publishing, to mail consumers the Better Retirement Report.

(Frank Aff., paragraph 21, Exhibits D-J).

46. TransMark also leases computer tapes containing names and addresses of consumers to customers who promote their product or services through telemarketing. Approximately 2% of TransMark's revenue is derived from the rental of computer tapes for telemarketing purposes. When a customer orders a computer tape for telemarketing purposes from TransMark, the tape is sent to a company that provides telemarketing services for TransMark's customer. The telemarketing company is not made aware of the criteria chosen by TransMark's customer to select the names and addresses appearing on the tape (Frank Aff., paragraph 24).

47. TransMark has several competitors such as Donnelley Marketing, Metromail and R.L. Polk, who have generated much more

revenue from the rental of consumer lists than has TransMark ($4,700,000 in 1992).

Name	Revenue
Donnelley Marketing	$60-100 million
Metromail	$40-60 million
R.L. Polk	$50 million

(Frank Aff., paragraph 26, Exhibit K).

III. CONCLUSIONS OF LAW

A. Summary Decision Is Appropriate In This Case

The Rules of Practice, Section 3.24(2), authorize summary decision when "there is no genuine issue as to material fact and . . . the moving party is entitled to such decision as a matter of law."

The existence of unimportant or peripheral disputed issues of fact does not rule out summary disposition as long as material facts are not seriously challenged. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986).

Trans Union's response to the motion for summary decision does not challenge the accuracy of those facts which complaint counsel offer in support of their motion for summary decision, nor does it point to substantial unresolved factual disputes; rather, Trans Union cites other facts--unchallenged by complaint counsel--which it claims support its argument that its target marketing operation does not violate the FCRA.

Thus, there is no genuine issue of material fact presented in the motion and response thereto; only legal disputes remain and summary decision is therefore appropriate.

B. The Purpose Of The FCRA

In enacting the FCRA, Congress found that "there is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy" Sec. 602(a)(4), and, in Section 602(b) of the Act, it required:

consumer reporting agencies [to] adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information. . . .

C. The Complaint Allegations

There is no dispute that Trans Union is a consumer reporting agency as defined in Section 603(f) of the FCRA (F. 2). The remaining issues raised by the complaint in this proceeding are whether its target marketing lists are "consumer reports" under the FCRA[3] and, if so, whether those reports are sold to its customers for a permissible purpose under Section 604.[4]

D. Trans Union's Target Marketing Lists Are Consumer Reports Under Section 603 Of The FCRA

Section 603(d) of the FCRA defines a consumer report as the communication of any information by a consumer reporting agency such as Trans Union bearing on "a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living."

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[3] Section 603(d) of the FCRA defines a consumer report as:

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 (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes or (3) other purposes authorized under section 604.

[4] Section 604. Permissible purposes of reports:

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe--

(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, or review or collection of an account of, the consumer; or

(B) Intends to use the information for employment purposes; or

(C) Intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) Intends to use the information 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; or

(E) Otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

In January 1993, the Commission approved a consent order with TRW Inc. which allowed it to use only the following identifying information from its consumer reporting database to compile target marketing lists of consumers for sale to its customers: name, telephone number, mother's maiden name, address, zip code, year of birth, age, any generational designation, social security number, or substantially similar identifiers, or any combination thereof.

Since TRW can use only the listed identifying information to create its target marketing lists, the Commission, by accepting the TRW consent agreement, has established a standard for determining what types of information are not credit-related for the purposes of defining a consumer report under the FCRA.

Trans Union's target marketing lists reveal much more information about the consumer in its database than is allowed under the TRW standard.

When Trans Union generates its target marketing database and lists, it lists only those consumers from its credit reporting database who have two or more tradelines (F. 21). Since tradelines are reports of accounts by credit grantors (F. 8, 9, 10), they reveal to Trans Union's customers that at least two credit grantors found consumers on the list to be credit worthy (F. 22), and this information therefore bears on the consumer's "credit worthiness, credit standing, [or] credit capacity" (Sec. 603(d), FCRA). Even the fact that a consumer possesses a credit card (F. 24, 28) reveals, to some extent, a consumer's credit worthiness, credit standing, or credit capacity because it "conveys the information that each consumer named meets certain criteria for credit worthiness." FTC Commentary on the FCRA, 55 Fed. Reg. 18804 at 18815 (1990) ("FCRA" Commentary) (*re* prescreened lists).

Other Trans Union lists such as "Upscale Retail" (F. 29) or its "selects" (F. 30) bear on a customer's credit worthiness, credit standing or capacity. Indeed, the implication of Trans Union's description of "Upscale Retail" is that consumers on this list are credit worthy (F. 29).

I reject Trans Union's claim that if the information in its target marketing lists is not, as the complaint alleges, used for permissible purposes, it is therefore not credit-related. *See St. Paul Guardian Insurance Co. v. Johnson*, 884 F.2d 881, 884-85 (5th Cir. 1989):

One of the central purposes of the FCRA was to restrict the purposes for which consumer reports may be used, for the simple reason that such reports may contain sensitive information about consumers that can easily be misused. . . .
. . . the purpose for which the information contained in a credit report is collected determines whether the report is a consumer report as defined by the FCRA.

The purpose for which the information contained in Trans Union's files is collected is credit related and its target marketing lists are derived from this information. These lists are therefore "consumer reports" as defined in the FCRA regardless of their ultimate use by Trans Union's customers.

I also reject Trans Union's argument that only information which is "judgmental" or which provides a consumer's "credit rating" is protected by the FCRA. The phrase "bearing on" in Section 603 indicates that the definition of "consumer report" is not as restricted as Trans Union claims. Thus, Mr. Hopfensperger's belief that Trans-Mark's list databases do not contain enough information to support a credit grantor's judgment as to credit eligibility (F. 40) is irrelevant.

E. Trans Union Communicates The Information Taken From Its Consumer Reporting Database To Its Customers

Trans Union furnishes credit-related information through its target marketing lists either directly to its clients or to third-party mailers on behalf of its clients (F. 39). In either case, this is a statutory "communication" of credit-related information:

Some public commentators also suggested that prescreened lists are not consumer reports if they are furnished solely to third parties (*e.g.*, mailing services) rather than directly to the customer that ordered them. Comment 6 has been revised to reflect the Commission's view that this procedure is not a means by which a consumer reporting agency can avoid application of the FCRA to such lists.

FCRA Commentary at 18807.

Its target marketing lists are not, as suggested by Trans Union, akin to a coded credit guide because a credit guide is not useful until the key is given, whereas a target marketing list is immediately useful to its recipient.

F. Trans Union's Clients Have No Permissible Purpose To Receive Consumer Reports In The Form Of Target Marketing Lists

The Commission has taken the position that all of the permissible purposes for obtaining a consumer report listed in Section 604 of the FCRA relate to transactions initiated by the consumer by applying for credit, employment, insurance, government benefits, a lease, or check cashing privileges.

For example, the Commission has interpreted Section 604(3)(A) of the FCRA as allowing creditors to obtain prescreened lists of consumers; however, it has done so only with the understanding that consumers on the list would be given credit as a result.

Prescreening is permissible under the FCRA if the client agrees in advance that each consumer whose name is on the list after prescreening will receive an offer of credit. In these circumstances, a permissible purpose for the prescreening service exists under this section, because of the client's present intent to grant credit to all consumers on the final list, with the result that the information is used "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."

FCRA Commentary at 18815.

On the other hand, the Commission has recently rejected the claim that target marketing is legal under the FCRA:

List sellers and those who sell consumer goods and services are always eager to obtain personal information about consumers' finances and lifestyles for marketing purposes. When they obtain such information from sources other than consumer reporting agencies, the FCRA is inapplicable. When credit bureaus supply such information on consumers from their consumer reporting databases, however, the privacy protections of Section 604 come into play because the Commission views such lists as a series of consumer reports.

Prepared Statement of the FTC before the Senate Banking Committee (May 27, 1993) at 16.

Another Commission statement to Congress took the same position:

There is no apparent legal rationale for this [the industry] position under the existing law. The desire to market goods or services to consumers does not constitute a permissible purpose for obtaining a consumer report under any of the provisions of Section 604, and the Commission has never interpreted the Act to permit reports to be obtained for such purposes, whether in their entirety or in the form of prescreened lists.

See Prepared Statement of the Federal Trade Commission before the Subcommittee on Consumer Affairs and Coinage of the House Banking, Finance and Urban Affairs Committee (Oct. 24, 1991) at 14-15. This statement also denied that Section 604(3)(E) of the FCRA might be interpreted as permitting target marketing:

> The Commission has interpreted Section 604(3)(E) to apply only to a limited category of consumer-initiated transactions, such as applications for residential leases or for check cashing privileges. A narrow construction of Section 604(3)(E) is critical to the privacy protections of the Act.

1991 Prepared Statement, footnote 12 at 12.

The legislative history of the FCRA supports complaint counsel's claim that target marketing is not a permissible purpose under Section 604.

In introducing his version of the statute, Senator Proxmire, the author of the FCRA, stated:

> Credit reporting agencies would furnish information on individuals only to persons with a legitimate business need for the information. . . . This would preclude the furnishing of information . . . to market research firms or to other business firms who are simply on fishing expeditions.

115 Cong. Rec. 2415 (Jan. 31, 1969).

And, in a letter to the Commission dated October 8, 1971, he wrote:

> While Section 604(3)(E) permits the furnishing of credit information to persons who have "a legitimate business need for the information in connection with a business transaction involving the consumer," I do not believe the sale of credit information for compiling a mailing list would qualify as a transaction involving the consumer. The legislative history is not definitive on this point, but I believe it is reasonable to interpret a transaction "involving the consumer" as one in which the consumer himself is aware of the proposed transaction. Indeed, this was the position taken by your staff in their interpretation dated May 25, 1971. Under this interpretation, credit information could not be furnished by a consumer reporting agency for the purpose of compiling a mailing list if the individuals on the list have not specifically applied for credit or are otherwise unaware of the proposed transaction.

Thus, while the language of Section 604(3)(E) could be construed as supporting Trans Union's position, congressional history suggests otherwise as does the Commission's opinion that target marketing is not a permissible purpose. This opinion, which is not unreasonable in view of the reasons for passage of the FCRA, is persuasive. *See*

Cochran v. Metropolitan Life Ins. Co., 472 F. Supp. 827, 831 (N.D. Ga. 1979):

> the FTC has declared that [claim reports] are not regulated by the Act. The court has no cause to deviate from the agency.

Id. at 832.

Since Trans Union's target marketing lists are consumer reports which are not consumer-initiated (F. 4, 6), they are not furnished to its clients for a permissible purpose under the FCRA.

G. There Are No Constitutional Impediments To This Proceeding

Trans Union claims that prohibiting the use of its target marketing lists would violate First Amendment and Equal Protection rights guaranteed to it by the U.S. Constitution.

Trans Union argues that since its target marketing lists do no more than propose a commercial transaction, they are protected by the First Amendment guarantee of freedom of speech. *See Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Trans Union also claims that its equal protection rights would be denied if it were barred from using target marketing lists while its competitors who are not covered by the FCRA would be allowed to do so. *See Sullivan v. Stroop*, 496 U.S. 478, 485 (1990).

In *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980), the Court applied a four part test to determine whether restrictions on commercial speech are constitutional:

1. Is the speech lawful and neither deceptive or misleading?;
2. If the speech is lawful, is the government's interest in regulating it substantial?;
3. If the answer to the first two questions is yes, does regulation directly advance some governmental interest?;
4. Is the regulation no more extensive than is necessary to serve the governmental interest?

Assuming that Trans Union is correct in its assertion that its target marketing lists do not transmit deceptive or misleading information, there is nevertheless a substantial government interest in protecting a consumer's right to privacy, and the FCRA directly advances this interest in a manner which is not unduly restrictive.

I also reject Trans Union's equal protection argument because the FCRA applies equally to all consumer reporting agencies. Furthermore, Congress' conclusion that consumer reporting agencies presented unique problems with respect to consumer privacy which required some regulation of their activities was not unreasonable and its decision to regulate these agencies furthers a legitimate public interest. *See FCC v. Beach Communications, Inc.* 113 S. Ct. 2096 (1993); *Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

H. Conclusion

I conclude that Trans Union's target marketing lists are consumer reports under Section 603(d) of the FCRA, and that its sale of such lists to persons whom it does not have reason to believe have a permissible purpose to obtain such lists violates Sections 604 and 607 of the FCRA. Therefore, the following cease and desist order is appropriate:

ORDER

It is hereby ordered, That respondent, Trans Union Corporation:

a) Cease and desist from compiling and/or selling consumer reports in the form of target marketing lists to any person unless respondent has reason to believe that such person either intends to make a firm offer of credit to all consumers on the lists or to use such lists for purposes authorized under Section 604 of the FCRA.

b) Maintain for at least five (5) years from the date of service of this order and upon request, make available to the Federal Trade Commission for inspection and copying, all records and documents necessary to demonstrate fully its compliance with this order.

c) Deliver a copy of this order to all present and future management officials having administrative, sales, advertising, or policy responsibilities with respect to the subject matter of this order.

d) For the five (5) year period following the entry of this order, notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or

dissolution of subsidiaries, or any other change in the corporation that might affect compliance obligations arising out of this order.

e) Within one hundred and eighty (180) days of service of this order, deliver to the Commission a report, in writing, setting forth the manner and form in which it has complied with this order as of that date.

OPINION OF THE COMMISSION

BY YAO, *Commissioner:*

I. INTRODUCTION

On December 15, 1992, the Commission issued an administrative complaint charging respondent Trans Union Corporation ("Trans Union") with violating the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681 *et seq.* (1990). The complaint alleged, *inter alia*, that Trans Union violated the FCRA by using credit information to compile lists of consumers for purposes of target marketing and selling such lists to companies who did not have a permissible purpose for obtaining the lists.[1] On September 20, 1993, Administrative Law Judge Lewis F. Parker ("ALJ") issued an Initial Decision granting complaint counsel's motion for summary decision.[2]

Trans Union appeals, arguing that the ALJ erred in granting summary decision. First, Trans Union urges that the ALJ erred in holding that its target marketing lists violated the FCRA or, in the alternative,

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[1] The complaint also alleged that Trans Union provided prescreened lists to credit grantors without requiring that those credit grantors make a firm offer of credit to each person on the list. This part of the litigation was certified to the Secretary and withdrawn from adjudication on June 1, 1993, so that the Commission could consider a proposed consent agreement dealing solely with the issue of prescreening for credit offers. Following the 60 day public comment period, the agreement was given final approval by the Commission on November 18, 1993. Consequently, the prescreening portion of this case is not at issue here.

Moreover, although respondent's brief makes a brief reference to the practice of insurance prescreening, this issue is also not part of this litigation and thus is not discussed in this decision.

[2] The following abbreviations are used in this opinion:

ID	Initial Decision
IDF	Initial Decision Finding number
OA Tr.	Transcript of Commission Oral Argument (May 4, 1993)
TUAB	Trans Union's Appeal Brief
CCAB	Brief of Appellee Complaint Counsel
TURB	Trans Union's Reply Brief
Aff.	Affidavit

erred in finding no genuine dispute of material fact concerning this question. More specifically, Trans Union argues that its target marketing lists do not fall within the definition of "consumer report" as set forth in the FCRA; that there is no "communication" as required by the statute; and that Trans Union's customers have a permissible purpose for obtaining the lists. Second, Trans Union argues that the order is an unconstitutional restriction on its freedom of expression. Third, Trans Union argues that the order creates an arbitrary classification that denies its constitutional right to equal protection. Fourth, and finally, Trans Union urges that the ALJ erred by relying on improper evidence and denying discovery of relevant materials which served as the basis of his decision.

As set forth more fully below, we hold, relying on the FCRA's statutory language and federal court jurisprudence concerning the FCRA, as well as the FCRA's legislative history where relevant, that Trans Union's sale of target marketing lists violates the FCRA and that there is no genuine dispute of material fact concerning this question. We also find that the order does not violate Trans Union's First Amendment or equal protection rights. Because our review is *de novo* and we have not relied upon the materials which Trans Union alleges were improperly relied upon by the ALJ or improperly denied to Trans Union in discovery, we find that the evidentiary and discovery issues raised by Trans Union are either moot or the error, if any, is harmless. Accordingly, we affirm the ALJ's conclusion that Trans Union is liable, and adopt the ALJ's order, except as modified.

II. THE STANDARD FOR SUMMARY DECISION

Commission Rule 3.24 provides that summary decision is appropriate when "there is no genuine issue as to any <u>material</u> fact and . . . the moving party is entitled to such decision as a matter of law." 16 CFR 3.24(a)(2) (1994) (emphasis added). The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A <u>material</u> fact is a fact which might affect the outcome of a suit because of its legal import. *Id.*; *Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985) (*per curiam*). In deciding a motion for summary decision, the burden falls on the moving party to establish that no relevant facts are in dispute. *Clements v. County of*

Nassau, 835 F.2d 1000, 1004 (2d Cir. 1987). In determining whether a genuine issue has been raised, an adjudicative body must resolve all ambiguities and draw all reasonable inferences against the moving party. *United States v. Diebold*, 369 U.S. 654, 655 (1962) (*per curiam*).

With these principles in mind, we turn to the undisputed facts concerning Trans Union's practices.

III. TRANS UNION'S BUSINESS

Based on the record in this matter, the ALJ made findings of undisputed fact.[3] The crucial facts, culled from affidavits, transcripts and documents filed by both sides in the summary decision motion, are set forth below.[4]

Respondent's Consumer Reporting Database

Respondent is a consumer reporting agency, as that term is defined under Section 603(f) of the FCRA and is regularly engaged in the business of credit reporting. IDF 2. Respondent creates and maintains a consumer reporting database named CRONUS, containing credit-related information, for use in its credit reporting database. IDF 7. Credit information on individual consumers is provided to Trans Union, generally, in the form of a credit grantor's accounts receivable tape. Botruff Aff. paragraph 7; IDF 8. These accounts receivable tapes are provided to Trans Union by various credit grantors under agreements that do not prevent their use for target marketing. Weckman Aff. paragraph 3. The CRONUS computer is programmed to read these accounts receivable tapes and to consolidate the information on a particular individual consumer contained in those tapes with the existing information in that

[3] The Initial Decision makes reference to "findings of fact," and Section 5(b) of the Federal Trade Commission Act, 5 U.S.C. 45(b) (1990), requires "findings of fact." Of course, in a case resolved through summary decision, findings of fact are appropriate only to the extent that the facts are not subject to genuine dispute. We thus use the phrase "findings of fact" to mean findings concerning undisputed facts only. We understand the ALJ to have used the term in this fashion as well.

The following recitation of undisputed facts highlights only the most pertinent facts. The Commission adopts all of the ALJ's undisputed facts.

[4] The ALJ did not grant any evidence submitted *in camera* treatment, noting that the parties did not request it. ID 1, n.l. Neither party has sought to appeal that decision and, therefore, we hold that none of the materials is subject to *in camera* treatment.

consumer's CRONUS file. Botruff Aff. paragraph 8. Once the CRONUS program finds a match, the credit-related information contained on the credit grantor's tape is appended to an individual consumer's CRONUS file by adding it to an existing account number or by creating a new account. *Id.* paragraph 10. The credit-related information consists of positive and negative credit information, such as credit limits, payment history, current outstanding balances, past due payments. *Id.* paragraph 11. The account number and the credit-related information appended to this number are called a "tradeline." *Id.* paragraphs 8, 9, 10; IDF 9, 10. A tradeline is identified in CRONUS by the name of the credit grantor and the account number. Botruff Aff. paragraph 10.

Respondent's Target Marketing Division

Respondent, through its TransMark division, creates and maintains a number of separate databases for generating lists used in target marketing. IDF 33; Weckman Aff. paragraph 5. The most important database is what TransMark calls its "Base List," but it also creates and maintains the following separate databases: (a) Homeowners; (b) Automobile Owners; (c) Students; (d) Puerto Rico; (e) New Charge Card Issues; and (f) New Homeowners. IDF 20.[5] We will first discuss the Base List and later describe these other databases.

The Base List Database

The Base List is created by selecting from CRONUS only those consumers who have at least two tradelines. IDF 21. The Base List contains tradeline information extracted from CRONUS. IDF2 4. The information in the Base List is separated into five segments: (1) Bankcard; (2) Premium Bankcard; (3) Retail; (4) Upscale Retail; and (5) Finance Loan. IDF 24.

The information extracted from CRONUS and included in each of these five segments of the Base List is a positive or negative indication as to whether the consumer has one or more of the type of accounts included in that segment, the open date of the oldest trade-

[5] *See infra* pp. 6-7.

line, and the open date of the newest tradeline. IDF 24.[6] The Base List does not include the identity of the credit grantor, the credit terms, the amount of collateral pledged, the high credit amount, the credit limit, the payment status or pattern, delinquency or derogatory information, or any other comparable information included in CRONUS. IDF 26. The source of all five segments is identified in one of TransMark's brochures as "Trans Union consumer database." IDF 3 (quoting HX 2).

For each Base List segment, there is a brochure describing the particular segment's core population, the file size (the number of consumers on the list), a description of the list, the list's purchase price, and the various "selects" options available for that segment. "Selects" are options enabling a customer to request a list of consumers having certain specific characteristics. IDF 30. Examples of the "selects" offered by Trans Union include: bankcard or retailer; age; estimated household income; children; working women; length of residence; zip code; persons who have responded to mail order solicitations; and "hotline" consumers. IDF 31. The "hotline" select is a compilation of those consumers who have appeared on a credit grantor's list within the prior 30 to 90 days. IDF 34. Most of the information for selects is derived from Trans Union's consumer reporting database. Kiska Tr. at 60.

Trans Union also performs modeling with information contained in CRONUS and includes the result as a data element in the Base List. Weckman Aff. paragraph 61. One model is the TransMark Income Estimator ("TIE"), which is described as follows in one of its brochures:

> TIE evaluates individual consumer income based upon a mix of credit data from Trans Union's database and census demographic data. . .
> TIE . . . is based on the notion that consumer spending and payment behavior is closely related to income.

IDF 35 (quoting HX 1). TIE is a mathematical model that estimates an individual's income based on a mix of individual credit information and demographic information. Weckman Aff., Exhibit C. This model is used to select mailing lists by income. *Id.* Once again, the

[6] The list also contains demographic information extracted from CRONUS which reveals: (1) the consumer's name, address, social security number, date of birth and telephone number; (2) whether the consumer is the head of the household, his or her ethnic background and marital status; and (3) the consumer's occupation. IDF 23.

information created by the TIE model is based in whole or in part on information contained in Trans Union's consumer reporting database. IDF 36.

Another model recently introduced by TransMark is "SOLO," described in a brochure, along with a companion program known as SILHOUETTE (offered only for prescreened lists), as follows:

> Both products provide a consistent and effective way to develop qualified prospects based upon similar credit behavior (SILHOUETTE) and credit behavior overlaid with demographic data (SOLO) .... [T]he products evaluate <u>individual</u> <u>behavior</u> and establish tendencies.

IDF 37 (quoting HX 1). Once again, SOLO is based upon information contained in Trans Union's consumer reporting database. IDF 38.

Other Databases

The other databases created and maintained by TransMark, like the Base List database, contain tradeline information derived from CRONUS. *See generally* Weckman Aff.

The Homeowners List is created by selecting from CRONUS consumers who have at least two tradelines, one of which is a mortgage loan or a secured loan with an opening amount in excess of $50,000. Weckman Aff. paragraph 19. One of the pieces of information extracted from CRONUS and included in the Homeowners List is the type of loan, the date the account was opened, and the date the account was closed. The mortgage section categorizes the type of loan as either FHA, Veterans, real estate or secured. Weckman Aff. paragraph 22.

The Automobile Owners List is created by selecting from CRONUS consumers who have at least two tradelines, one of which is a loan from a credit grantor such as General Motors Acceptance Corporation. Weckman Aff. paragraph 27. One of the pieces of information extracted from CRONUS and included in the Automobile Owners List is the date that the loan was opened and the expiration date. Weckman Aff. paragraph 30.

The Students List is created by selecting from CRONUS installment loans that have an indicator of "ST" which were opened within the last four years; the "ST" indicator in CRONUS indicates that the individual has a student loan. Weckman Aff. paragraph 34.

One of the pieces of information extracted from CRONUS and included in the Students List identifies the date on which the loan was opened. Weckman Aff. paragraph 35-37.

The Puerto Rico List is a list of consumers residing in Puerto Rico. Weckman Aff. paragraph 42. The list is segmented in basically the same fashion as the Base List, using information obtained from CRONUS. Weckman Aff. paragraph 42-43.

The New Charge Card Issues List is created by selecting from CRONUS consumers who have at least two tradelines, one of which has an opening date within the last 90 days. Weckman Aff. paragraph 46. This list is segmented in the same fashion as the Base List, using information from CRONUS. Weckman Aff. paragraph 47.

Finally, the New Homeowners List is created by selecting from CRONUS consumers who have at least two tradelines, one of which is a mortgage loan or a secured loan with an opening loan amount in excess of $50,000 and an opening date within the last 90 days. Weckman Aff. paragraph 51. This list includes the same type of information extracted from CRONUS that is included in the Homeowners List. Weckman Aff. paragraph 52.

The Homeowners, New Homeowners, Automobile Owners, Students, Puerto Rico and New Charge Card Issues Lists do not include the identity of the credit grantor, the terms, collateral, the payment status or pattern, delinquency or derogatory information, or any other comparable information included in CRONUS. Weckman Aff. paragraphs 24, 31, 39, 44, 53, 69, 74.

Customers' Knowledge of Criteria for Selecting Consumers

Customers for respondent's target marketing lists are aware of the criteria by which consumers are picked. For example, promotional material used by TransMark entitled "Direct Marketing Lists" states:

> Consumers on each quarterly updated list must possess a minimum of two tradelines and have activity in past 90 days on one account.

IDF 22 (quoting HX 1). Similarly, promotional material for TransMark's New Charge Card List states that the list "is created monthly from the Trans Union Consumer Database and consists of individuals who have responded via mail to a credit card solicitation .... These consumers are ready to purchase with their new cards."

Memorandum in Support of Complaint Counsel's Motion for Summary Decision, Attachment J. TransMark advertisements emphasize that its lists are: "Not just ordinary lists but lists of people who are active users of credit." IDF 40 (quoting TransMark advertisement in DM News, May 18, 1992 at 12).

Similarly, customers are aware of the criteria by which consumers are placed in "segments" and "selects" derived from the Base List. For example, the "Upscale Retail" segment of the Base List, which names 36.2 million consumers, is described in a marketing brochure as offering:

> direct marketers the opportunity to reach America's retail shopping elite. The Upscale file has been developed from TransMark's list of retailers that cater to consumers with discriminating taste. These individuals have high discretionary income and are used to paying more than the average consumer to purchase quality products.

IDF 29 (quoting HX 2).

Dissemination of Target Marketing Lists to Customers

TransMark sends its target marketing lists directly to its customers as well as to third-party mailers. IDF 39. Approximately 90% of the computer tapes leased by TransMark are sent directly to mail houses that are independent of its customers. IDF 39, 44.

The computer tapes leased by TransMark are rented for one-time use -- to produce mailing labels to mail the customer's material to consumers. TransMark's customers are not allowed to place the computerized information into a database to access the information contained on the tape, or use the tape for any other purpose. IDF 41.

Both TransMark's customers and third-party mailers have access to the names on the target marketing lists. TransMark's customers who conduct mailings themselves must have access to the names on the list to send out mailings. When TransMark's customers use third-party mailers, these mailers have access to the names on the list. For example, an official of a third-party mailing company, Acxiom Mailing Services ("AMS"), notes that:

> AMS's customer will occasionally request AMS to access the tape for an individual name to confirm that a particular person was sent a mail piece and/or to delete a particular person's name.

Ortiz Aff. paragraph 15.

TransMark's customers use the computer tapes to mail offers to consumers to enter into credit, insurance or business transactions. IDF 45. The customer or the customer's third-party mailer places a source code on each mail piece. Ortiz Aff. paragraph 13; Frank Aff. paragraph 22. "The source code enables AMS' customer to track the number of consumers who respond to a particular mailing from a particular target list." Ortiz Aff. paragraph 13; *see also* Frank Aff. paragraph 22.

TransMark does not require that its customers only use the lists to make a firm offer of credit to all consumers on the lists. IDF 8; Frank Tr. at 15. TransMark also leases its tapes to some customers who promote their product or service through telemarketing. IDF 46.

IV. THE FAIR CREDIT REPORTING ACT

In holding that respondent's activities fell within the scope of the FCRA, the ALJ relied to some extent on the FTC Commentary on the FCRA, 55 Fed. Reg. 18,804 (1990) (hereafter "FCRA Commentary"), the Commission's consent agreement with TRW entered on January 14, 1993, and Commission testimony before various committees of Congress. *See* IDF 11-16. While federal courts have sought guidance from the Commission's FCRA Commentary in recognition of the Commission's special expertise with regard to the FCRA, *see, e.g., Estiverne v. Sak's Fifth Ave.*, 9 F. 3d 1171, 1173-74 (5th Cir. 1993) (concerning the FCRA Commentary discussion of bad check lists), *Yonter v. Aetna Fin. Co.*, 777 F. Supp. 490, 491-92 (E.D. La. 1991) (concerning the FCRA Commentary section on prescreening for firm offers of credit), the Commission has expressly stated that "the Commentary does not have the force of regulations or statutory provisions, and its contents may be revised and updated as the Commission considers necessary or appropriate." 16 CFR 600, App. at 358 (1994). Of course, neither the Commission's consent agreement with TRW nor its testimony to Congressional committees govern the result in this case. As demonstrated below, our conclusion that respondent is liable is based on the statutory language of the FCRA and federal court case law interpreting it, as well as relevant legislative history.

In determining whether respondent's activities fall within the scope of the FCRA, it is necessary to answer two questions: (1)Are TransMark's target marketing lists "consumer reports" under Section

603(d); and (2) if so, are those reports sold to its customers for a permissible purpose under Section 604(3)?[7] As detailed below, we believe that a proper reading of the statutory language and case law construing that language supports the conclusion that TransMark's target marketing lists are "consumer reports" under Section 603(d) and that its customers have no permissible purpose under Section 604 to receive these reports.

In this endeavor, we are guided by some elemental principles of statutory construction. In order to ascertain the meaning of a statute, a reviewing tribunal should first look at the plain language of the statute. *Pennsylvania Pub. Welfare Dep't v. Davenport*, 495 U.S. 552, 557-58 (1990). Because courts assume that the legislative will is expressed by the ordinary meaning of the words used in the statute, *Moorhead v. United States*, 774 F.2d 936, 941 (9th Cir. 1985), the plain language is usually regarded as conclusive. *Central Montana Elec. v. Administrator of Bonneville Power*, 840 F.2d 1472, 1477 (9th Cir. 1988). Further inquiry is only necessary when (1) the statutory language is ambiguous, *Freytag v. C.I.R.*, 111 S. Ct. 2631, 2636 (1991), or (2) the plain meaning of the words is at variance with the statute as a whole, *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173, 2182 (1993). *See Richards v. United States*, 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that fulfilling our responsibility in interpreting legislation, 'we must . . . look to the provisions of the whole law, and to its object and policy.'"). Accordingly, appeals to legislative history are usually well taken only to resolve statutory ambiguity. *Ratzlaf v. United States*, 114 S. Ct. 655, 662 (1994) ("There are, we recognize, contrary indications in the statute's legislative history. But we do not resort to legislative history to cloud a statutory text that is clear."); *See also Barnhill v. Johnson*, 112 S. Ct. 1386, 1391 (1992); *Toibb v. Radloff*, 111 S. Ct. 2197, 2200 (1991).

[7] Both parties agree that Trans Union is a consumer reporting agency as defined in Section 603(f) of FCRA. IDF 2.

A. *The FCRA's Definition of "Consumer Report"*

The FCRA's consumer report definition is contained in two sections of the FCRA. Section 603(d) defines a consumer report as:

> 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 (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 604.

The last clause of Section 603(d) incorporates Section 604, which establishes the limited permissible purposes under which a customer may receive a report. Section 604 provides as follows:

> A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> (1) In response to the order of a court having jurisdiction to issue such an order.
> (2) In accordance with the written instructions of the consumer to whom it relates.
> (3) To a person which it has reason to believe --
>
> (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, or review or collection of an account of, the consumer; or
> (B) Intends to use the information for employment purposes; or
> (C) Intends to use the information in connection with the underwriting of insurance involving the consumer; or
> (D) Intends to use the information 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; or
> (E) Otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

Both parties agree on two aspects of this definition:

(1) The information on a consumer must bear on one of the seven enumerated characteristics described in Section 603(d) (consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living); and (2) this

information on a consumer must then be communicated to a third party. We will return to these two aspects of the definition later. A major point of disagreement that we will consider first concerns the proper interpretation of the portion of Section 603(d)'s definition of a consumer report that reads: "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 (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under Section 604."

1. Is the information in the target marketing lists 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 one of the enumerated purposes?

Respondent argues that the statutory definition requires that the information communicated, in addition to its bearing on one of the seven enumerated characteristics, be of the type or kind that is used or expected to be used or collected for the purpose of serving as a factor in determining the consumer's eligibility for one of the identified transactions. TUAB at 16-17. Thus, respondent argues that the ALJ failed to consider whether the information disclosed in the target marketing lists could "be judgmental information of the type used to establish a consumer's eligibility." TUAB at 20 (emphasis added). In support of its argument that there is a factual dispute on this issue, respondent points to an affidavit by TransMark's Director of Marketing for the Central Region, Peter J. Hopfensperger, in which he states that "the list databases do not contain any information upon which a credit grantor can make a judgment as to a consumer's eligibility for credit." Hopfensperger Aff. paragraph 7.

In sharp contrast, complaint counsel views the disputed language -- "which is used or expected to be used or collected for the purpose of serving as a factor in establishing the consumer's eligibility" -- as focusing instead on why the information was collected in the first place by the credit reporting agency or why its customer desires the information. Thus, complaint counsel argues that this statutory language requires only that either (1) the information has been originally collected by a consumer reporting agency for the purpose of serving as a factor in establishing the consumer's eligibility for one of the

enumerated purposes or (2) that it be used or expected to be used for the purpose of serving as a factor in establishing the consumer's eligibility for one of the enumerated purposes. CCAB at 17-21.

We believe that the plain reading of the phrase -- "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 . . . . " -- makes it clear that this language was aimed at limiting coverage by focusing on the purposes for which the information was either collected, used or expected to be used, not the actual content of the information imparted. The structure of the statute supports this reading. The first portion of Section 603(d) sets forth the actual type of information covered by the statute, by including only information that bears on one of the seven enumerated characteristics. By contrast, the second portion of Section 603(d) (and Section 604 which is incorporated by reference) focuses on the consumer reporting agency's reason for collecting the information, its expectation as to how it would be used, or the reason why the requester desires the information. Thus, to determine whether the information imparted falls within the second portion of Section 603(d), the inquiry concentrates on the purposes for which the information was either originally collected, used or expected to be used, not on the actual content of the information imparted.

Federal courts construing this language -- "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 . . ." -- support our interpretation. In *Heath v. Credit Bureau of Sheridan, Inc.*, 618 F.2d 693 (10th Cir. 1980), the Tenth Circuit held that:

> [A] critical phrase in the definition of consumer report is the second requirement: the relevant information must be "used or expected to be used or collected in whole or in part for the purpose of serving as a factor" with regard to enumerated transactions. This phrase clearly requires a judicial inquiry into the motives of the credit reporting agency, for only it "collects" the information. Similarly, the term "expected to be used" would seem to refer to what the reporting agency believed. Thus, if a credit bureau supplies information on a consumer that bears on personal financial status, but does not know the purpose for which the information is to be used, it may be reasonable to assume the agency expected the information to be used for a proper purpose. Similarly, if at the time the information was collected,

the agency expected it to be used for proper purposes, a transmittal of that information would be a consumer report.

Id. at 696 (citations omitted).[8]

Respondent's interpretation would also eviscerate one of the fundamental purposes of the statute. By limiting coverage under the Act to only "judgmental" information of the type or kind used to establish a consumer's eligibility for specified transactions, respondent's interpretation could potentially permit the release of highly confidential personal and credit-related information about consumers. In this way, respondent's interpretation would undermine Congress' concern that consumers' highly confidential credit-related information be kept confidential.[9] Although respondent has not suggested what determines whether a piece of information is "judgmental," and thus we lack any guideposts as to how respondent would set the legal standard, counsel for respondent suggested at oral argument that "judgmental" information means information that relates to a consumer's credit performance, *i.e.*, paying off debts or making monthly payments.[10] There are, however, potentially numerous situations of highly confidential credit and personal information that might not relate to a consumer's credit performance.

One example might be information providing the number of times a consumer had used a credit card recently. A second situation might be where the information imparted provides no "judgmental" information at all; rather there is an absence of relevant credit history in

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[8] *Accord St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 885 n.3 (5th Cir. 1989) ("The focus of the FCRA is primarily upon the credit reporting agency, and the confidentiality and accuracy of the information collected. To focus only on the use of the information after it was collected in determining whether the Act applied would severely undermine the Act's ability to regulate the practice of the collector of the information, the consumer reporting agency"); *Ippolito v. WNS, Inc.*, 864 F.2d 440, 449 n.10 (7th Cir. 1988) ("[T]he plain language of the statute, 'used or expected to be used or collected in whole or in part' requires inquiry into the reasons why the report was requested and why the information contained in the report was collected or expected to be used by the consumer reporting agency."); *Hansen v. Morgan*, 582 F.2d 1214, 1218 (9th Cir. 1978); *Zeller v. Samia*, 758 F. Supp. 775 (D. Mass. 1991).

[9] As Congress found when it passed the FCRA:

There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

Section 602(a)(4) (emphasis added).

[10] OA Tr. at 21 ("[Credit grantors] want to know the [consumer's] performance on all three [trade]lines, one, two or any").

the information.[11] Under respondent's interpretation, a report indicating an absence of credit-related information might not be covered by the Act because it did not transmit "judgmental" information of the type or kind used to establish a consumer's eligibility for a specified transaction. There are potentially many other situations in which highly confidential credit-related and other personal information might not be covered by the FCRA under respondent's standard.

No court has ever squarely held that this statutory language requires that the information imparted be what respondent calls "judgmental" information. The federal court decisions respondent cites do not alter this conclusion. In *Hovater v. Equifax*, 823 F.2d 413 (11th Cir. 1987), the Eleventh Circuit focused on the fact that the information received from a consumer reporting agency was used by the third party solely to evaluate an insured's claim for benefits. The court did not focus on the actual contents of the information imparted. Noting that the statutory language refers only to a consumer's "eligibility" for insurance and that Section 604(3)(D) also refers only to the "underwriting of insurance," the court stressed that the third party did not in fact use the information for determining eligibility for insurance, but rather to evaluate an insured's claim for benefits under an existing policy. *Id.* at 418-19. Similarly, in *Cochran v. Metropolitan Life Ins. Co.*, 472 F. Supp. 827, 830 (N.D. Ga. 1979), an insurance claim report was found not to be within the ambit of the FCRA. The court emphasized that the recipient did not obtain the report to "determine eligibility for certain transactions." *Id.*

The Third Circuit in *Houghton v. New Jersey Mfrs. Ins. Co.*, 795 F.2d 1144, 1148 (3d Cir. 1986), another case cited by respondent, also focused on the use that the third party was intending to make of the information. In that case, the court considered whether an investigative report prepared for the defense of a personal injury claim was covered by the FCRA. The court found that such a report was not covered by the FCRA. In doing so, the court stressed that:

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[11] For example, in *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143 (5th Cir. 1983), the third party recipient of the credit report argued, and the lower court had held, that because credit was refused "for what was not in the report: there was not sufficient evidence . . . of his ability to sustain high monthly payments," the recipient did not need to notify the consumer under Section 615(a). *Id.* at 149. The appellate court rejected this argument, citing to *Carroll v. Exxon Co., U.S.A.*, 434 F. Supp. 557 (E.D. La. 1977), for the proposition that "where denial of credit [is] not premised on adverse information in consumer report, but on credit bureau's inability to furnish definitive information regarding applicant's credit, Section 1681m(a)'s [Section 615(a)'s] disclosure requirement [is] deemed controlling." *Fischl*, 708 F.2d at 149.

[n]othing in the request indicated that [the third party] desired a report on Houghton for a purpose encompassed within the statutory definition of an investigative consumer report. The request concerned only the genuineness of Houghton's personal injury claim and not her "eligibility for . . . credit or insurance . . . or employment . . . ."

Id. (emphasis added).[12]

Federal courts have similarly distinguished Hovater, Houghton and Cochran as cases where reports were prepared and transmitted specifically as insurance claims reports, not general credit reports. In *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 885 n.3 (5th Cir. 1989), the court recognized that reports provided to insurers by claims investigation services solely to determine the validity of insurance claims are not consumer reports because Section 604(3)(C) specifically sets forth only "underwriting" as an insurance-related purpose -- rather than "claims" -- and Section 603(d)(1) speaks specifically of "eligibility" for insurance, not the propriety of a claim under a pre-existing insurance policy. *Id.*; *accord Ippolito v. WNS, Inc.*, 864 F.2d 440, 449 n.10 (7th Cir. 1988).

In short, the cases cited by respondent do not support its argument. In fact, courts that have considered Houghton, Cochran and Hovater have refused to read these decisions as enunciating broad principles beyond their facts. For example, litigants in other cases have argued that these decisions stand for the broad proposition that the purpose for which the information was used (as opposed to originally collected) is solely dispositive of whether the information

[12] After finding that the third party did not intend to receive a report covered by the FCRA, the court did proceed to discuss the contents of the report, but only in the context of deciding whether the third-party recipient had a duty to notify the report's subject of its use of the report. The court stressed that "[o]n its face the Equifax report did not contain sufficient detail to alert [the third party] that it may have obtained an investigative consumer report from Equifax that was subject to the FCRA disclosure requirement." *Id.* at 1149 (emphasis added). The court noted that the report stated that Equifax "did check available credit files through a confidential source and ... [was] unable to come up with any financial irregularities" but that this was not sufficient to alert the third party that it had, contrary to its wishes, received a report covered by the FCRA. *Id.* Again, the court stressed the third party's understanding of the report, not what type of information was contained in the report. The court then noted that:

> [a]bsolutely nothing in the report indicates that the "available credit files" served as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used for personal, family, or household purposes, (2) employment purposes, or (3) "a legitimate business need for the information in connection with a business transaction involving the consumer."

Id. at 1149. Respondent focuses on this isolated comment to establish the broad principle that only "judgmental" information of the type or kind that would serve as a factor in establishing a consumer's eligibility for one of the permissible purposes constitutes a "consumer report" and is covered by the Act. There is no indication, however, that the court intended to establish such a broad principle or squarely considered all the ramifications of such a holding.

constitutes a "consumer report" under Section 603(d).[13] Courts, however, have rejected this argument. In St. Paul, an insurance company, in the course of investigating an insured's claim for losses under an existing policy, obtained a credit report that was originally collected for purposes of establishing the consumer's eligibility for credit and other permissible purposes. The recipient argued that, because it did not "use" the information contained in the plaintiff's credit report for any of the enumerated purposes in Section 603(d), the credit report was not a consumer report within the meaning of the FCRA. The court rejected the argument that use is solely dispositive, noting that the statutory language expressly includes information "collected" for one of the enumerated purposes. 884 F.2d at 884 & n.l. *Accord Ippolito*, 864 F.2d at 449-50.

We thus find no case law in support of respondent's position that only "judgmental" information of the type or kind used to establish a consumer's eligibility for a specified transaction is protected from disclosure by FCRA. Rather, we believe that the statutory language in question is aimed at limiting coverage by focusing on the purposes for which the information was either collected, used or expected to be used.[14]

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[13] Complaint counsel characterizes Trans Union's position as standing for the proposition that target marketing lists are not consumer reports because the information is not used by target marketers to determine eligibility for credit. CCAB at 17. Complaint counsel argues that such an interpretation effectively reads the "collected" language out of the statute. Respondent, however, rejects complaint counsels characterization of its argument:

> Rather, Trans Union contends that target marketing lists are not consumer reports because the type of information used to prepare them is not the type of information which is "used or collected" for purposes of determining "eligibility" for credit, employment, or insurance.

TURB at 7. Although respondent does not advance the argument attributed to it by complaint counsel, we discuss this point in order to complete our interpretation of the statutory language. *See infra* n.14.

[14] We also agree with St. Paul and Ippolito that Houghton cannot be read for the broad proposition that the purpose for which the information was used is solely dispositive of whether the information constitutes a "consumer report" under Section 603(d). As pointed out by the court in St. Paul, Houghton involved what was largely an insurance report used for the purpose of reviewing the validity of an insurance claim, not information from general credit reports, and thus there was no need for the Houghton court to consider whether the information imparted was "collected" for a permissible purpose. *St. Paul*, 884 F.2d at 885 n.3. The report at issue in Houghton, however, did briefly reference information from a consumer reporting database and thus may have contained information originally collected in whole or in part with the expectation that the information would be used for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA. *Houghton*, 795 F.2d at 1149. We believe that St. Paul and Ippolito's interpretation comports with the actual statutory language which refers to the communication of information which "is used or expected to be used or collected" for one of the enumerated permissible purposes. Section 603(d) (emphasis added).

In accordance with the statutory language, then, the target marketing lists fall within the FCRA's definition of "consumer report" if -- in addition to the requirements that the lists impart information bearing on one of the seven characteristics and that they be communicated to a third party -- any one of the following is true:

> (1) The person who requests the information actually uses the information in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA;
>
> (2) The consumer reporting agency which prepares the information "expects" the information to be used in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA; or
>
> (3) The consumer reporting agency which prepared the communicated information originally collected the information in whole or in part for the purpose of it serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA.

Ippolito, 864 F.2d at 449. As discussed *infra* at pp. 22-24, we determine that respondent's target marketing lists fall within the third prong.

We believe that both the plain language of the statute and the purposes enumerated in the Act support our interpretation and that, consequently, there is no need to look at the legislative history of the FCRA. *Ratzlaf v. United States*, 114 S. Ct. 655, 662 (1994). However, our review of the somewhat sparse legislative history not only provides no support for respondent's position, but, to the extent that any history exists, lends support to our reading of this portion of Section 603(d). Two points emerge from examining the course of legislative drafting of the FCRA.[15] First, throughout the legislative history, it is clear that this portion of Section 603(d), rather than attempting to limit the content of the divulged information that would be covered under the Act, was aimed at limiting coverage by focusing on the purposes for which the information was either collected, used or expected to be used. There is simply never any hint that the language was intended to restrict coverage in a manner suggested by Trans Union. Second, over the course of the legislative drafting, the

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[15] The evolution of the statutory language during the enactment process has been recognized as a useful guide in ascertaining the purpose and intended effect of the bill as passed. 2A Norman J. Singer, Sutherland Statutory Construction Section 48.04, at 324-26 (5th ed. 1992) [hereinafter "Sutherland Statutory Construction"].

scope of the definition of "consumer report" was significantly broadened, rather than narrowed.[16]

When Senator Proxmire first proposed his credit reporting bill to the Senate in 1968, the scope provision provided:

> The term 'credit report' means any written or oral report, recommendation, or representation as to the credit worthiness, standing, or capacity of any individual, and includes any information which is sought or given for the purpose of serving as the basis for a judgment as to any of the foregoing factors.

114 Cong. Rec. 24,904 (1968). The references to information being "sought or given" clearly demonstrate that this language was focused on the intent of the credit bureau and/or the recipient in using information, rather than a limitation on the type or kind of information that would be covered by the Act. Respondent focuses upon the fact that the language refers to "information which is sought or given for the purpose of serving as a basis for judgment" as somehow indicating Senator Proxmire's intent that only "judgmental" information be covered. TUAB at 24. However, the use of the words before that phrase -- "and includes any information which . . ." -- demonstrates that the language was clearly intended to expand the coverage of the statute, rather than to serve as a restriction on the type of information covered. The bill was not addressed before the end of the session.

Senator Proxmire reintroduced the bill in 1969 with a modified definitional provision. The new definition appeared in two parts. The term "credit rating" was defined as "any evaluation or representation as to the credit worthiness, credit standing, credit capacity, character, or general reputation of any individual." "Credit report" was then defined as a "communication of any credit rating, or of any information which is sought or given for the purpose of serving as a basis for a credit rating." S. 823, 91st Cong., lst Sess., 115 Cong. Rec. 2415 (1969). Again, the use of the terms "sought or given" indicates that the focus was on the intent of the credit bureau and/or the recipient to use the information, not on the actual content of the information. Moreover, this two-part definition suggests that this language was intended to expand the scope of coverage beyond what

[16] *See generally* Mary A. Bernard, *Houghton v. New Jersey Manufacturers Insurance Co.: A Narrow Interpretation of the Scope Provisions of the Fair Credit Reporting Act Threatens Consumer Protection*, 71 Minn. L. Rev. 1319, 1332-33 n.69 (1987) (providing a full explication of the evolution of this statutory language) [hereinafter "Bernard"].

the bill denominated as "credit rating" information, not to restrict coverage to certain types or kinds of information, contrary to respondent's reading of it. And, finally, the definition of "credit rating" had expanded. It now included information about character or general reputation.

The 1969 bill was then reported to the Senate Committee on Banking and Currency, which substantially changed the bill's language. "Credit reports" were changed to "consumer reports," reflecting Congressional intent that the Act regulate more than credit reports. The definition was expanded to cover seven types of information and the language now at issue here was added at the end of Section 603(d). That language had been changed from "sought or given" to "used or expected to be used or collected" for insurance, credit, employment, or licensing purposes, or used in connection with a business transaction involving the consumer. The addition of "collected" was a clear expansion from the language referring to "sought or given." The emphasis behind the language, however, remained focused on the intent of the recipient and/or the consumer reporting agency in collecting or disseminating the information.

The latter portion of Section 603(d) was obviously an attempt to limit the rather broad definition of "consumer report" by excluding from coverage information in reports that are not used or expected to be used or collected for determining consumer eligibility for insurance, credit, employment, or licensing purposes, or used in connection with a business transaction involving the consumer. For example, the legislative history reveals that this language was relied upon by the drafters in arguing that the statute excluded credit reports in connection with business firms. When the bill was passed by the Senate in substantially identical form to the bill that was reported by the Committee on Banking, as a part of the Bank Records and Foreign Transactions and Credit Card legislation, Senator Proxmire stated, in summarizing the bill:

> The act covers all reporting on consumers, whether it be for the purpose of obtaining credit, insurance, or employment. However, credit reports or other reports on business firms are excluded.

116 Cong. Rec. 35,941 (1970). Similarly, when Congresswoman Sullivan, Chairman of the House Subcommittee on Consumer Affairs of the Banking and Currency Committee, reported the conference report to the House, she stated:

The purpose of the fair credit reporting bill is to protect consumers from inaccurate or arbitrary information in a consumer report, which is used as a factor in determining an individual's eligibility for credit, insurance or employment. It does not apply to reports utilized for business, commercial, or professional purposes.

116 Cong. Rec. 36,572 (1970). Respondent asserts that the first sentence of this quotation demonstrates an intention to limit coverage to the type or kind of information used to establish eligibility for credit, insurance or employment. But, as her next sentence reveals, Congresswoman Sullivan referred to reports "used as a factor in determining an individual's eligibility for credit, insurance or employment" solely to distinguish those types of reports from those "utilized for business, commercial, or professional purposes," not to limit coverage under the Act only to "judgmental" information.

Indeed, when Congressman Bow asked for clarification regarding how the statutory language could be read to exclude reports for business purposes, Congresswoman Sullivan pointed to the statutory language at issue here in support of her position that the legislation was designed not to cover reports used for business purposes:

Insofar as reports of a business nature are concerned, this point was raised continually in our hearings on H.R. 16340 in the Subcommittee on Consumer Affairs, and I think we always made clear that we were not interested in extending this law to credit reports for business credit or business insurance. The conference bill spells this out, furthermore, in section 603(d), which defines a "consumer report" as a report, and so on, "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 (1) credit or insurance to be used primarily for personal, family, or household purposes" and so forth.

Id. at 36, 573. Throughout the legislative history, it appears that this language, rather than attempting to limit the content of the divulged information that would be covered under the Act, was aimed at limiting coverage by focusing on the purposes for which the information was either collected, used or expected to be used.[17]

[17] Respondent also asserts that the Commission itself has interpreted this statutory language to restrict coverage to only "judgmental" information. First, respondent cites to prior commentary concerning whether credit guides constitute consumer reports. 16 CFR 600.1 (1981). Credit guides are prepared by credit bureaus which utilize their consumer reporting databases to rate each consumer's bill payment practices. The prior Commentary stated that these guides fit within the definition of "consumer report":

"Credit Guides" as presently compiled and distributed by credit bureaus, are a series of consumer reports, since they contain information which is used for the purpose of serving as a factor in establishing a consumer's eligibility for credit.

We thus proceed to determine whether the information imparted by the target marketing lists was used, expected to be used or originally collected for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA. *See Ippolito*, 864 F.2d at 449. We conclude that these lists fall within the definition of "consumer report" because the information imparted by them was originally collected by the consumer reporting agency with the expectation that it would be used by credit grantors as a factor in establishing the consumer's eligibility for one of the transactions set forth in Section 603(d) of the FCRA. The target marketing lists here were compiled by using tradeline information. The tradeline information was originally collected in whole or in part with the expectation that it would be used for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA.

There is no genuine dispute of fact here. Respondent admits that it is a consumer reporting agency, as that term is used in the FCRA, and is regularly engaged in the business of credit reporting. IDF 2. Respondent creates and maintains a consumer reporting database named CRONUS. IDF 8. This database contains, *inter alia*, tradeline information collected in whole or in part with the expectation that it will be used by credit grantors for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA. The tradeline information is included as one section in credit reports that are routinely sent to credit grantors for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA. Botruff Aff. paragraphs 6-14.

Furthermore, there is no factual dispute that respondent, through its TransMark division, creates and maintains databases for generating lists used in target marketing. *See supra* pp. 47. There is also no factual dispute that the lists are created by using tradeline information from CRONUS. *Id.* For example, the Base List is created by select-

16 CFR 600.1(c) (emphasis added). Respondent asserts that the underscored portion indicates that the Commentary found that these guides fit within the definition of "consumer report" only because they contain information of a type or kind that is used for the purpose of serving as a factor in establishing a consumer's eligibility for credit. TUAB at 25-26. We do not agree with respondent's reading. The underscored portion merely reflects the proper statutory interpretation that a report containing information bearing on one of seven enumerated characteristics falls within the definition if it is then used as a factor in establishing a consumer's eligibility for credit. That the quotation does not refer to the "expected to be used or collected" language does not mean that the Commission reads such language out of the statute. Moreover, even if this language supported Trans Union's position, this Commentary has been superseded. 55 Fed. Reg. 18,804.

ing from CRONUS only those consumers who have at least two tradelines as revealed in those consumers' CRONUS individual files. IDF 21. Furthermore, databases other than the Base List contain even more information from the tradelines that came from CRONUS. *See supra* pp. 6-7.

Thus, the tradeline information that is imparted via the target marketing lists was originally collected by respondent, in whole or in part, for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA.

Respondent has argued that the tradeline information does not meet this test because credit grantors could not in fact use the information actually imparted here (the number of tradelines as well as some basic information about those tradelines) in establishing the consumer's eligibility for one of the transactions set forth in the FCRA. We have shown that the statutory language cannot be read as restricting coverage in this manner.

Moreover, courts have recognized that, when a consumer reporting agency collects credit-related information in a consumer reporting database, there is a presumption that information was collected with the intention that it will be used by credit grantors as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA. *See Hansen v. Morgan*, 582 F.2d 1214, 1218 (9th Cir. 1978) ("[U]nless the Bureau was generally collecting such information for purposes not permitted by the FCRA, it must have collected the information in the report for use consistent with the purposes stated in the act. There has been no suggestion otherwise."). Logically, it makes sense that, when a consumer reporting agency admits that it is collecting a natural cluster of credit-related information for statutory purposes, all the credit-related information in that cluster has been collected with the expectation that it will be used by credit grantors as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA. Indeed, given that all the tradeline information was placed in respondent's consumer reporting database, CRONUS, it flies in the face of the facts in this case to suggest that respondent had a different intent with respect to collecting certain aspects of tradeline information than it had in collecting the natural cluster of tradeline information. In any event, even if respondent in fact did have multiple purposes in collecting a natural cluster of tradeline information, respondent would still be liable if one of the purposes for which the cluster was collect-

ed was to serve as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA.

In sum, there is simply no factual dispute that the target marketing lists are created with tradeline information that was originally collected in whole or in part by respondent with the expectation that it would be used by credit grantors for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA.

2. Does the information in the target marketing lists bear on one of the seven enumerated characteristics?

The definition of "consumer report" also requires that the information "bear[] on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." The ALJ held, and we agree, that the information imparted "bears on" the consumer's credit worthiness, credit standing or credit capacity. The plain reading of this statutory language is that the information need only be of some relevance to one of the seven enumerated characteristics. Indeed, the dictionary defines the term "bearing on" as meaning "to relate or have relevance: apply, pertain (facts bearing on the question)." Webster's Third New Int'l Dictionary 191 (1967).

We believe that, taken together, the information respondent releases via its target marketing is of relevance concerning a consumer's credit worthiness, credit standing or credit capacity. The fact that a person has two tradelines alone demonstrates that, at two distinct points in time, credit grantors deemed that person sufficiently credit worthy to be granted credit. Furthermore, the undisputed facts show that TransMark imparted much more credit-related information than the fact that these consumers all had two tradelines. *See supra* pp. 4-7. For example, the information extracted from CRONUS and included in each of the five segments of the Base List is a positive or negative indication as to whether the consumer has one or more of the type of account included in that segment, the open date of the oldest tradeline, and the open date of the newest tradeline. IDF 24.

TransMark advertisements emphasize that its lists are: "Not just ordinary lists but lists of people who are active users of credit." IDF 40 (quoting TransMark advertisement in DM News, May 18, 1992 at

12). For example, the "Upscale Retail" segment of the Base List is described in a marketing brochure as offering:

> direct marketers the opportunity to reach America's retail shopping elite. The Upscale file has been developed from TransMark's list of retailers that cater to consumers with discriminating taste. These individuals have high discretionary income and are used to paying more than the average consumer to purchase quality products.

IDF 29 (quoting HX 2). Furthermore, one of the selects, the "hot-line" select, is a compilation of those consumers who have appeared on a credit grantor's tape within the prior 30 to 90 days. IDF 34.

In addition to creating these segments from the Base List, TransMark also maintains other separate databases and offers target marketing lists from those databases. *See supra* pp. 6-7. These databases impart much more than the fact that each consumer on the lists has two tradelines. In the Homeowners List, for example, one of the pieces of information extracted from CRONUS is the type of loan, the date the account was opened, and the date the account was closed. Weckman Aff. paragraph 19. The mortgage segment of the Homeowners List categorizes the type of loan as either FHA, Veterans, real estate or secured. Weckman Aff. paragraph 22. One of the pieces of information extracted from CRONUS and included in the Automobile Owners List is the date that the loan was opened and the expiration date. Weckman Aff. paragraph 30. The New Charge Card Issues List is created by selecting from CRONUS consumers who have at least two tradelines, one of which has an opening date within the last 90 days. Weckman Aff. paragraph 46. The New Homeowners List selects from CRONUS consumers who have at least two tradelines, one of which is a mortgage loan or a secured loan with an opening loan amount in excess of $50,000 and an opening date within the last 90 days. Weckman Aff. paragraph 51. Finally, one of Trans Union's models, the TransMark Income Estimator, uses a mix of individual credit information and demographic information to estimate an individual's income. *See supra* p. 5.

Taken together, this information is unquestionably of relevance concerning a consumer's credit worthiness, credit standing or credit capacity. Respondent does not deny any of the facts described above about the operation of its target marketing lists. Rather, respondent places most of its reliance on its contention, which we have rejected above, that the information imparted must be "judgmental" informa-

tion of the type or kind used to establish a consumer's eligibility for a specified transaction.

Respondent, however, also argues that it has raised a material factual issue whether the target marketing lists disclose something of relevance about a consumer's credit worthiness. At oral argument, counsel for Trans Union questioned whether a credit grantor would find of relevance at all the fact that a consumer had two tradelines. OA Tr. at 21-22. The only affidavit respondent has filed that potentially addresses this question is an affidavit by its Director of Marketing for the Central Region, Peter J. Hopfensperger, who states only that "the list databases do not contain any information upon which a credit grantor can make a judgment as to a consumer's eligibility for credit." Hopfensperger Aff. paragraph 7. But this affidavit raises the issue only of whether the existence of two tradelines is sufficient information for a credit grantor to "make a judgment" as to eligibility; it does not question whether the fact that a person has two tradelines would be of some relevance to one of the seven enumerated characteristics. Moreover, it does not undermine the undisputed evidence that respondent's target marketing lists impart more than the fact that a consumer has two tradelines. Given the undisputed facts showing that the totality of information imparted in respondent's target marketing lists is unquestionably of relevance to a consumer's credit worthiness, credit standing, or credit capacity, this affidavit is simply not sufficient to defeat a motion for summary decision. *See* 6 Moore's Federal Practice paragraph 56.15[3] at 56-274-76 ("the opposing party's fact must be material, and of a substantial nature"); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (the party opposing summary judgment is required to raise more than "some metaphysical doubt").

Respondent also asserts that "consumers with both good and bad credit ratings, high and low credit capacity, and negative public information are included in TransMark's database." TUAB at 29. Even granting respondent every possible inference and assuming that respondent could show that consumers with poor credit ratings are included in its lists, this fact would not be material to the critical question here: namely, whether the information imparted via respon-

dent's target marketing lists bears on one of the seven enumerated characteristics.[18]

In sum, we hold that the undisputed facts reveal that respondent's target marketing lists impart information bearing on one of the seven enumerated characteristics ("the covered information").[19]

3. Is the covered information in the target marketing lists "communicated"?

The FCRA also requires that, in order to constitute a consumer report, the covered information must be "communicated" to a third

[18] This conclusion, respondent argues, conflicts with the Commission's TRW consent agreement. That consent agreement is binding only between the Commission and TRW. In any event, we believe that there is no conflict between the result here and the consent agreement with TRW. The TRW consent agreement permits TRW to communicate certain information from its consumer reporting database: a consumer's name, telephone number, mother's maiden name, address, zip code, year of birth, age, any generational designation, social security number, or substantially similar identifiers, or any combination thereof. *FTC v. TRW, Inc.*, 784 F. Supp. 361 (N.D. Tex. 1991) (Amendment to Consent Decree dated January 14, 1993). Respondent points out that these identifiers arguably fall within one of the enumerated characteristics -- namely, "personal characteristics." Oral Arg. Tr. at 20. Because any information about an individual consumer is arguably "personal," however, the TRW consent sought to provide a common sense distinction between information that merely identifies an individual -- *i.e.*, that John Doe really is John Doe -- and information that bears on one of the seven enumerated characteristics.

Respondent's attorney also asserted at oral argument that release of a consumer's mother's maiden name arguably reveals something of that person's credit worthiness:

> How do you think mother's maiden name gets into the database? It's bank card fraud protection. If I printed out a list of everybody with the mother's maiden name, I would have a list of everybody with a bank card.

OA Tr. 70. Respondent, however, has provided no factual support to back this assertion. Moreover, a person's mother's maiden name is commonly used for a variety of security situations to ensure proper identification of an individual, including protecting the confidentiality of common savings and checking accounts. *See, e.g., Wolstein v. C.I.R.*, 52 T.C.M. (CCH) 1069, T.C.M. (P-H) paragraph 860,561 (T.C. Nov. 24, 1986) (savings accounts); *People v. Rosborough*, 2 Cal. Rptr. 669, 674 (Cal. Ct. App. 1960) (checking accounts); *Fanara v. Candella*, 1994 La. App. LEXIS 1059 (La. Ct. App. Apr. 18, 1994) (voting records). *See also Traver v. Meshriy*, 627 F.2d 934, 937 (9th Cir. 1980) (mother's maiden name requested for bank withdrawal over teller's approved limit). Thus, inclusion of identifying information such as an individual's mother's maiden name does not result in the release of information relevant to the seven enumerated characteristics. By contrast, the undisputed facts, as described above, show that Trans Union's target marketing lists impart information bearing on the seven enumerated characteristics.

Finally, respondent claims that the TRW consent agreement might permit recipients to know that consumers have at least one tradeline because inclusion in TRW's consumer reporting database implicitly requires at least one tradeline. TUAB at 27. Respondent's hypothetical, however, is mere speculation. It is not intuitively obvious to us that a reasonable recipient will in fact assume that consumers on a list obtained from TRW's consumer reporting database have at least one tradeline. By contrast, the recipients of Trans Union's target marketing lists clearly receive information about individuals that bears on one of the seven enumerated characteristics.

[19] For ease of expression, "covered information" will be used to refer to information that bears on one of the seven enumerated characteristics (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 one of the transactions set forth in the FCRA.

party. Respondent argues that, because in 90% of sales of its target marketing lists TransMark sends a computer-coded tape containing the names and addresses of consumers to a mail facility hired by the customer which is not given the criteria used to select the names, there is no actual "communication" of any covered information. TUAB at 34-35. Respondent further argues that, in the remaining cases, the customer directs the coded tape to its in-house mail facility without providing the criteria used to select the names. *Id.* In sum, respondent argues that, because the individual using the lists to mail out target marketing letters does not know of the criteria by which the names were originally selected, there is no "communication" of covered information as required by the statute.

Webster's Third New International Dictionary defines "communication" as the "act or action of imparting or transmitting." Webster's Third New Int'l Dictionary 460. The broad language in the statute -- "any written, oral or other communication" -- demonstrates that Congress intended that the definition of "consumer report" be read broadly to cover a wide variety of potential avenues of dissemination. Indeed, even at the time of passage of the FCRA, Congress was well aware of the possibilities that computerization might bring.[20] The statute's reference to written, oral or <u>other</u> communication demonstrates Congressional resolve that entities not escape coverage under the FCRA by establishing artificial mechanisms that in fact permit them to access covered information.

Given the undisputed facts here, we hold that covered information is "communicated" to TransMark's customers within the meaning of the statute. First, it is undisputed that TransMark's customers know the specific criteria by which names are placed on various TransMark's target marketing lists.[21] Second, the evidence is also undisputed that both employees of customers, as well as mailers hired by

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[20] Congresswoman Sullivan, describing the conference bill to her colleagues, captioned one portion of her presentation to the House "The Specter of the Impersonal Computer" and remarked:

> [W]ith the trend toward computerization of billings and the establishment of all sorts of computerized data banks, the individual is in great danger of having his life reduced to impersonal "blips" and keypunch holes in a stolid and unthinking machine which can literally ruin his reputation without cause, and make him unemployable and uninsurable, as well as deny him the opportunity to obtain a mortgage to buy a home.

116 Cong. Rec. 36,570 (1970).

[21] *See supra* p. 7.

TransMark's customers as their agents, have actually accessed the names on the lists and, consequently, are aware of those names.[22]

In the analogous area of agency law, the law presumes what is common sense: namely, that relevant information within the control of agents, such as the mailers here, concerning matters entrusted to that agent is imputed to the principal. Restatement of the Law (Second) Agency 2d Section 9(3) (1958) ("A person has notice of a fact if his agent has knowledge of the fact, reason to know it or should know it, or has been given a notification of it, under circumstances coming within the rules applying to the liability of a principal because of notice to his agent."); *see, e.g., National Petrochemical Co. of Iran v. The M/T Stolt Sheaf*, 930 F.2d 240, 244 (2d Cir. 1991) ("[i]t is a basic tenet of the law of agency that the knowledge of an agent . . . is imputed to the principal.") (quoting *Mallis v. Bankers Trust Co.*, 717 F.2d 683, 689 n.9 (2d Cir. 1983)).

Courts have found that a corporation cannot pigeonhole various bits of information among different departments and claim that it was not aware of all of the information. As explained by the First Circuit in *United States v. Bank of New England*, 821 F.2d 844 (lst Cir.), *cert. denied*, 484 U.S. 943 (1987),

> Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation.

Id. at 856 (emphasis added). *See also United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738 (W.D.W.Va. 1974). Similarly, courts

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[22] Although TransMark's customers are not allowed to place the computerized information into a database to access the information contained on the tape, or use the tape for any other purpose, IDF 41, individuals actually mailing out the solicitations have access to the names on the tape. An affidavit provided by respondent of an official of a third party mailing company, Acxiom Mailing Services ("AMS"), notes that:

> AMS's customer will occasionally request AMS to access the tape for an individual name to confirm that a particular person was sent a mail piece and/or to delete a particular person's name.

Ortiz Aff. paragraph 15. In order to take names off of a list or to check to see if the name is on a list, one must necessarily look at the names on the list, and therefore, be aware of the names. Although, at oral argument, respondent's attorney questioned whether this piece of evidence shows that the third party mailers in fact have accessed the lists in the past, OA Tr. at 68, we find his contention to be belied by Mr. Ortiz's own statement of the facts. Moreover, as discussed *infra*, Mr. Ortiz's assertion that he did not have knowledge of the criteria used in picking the names on particular lists does not raise a material factual dispute as to whether Trans Union has communicated the critical two pieces of information to its customers or their agents: the criteria which are used to pick the names and the names themselves.

have found that a principal cannot apportion various pieces of information between itself and its agent and claim that it was not aware of all of the information. *See, e.g., Flying Diamond Corp. v. Pennaluna & Co.*, 586 F.2d 707, 712 (9th Cir. 1978) (rejecting the claim that a principal can "attempt to bootstrap to itself the agent's ignorance of the facts.").

These agency law principles have usually been applied to situations involving the principal's liability for acts of the agent or the imputation of knowledge acquired by the agent. They thus have even greater force when applied to the question at hand. Here the issue is not a matter of apportioning liability or determining whether a principal has notice or knowledge imputed to it.[23] Rather, the question is whether corporate entities can parcel out discrete pieces of information among employees and agents such that the sender of the information may assert that the information the corporate entities requested was actually never "communicated" to the corporate entities.

We do not believe that respondent has raised a material factual dispute as to whether respondent communicates covered information within the meaning of the statute. It does not matter whether there are factual questions as to whether the employees and agents mailing out the target marketing information to consumers know the criteria by which those consumers were picked. The undisputed evidence is that (1) customers know the criteria by which the names are placed on the target marketing lists they request and (2) the customers' employees and agents mailing out promotional material to consumers on those lists have access to the names on the lists and are thus aware of the names. Consequently, respondent has failed to raise a material factual dispute as to whether Trans Union has communicated the critical two pieces of information: the criteria which were used to pick the names, and the names themselves. *See Fabulous Fur Corp. v. United Parcel Serv.*, 664 F. Supp. 694, 697 (E.D.N.Y. 1987) (granting summary judgment and rejecting conclusory claims unsupported by affidavits asserting that there was a question whether a company was an agent of defendant or plaintiff); *see also National*

[23] We do not read the statute to require a showing of knowledge to prove that "communication" occurred.

Petrochemical Co. of Iran, 930 F.2d at 244 (affirming summary judgment on agency issue).[24]

Respondent also advances two arguments, each of which questions whether the conclusion here is consistent with the FCRA Commentary. As we have noted above, the FCRA Commentary does not carry the force of law. While we nonetheless consider respondent's arguments, we do not find any of respondent's attempted analogies persuasive. Trans Union first argues that its coding of tapes is similar to the FCRA Commentary position that permits dissemination of coded credit guides, which are listings furnished by credit bureaus to credit grantors that rate how well consumers pay their bills. 16 CFR 600 app. at 360-61 (1994). *See also Howard Enters.*, 93 FTC 909 (1979). The FCRA Commentary permits the dissemination of such credit guides only so long as they are coded, whether by social security number, driver's license number or bank account number. 16 CFR 600 app. at 360-61 (1994). Because of this coding, the credit grantor cannot identify the particular consumer until that consumer affirmatively provides her or his social security number, driver's license number or bank account number. In this way, there is no effective tying of an individual's credit history to her or his name, and thus no imparting of covered information, until the consumer enters into a transaction, at which point the credit grantor has a permissible purpose under Section 604(3). *See infra* Section IV.B. In sharp contrast, Trans Union has no similar restrictions on the dissemination of its lists to ensure anonymity. The customer knows the criteria by which names are placed on lists it purchases and the

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[24] Furthermore, even if there were no such evidence of the customers' access to names on the target marketing lists, the customers are able to learn the names of individuals responding to target mailings. It is undisputed that, when a promotional mailing goes out, a source code is placed on the mailing by which a customer can discover which list the consumer's name came from. Ortiz Aff. paragraph 13; Frank Aff. paragraph 22. Ortiz states that "[t]he source code enables AMS' customer to track the number of consumers who respond to a particular mailing from a particular target list." Ortiz Aff. paragraph 13; *see also* Frank Aff. paragraph 22. TransMark's customers use the computer tapes to mail offers to consumers to enter into credit, insurance or business transactions. IDF 45. Thus, the source code enables the customer eventually to connect an individual consumer's name to the criteria by which that name was first picked. Trans Union responds, however, that, at that point, the customer then has a "permissible purpose" under the FCRA to know of this information because the consumer has initiated the transaction. *See infra* Section IV.B. However, there is no evidence that consumers are asked this source code only when they are actually ready to purchase a product or service. Indeed, respondent's evidence suggests precisely the opposite: namely that the source code is requested any time a consumer requests more information about an offer, not just when the consumer actually accepts an offer. For example, one of TransMark's customers, Colonial Penn Auto Insurance, mailed consumers material about "The Experienced Driver Program." The source code was printed on the "Rate Request Form" which the consumer could fill out, the customer stressed, for a "no-obligation Rate Quote." Frank Aff. Ex. D (emphasis added).

customer, via its employees or its agents, has access to those names. Moreover, unlike recipients of coded credit guides or bad check lists, Trans Union's customers do not have a permissible purpose to obtain or use target marketing lists, thus making respondent's analogy misplaced. *See infra* Section IV.B.

Respondent's second analogy, this time to the FCRA Commentary section on prescreening, is similarly flawed. Prescreening is the process whereby a consumer reporting agency compiles or edits a list of consumers who meet specific criteria and provides this list to the client or a third party on behalf of the client for the purpose of making a firm offer of credit. The FCRA Commentary has taken the position that a prescreening list constitutes a series of consumer reports, because the list conveys the information that each consumer named meets certain criteria for creditworthiness. However, the FCRA Commentary provides that, if the client agrees in advance that each consumer whose name is on the list will receive a firm offer of credit, there is a permissible purpose for clients to receive this information, since, under Section 604(3)(A), a consumer reporting agency may issue a consumer report "to a person which 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 . . . ." 16 CFR 600 app. at 370 (Comment 6). Respondent seizes upon the fact that the FCRA Commentary permits this prescreening process to include:

> demographic or other analysis of the consumers on the list (*e.g.*, use of census tract data reflecting real estate values) by the consumer reporting agency or by a third party employed for that purpose (by either the agency or its client) before the list is provided to the consumer reporting agency's client. In such situations, the client's creditworthiness criteria may be provided only to the consumer reporting agency and not to the third party performing the demographic analysis.

Id. Respondent interprets this quotation to suggest that the Commission endorses the view that there is no "communication" so long as the agent does not know the criteria. The Commentary, however, flatly rejects the notion that prescreened lists are not consumer reports if they are furnished solely to third party mailers. FCRA Commentary, 55 Fed. Reg. at 18,807.

In sum, we hold that Trans Union's target marketing lists contain information bearing on one of the seven enumerated characteristics,

that the lists were created with tradeline information that was originally collected in whole or in part by respondent with the expectation that it would be used by credit grantors for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA, and that this information is communicated to Trans Union's customers. We thus hold that Trans Union's target marketing lists are "consumer reports" within the statutory definition.

B. The FCRA's Permissible Purpose Requirement

The FCRA permits a consumer reporting agency to provide consumer reports, but only so long as the report is in connection with a permissible purpose. Consequently, TransMark's target marketing lists can be communicated if TransMark's customers have a "permissible purpose" for obtaining these reports at the time of the communication. The ALJ concluded that both legislative history and previous Commission interpretations and statements establish that target marketing is not a permissible purpose under the FCRA. ID at 13-16. The ALJ recognized that Section 604(3)(E) permits release of a consumer report by a consumer reporting agency to a

> person which it has reason to believe . . . otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

Id. The ALJ held, however, that this provision requires that the consumer initiate the business transaction in question and thus that Trans Union's customers did not have a permissible purpose at the time they obtained the target marketing lists. ID at 16.

We agree with the ALJ's result, but take a different route. We first examine the relevant statutory language in question and then turn to federal court case law interpreting that language in order to determine whether Trans Union's customers have a permissible purpose to receive the target marketing lists. *See supra* pp. 8-10.

Respondent relies on Section 604(3)(E) for the proposition that its customers have a permissible purpose here. Respondent points to the "in connection with" language as evincing Congressional intent that this provision was designed to set a very broad standard for when

a consumer report may be permissibly requested. TUAB at 38. Respondent asserts:

Although target marketing is not specifically identified in Section 604 as a permissible purpose, the transactions offered as a result of target marketing, *e.g.*, consumer credit and insurance and the sale of consumer goods and services, are all specifically identified.

TUAB at 38.

Respondent's reading of the statute, however, would render much of the rest of the statute superfluous. Section 604 carefully lists the "permissible purposes" under which a consumer reporting agency may furnish a consumer report -- stating that reports may be furnished "under the following circumstances and no other" (emphasis added) -- and then provides certain limited circumstances. *See supra* pp. 10-11. Under respondent's reading of the breadth of (E), there would have been no need to delineate subparagraphs (A) through (D) of (3): any time a person wished to make an offer to a consumer about a good or service or wished to transact business of any kind, that person could obtain covered information about that consumer. There would have been no need for Congress to specify credit transactions and the underwriting of insurance. For example, there would have been no need for the careful construction of subparagraph (C)'s language relating to insurance -- in particular, the limitation to the "underwriting" of insurance. So long as the requester sought the report "in connection with" a possible business transaction with that consumer, the requester would have a permissible purpose under respondent's reading.

Respondent's reading of the statute violates the long established principle of statutory construction that a reviewing tribunal should not interpret a statutory provision so as to render superfluous other provisions. *Negonsott v. Samuels*, 113 S. Ct. 1119, 1123 (1993); *Pennsylvania Public Welfare Dept. v. Davenport*, 495 U.S. 552, 562 (1990) (expressing "deep reluctance" to interpret statutory provisions "so as to render superfluous other provisions in the same enactment") (citation omitted); *Bonner Mall Partnership v. U.S. BanCorp Mortgage Co.*, 2 F.3d 899, 908 (9th Cir. 1993); 2A *Sutherland Statutory Construction* Section 46.06 ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.") (quoting *State v. Bartley*, 58 N.W. 172 (Neb. 1894)).

Such a broad interpretation would also violate one of the Congressional findings underlying the perceived need for the FCRA:

> There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

Section 602(a)(4) (emphasis added). Under respondent's interpretation, any person seeking to sell a product or offer a service could obtain consumer reports about individual consumers, resulting in a significant invasion of privacy. We have no hesitation in finding that such an interpretation flies in the face of Congressional intent as expressed in the FCRA legislation in its totality. *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2713, 2782 (1993) ("Over and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy'") (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)); The Coca-Cola Co., Dkt. No. 9207, slip op. at 9-10 n.18 (June 13, 1994).

At oral argument, respondent's counsel was asked if respondent had a limiting principle for Section 604(3)(E) to which counsel replied:

> I would limit the availability of information . . . [to] the kind of information needed for the business transaction which in this case would be the name and address which we provided. That's what I'd give them. And I would restrict the ability to get any more information than that for a business transaction.

OA Tr. at 26-27. But, as we have found, respondent's target marketing lists divulge much more than merely the names and addresses of consumers. Those lists are compiled so that they impart covered information about individual consumers. Moreover even if only this limited information were given, that does not bring this under Section 604(3)(E) because respondent's principle is not a limitation on the purposes for which the information can be used; it is a limit on the type of information communicated. Such a limiting principle then is truly no limiting principle at all.

Courts have recognized the potential for a broad reading of subparagraph (E) to nullify the rest of the statute. In *Cochran v. Metro-*

politan Life Ins. Co., 472 F. Supp. 827, 830-31 (N.D. Ga. 1979), the court noted:

> If such a catch-all reading of [subparagraph (E)] is derived, the specifics of the preceding sections and subsections are rendered meaningless. There is no reason to enumerate covered reports if ultimately all reports are included. An allowance of any other imaginable reports involving consumers would logically conflict with the precision and specifics of Section 1681a [Section 603(d)].

Accord Hovater v. Equifax, Inc., 823 F.2d 413, 419 (11th Cir. 1987) ("In sum, Section 168lb(3)(E) [Section 604(3)(E)] has not been given an expansive interpretation.").[25]

Consequently, we reject respondent's unlimited reading of subparagraph (E) as fundamentally at odds with the language, structure and intent behind the statute. The question remains, however, as to precisely what situations Congress intended subparagraph (E) to cover. A few courts have opined on the proper interpretation. Judge Sloviter's concurrence in *Houghton v. New Jersey Mfrs. Ins, Co.*, 795 F.2d 1144, 1150-51 (3d Cir. 1986), sought to address concerns about the scope of subparagraph (E). The majority opinion in Houghton had interpreted subparagraph (E) to cover only those business transactions "that relate to one of the other specifically enumerated transactions in Sections 168la(d) [Section 603(d)] and b(3) [Section 604(3)], *i.e.*, credit, insurance eligibility, employment or licensing." *Id.* at 1151. Judge Sloviter was concerned that this construction of subparagraph (E) could render that provision "superfluous." *Id.* She suggested that subsection (E) encompasses "the types of business transactions <u>similar</u> to those set forth in subsections (A) through (D), but is not strictly limited to them." *Id.* at 1152 (emphasis in original).

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[25] In response, Trans Union notes that, in *Ippolito v. WNS, Inc.*, 864 F.2d 440, 451-52 n.11 (7th Cir. 1988), the Seventh Circuit stated that a court should read Section 604 in a broader fashion when determining whether a permissible purpose exists than when it determines whether a report fits within the statutory definition of "consumer report." But to say that subparagraph (E) should be read in a broader fashion in the permissible purpose context than when defining a consumer report does not mean that it should be read in a virtually unlimited fashion. Indeed, Ippolito recognized the potential that an unlimited reading of subparagraph (E) could wipe out the rest of the statute. Ippolito involved the question whether a report requested to evaluate prospective business franchisees fell within the definition of "consumer report." The court noted that, although Section 603(d) limited the definition to reports used for consumer, as opposed to business, purposes, and the legislative history was in accord, a literal reading of subparagraph (E) could support a finding that a report requested to evaluate prospective business franchisees constituted a "consumer report." Such a literal reading, the Seventh Circuit recognized, was in direct conflict with the rest of the statutory language:

> if [subparagraph (E)'s] "business transaction" language is incorporated without qualification into the definition of "consumer report," most of the other provisions of Section 168la(d) [Section 603(d)] and 168lb(3) [Section 604(3)] would be rendered a nullity.

Id. at 451. The court then quoted with approval the above excerpt from Cochran.

She found that this interpretation fits within the *ejusdem generis* doctrine of statutory construction that:

when general words follow an enumeration of specific terms the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.

Id. at 1152 (quoting 795 F.2d at 1150); *see also* 2A Sutherland Statutory Construction Section 47.17, at 166-77 (discussing the use of the *ejusdem generis* doctrine and citing supporting case law). Another court decision, *Boothe v. TRW*, 557 F. Supp. 66, 70 (S.D.N.Y. 1982), held that subparagraph (E):

refers only to those transactions in which there is a 'consumer relationship' between the requesting party and the subject of the report or in which the subject was seeking some benefit mentioned in the Act (credit, insurance, employment, licensing) from the requesting party.

(quoting *Boothe v. TRW*, 80 Civ. 5073, slip op. at 4 (S.D.N.Y. Aug. 26, 1981). In that case, the court held that investigating the plaintiff for suspected counterfeiting activities was an impermissible purpose because there was no consumer relationship between the private investigative agency and plaintiff. Once there is an ongoing relationship between the consumer and the requester or where the consumer initiates a transaction with the requester, and the relationship or transaction is of a type that necessitates use of a consumer report, the requester has a "business need" -- and hence a permissible purpose under subparagraph (E) -- in obtaining covered information. For example, in *Howard Enters., Inc.*, 93 FTC 909, 937-38 (1979), the Commission found that coded credit guides were proper under the FCRA because covered information could only be tied to an individual consumer when that consumer initiated a transaction and provided the unique identifier, such as a social security number, driver's license number or bank account number. Covered information was only imparted at the point when the retailer had a true "business need" -- that is, when the consumer had initiated a transaction and thus sought to establish a relationship with the retailer. *Id.* at 937-38.

We believe that, at least in the context here of companies desiring to sell goods or services or offer credit or insurance to consumers, requiring that the consumer have sought to initiate the transaction, and thus have sought the benefits of a relationship with the requester,

before a permissible purpose can be found, best comports with subparagraph (E)'s language and the case law interpreting it.[26] In the context of the facts of this case, the more permissive standard advocated by Trans Union would completely nullify other portions of the statute and undermine the intent behind the statute.

Respondent argues that our interpretation of subparagraph (E) is incorrect because courts do not require that the business transaction be contemporaneous with the communication of information covered by the FCRA. TUAB at 47. But the cases respondent cites all involve ongoing relationships of some type.[27]

Respondent briefly suggests that, because some of its customers are offering insurance or credit, some of its customers have a permissible purpose under subparagraphs (A) and (C) as well as under subparagraph (E). TUAB at 37. Respondent, however, has not suggested that all its customers have a permissible purpose under another subparagraph, so this issue is not even presented here. Moreover, the prescreening portion of this litigation, which directly con-

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[26] Respondent cites to *dicta* in one unreported court decision for the proposition that a consumer does not need to have initiated a relationship in order for a requester to have a permissible purpose. In *Anderson v. Nissan, Inc.*, No. 91-1162, 1991 U.S. Dist. LEXIS 14550 (E.D. La. Oct. 8, 1991), the consumer, on two separate occasions, had visited defendant's dealership, test drove a car, and engaged dealership personnel in discussions concerning possible leasing or purchasing of a vehicle. The discussions concerned plaintiff's income, the down payment he could make on a vehicle and the cost of insuring the car. A Nissan employee obtained a copy of his consumer report. The court first concluded that Nissan could not be held liable under the FCRA because Nissan was not a consumer reporting agency. "Alternatively," the court noted that, even if Nissan could be held liable, Nissan had a permissible purpose under subparagraph (A) "if plaintiff's dealings with Nissan are characterized as negotiations." *Id.* at 4. The court then opined that:

> Even if no 'negotiations' were being conducted, Nissan had an 'otherwise . . . legitimate business need for the information in connection with a business transaction involving the consumer.' *i.e.* determining whether plaintiff was actually a potential credit customer before having its sales and leasing staff expend further time and effort.

Id. at 4-5. While we need not address the result or reasoning in that case, we note that the level of consumer involvement with the requester in Anderson appears to have been qualitatively different from the situation at hand here -- namely, consumers who have not indicated in any way, shape or form any interest in the products or services offered by Trans Union's customers. A mere inquiry or the desire to determine whether someone is a potential customer does not constitute a permissible purpose under subsection (E).

[27] For example, in *Zeller v. Samia*, 758 F. Supp. 775, 781 (D. Mass. 1991), the plaintiff signed a note to defendant in 1976 for joint purchase of a condominium. In 1986, the defendant instituted a probate proceeding for a partition and an accounting in connection with the condominium. In 1987, the defendant discovered that the original note signed by plaintiff remained unpaid and subsequently reported a charge-off to Credit Data of New England on plaintiff's credit report. In August and September 1987, defendant made two inquiries to Credit Data regarding plaintiff and received plaintiff's entire credit history. The court held that defendant obtained the credit report for a permissible purpose:

> 'in connection with' a business arrangement involving the plaintiff. It is undisputed that defendant's inquiry and use of the plaintiff's credit information was limited to the transaction involving the Hull property that was the subject of the probate proceeding.

Id. at 782. Thus, the court recognized that the requester and the subject of the credit report were in an ongoing relationship.

cerns subparagraph (A), has already been settled. *See supra* p. 1 n. 1.[28] Although some courts have recognized that subparagraphs (A) through (D) have some flexibility in their interpretation,[29] no court has ever held that subparagraphs (A) or (C) could permit a company to obtain covered information in order to send out advertisements for credit or insurance offers.

In sum, we hold that a proper reading of the FCRA demonstrates that Trans Union's customers do not have a permissible purpose in receiving consumer reports in the form of target marketing lists. It is undisputed that TransMark's customers use the computer tapes to mail offers to consumers to enter into credit, insurance or other business transactions. IDF 45. TransMark also leases its tapes to customers who promote their product or service through telemarketing. IDF 46. It is also undisputed that TransMark does not require that its customers only use the lists to make a firm offer of credit to all consumers on the lists. IDF 8; Frank Tr. 15. Thus, there is no material factual dispute that Trans Union's customers lack a permissible purpose for receiving consumer reports in the form of target marketing lists.

Respondent urges, however, that the legislative history suggests that Congress intended to permit use of covered information for target marketing purposes. As we have noted above, however, recourse to legislative history is usually proper only to resolve ambiguities in the plain language of the statute or if the plain meaning conflicts directly with the language of the statute as a whole. Given the express language of the statute concerning limitations on permissible purposes and the language of the statute as a whole in protecting the

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[28] Respondent claims also that the FCRA Commentary's position on prescreening has interpreted subparagraph (A) in a broad fashion on the question of prescreening and thus that the FCRA Commentary's position on prescreening conflicts with the result here. TUAB 44-45. We do not find that the FCRA Commentary's policy on prescreening conflicts with the result here. We note that credit reporting agencies' customers in the context of prescreening have gone beyond a mere solicitation and have made a firm offer demonstrating a present intention to enter into a credit agreement with each consumer. Thus, following the language of subparagraph (A), a firm offer of credit is sufficient to demonstrate that the consumer reporting agency has "reason to believe" that the customer "intends to use the information in connection with a credit transaction." Section 604(3)(A); FCRA Commentary, 55 Fed. Reg. at 18,815. The credit prescreening situation is thus significantly different from the mere hypothetical possibility of some future purchase of a good or service.

[29] *See, e.g., Allen v. Kirkland & Ellis*, 1992 U.S. Dist. LEXIS 12383 (N.D. Ill. Aug. 14, 1992) (holding, *inter alia*, that law firm had permissible purpose under (A) in obtaining credit report of individual who was sole controller of alter ego corporation for litigation over business debt); but *see Mone v. Dranow*, 945 F.2d 306, 308 (9th Cir. 1991) (*per curiam*) (rejecting argument that subparagraph (A) could be interpreted to permit employer to obtain credit report of former employee for purpose of determining whether employee would be able to satisfy judgment in employer's unfair competition litigation against employee).

privacy of consumers' credit and other personal information, we see no need to delve into the legislative history on this question. *Ratzlaf v. United States*, 114 S. Ct. 655, 662 (1994); *see also Barnhill v. Johnson*, 112 S. Ct. 1386 (1992); *Toibb v. Radloff*, 111 S. Ct. 2197, 2200 (1991). Nevertheless, although the legislative history on this particular question is sparse and not entirely clear, we believe that the legislative history supports our interpretation of the statute here.

When Senator Proxmire, the primary sponsor of the legislation that became the FCRA, introduced the 1969 version of the bill, he stated an intent to exclude access to covered information by "market research firms or ... other businesses who are simply on fishing expeditions." 115 Cong. Rec. 2415 (1969). Senator Proxmire's statement signals an intent to exclude access to covered information by target marketers. As the primary sponsor of the legislation that became the FCRA, Senator Proxmire's statement is of relevance in determining the intent behind the legislation.[30]

Respondent argues that Congress rejected Senator Proxmire's position by rejecting the corresponding House bill that excluded from what it called "legitimate economic need" the use of consumer reports for "market research or marketing purposes." Section 34(c), H.R. 16340, 91st Cong., 2d Sess. (1970). As complaint counsel notes, the House version was never considered by the Congress at all because the Senate version was adopted by the Senate-House Conference Committee before the House had even considered its own FCRA legislation. Thus, Congress did not reject the House's explicit ban on target marketing.

Respondent, however, has unearthed one of a series of Senate Committee on Banking's draft versions of the FCRA that is similar to the House version in this respect. Because that draft's language restricting the scope of "business need" was not included in the final Senate version, respondent argues that the position of Senator Proxmire and the House version on this issue was in fact rejected by the Congress. TUAB at 40-41.

Respondent's argument requires too many leaps of faith. First, there simply is no documented evidence that the Senate Committee even considered this draft, let alone rejected the draft's provision on target marketing. Second, changes to the version of the bill intro-

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[30] *See Holtzman v. Schlesinger*, 414 U.S. 1304, 1312 n.13 (1973). *See generally* 2A Sutherland Statutory Construction Section 48.15 (discussing the use of statements by the primary sponsor of legislation in determining legislative intent).

duced by Senator Proxmire show that the provision addressing permissible purposes was clarified and more clearly defined, rather than expanded. Compare Section 164(f)(1), S. 823, 91st Cong., 1st Sess. (1969) with Section 604, S. Rep. No. 517, 91st Cong., lst Sess. (1969) (S. 823 as reported out of Committee on Nov. 5, 1969).[31] Nor is there any evidence which suggests that Congress sought to broaden the original scope of the permissible purposes portion of the Senate bill. As noted above, respondent's interpretation of subparagraph (E) would eviscerate the expressed intent to protect the confidentiality of consumer files from "fishing expeditions."

Finally, respondent notes recent Congressional proposals to amend the FCRA to allow use of consumer reports for target marketing purposes. Respondent asserts that such attempts by Congress following enactment of the FCRA demonstrate that Congress did not intend to prohibit use of consumer reports for target marketing purposes. TUAB at 42-44. On the other hand, complaint counsel responds that, if respondent were correct that the original FCRA permitted use of consumer reports for target marketing purposes, then there would be no need to amend the Act to allow something already provided by the Act. Rather than accept either inference, we prefer to look solely to the FCRA as passed by Congress. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences may be drawn from inaction.'").[32]

In conclusion, we hold that a proper reading of the FCRA demonstrates that Trans Union's customers do not have a permissible pur-

[31] Senator Proxmire's 1969 version, S. 823, quite broadly allowed release:

> to persons with a legitimate business need for the information and who intend to use the information in connection with a prospective consumer credit or other transaction with the individual on whom the individual is furnished . . .

Section 164(f)(1). S. 823, 91st Cong., lst Sess.; *see also* 115 Cong. Rec. at 2415. The potential breadth of this language was commented upon in hearings on S. 823. Fair Credit Reporting: Hearings on S. 823 Before the Subcomm, on Financial Institutions of the Senate Comm. on Banking and Currency, 91st Cong., 1st Sess. (1969) [hereinafter Hearings on S. 8231]. *See, e.g.*, Hearings on S. 823, at 128 (Statement of Dr. Harry C. Jordan, Credit Data Corp.), and 226 (Statement of Sarah Newman, National Consumers League). In response, the committee redrafted the provision and clearly enumerated the purposes covered. *See generally* Bernard at 1364 n.207.

[32] Respondent also argues that consumer reporting agencies engaged in the target marketing business at the time of passage of the FCRA and that Congress' silence on the issue demonstrates that it wished them to continue. TUAB at 42. Respondent, however, provides no evidence that such agencies were engaged in the target marketing business. And, even if they were, there is no requirement that Congress must specifically pass on each perceived abuse in passing general legislation on an industry. This position is particularly dubious, given that the legislative history is replete with references by legislators to a wide variety of perceived abuses on the part of the credit reporting industry. *See* generally Hearings on S. 823.

pose in receiving consumer reports in the form of target marketing lists. We also find that the legislative history, although sparse, supports our interpretation of the statute here.

V. DOES THE ORDER ABRIDGE RESPONDENT'S FREEDOM OF SPEECH?

Trans Union contends that the order violates its First Amendment rights by prohibiting it from distributing or selling consumer reports in the form of target marketing lists to its customers. In its argument, respondent has specifically denied that it is challenging the constitutionality of the FCRA on its face. Rather, respondent challenges the FCRA as it is applied in the order. TURB at 16.

A. Establishing the Proper First Amendment Test

Under the Supreme Court's First Amendment test for a restriction on commercial speech, the speech at issue must concern lawful activity and not be misleading, while the restriction must directly advance a substantial governmental interest and not be more extensive than necessary to serve that interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). By contrast, a restriction on fully protected speech which is not content neutral is constitutional only if it advances a compelling state interest and is the least restrictive way of advancing the asserted interest. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

Both sides have briefed the First Amendment issue here as if this matter concerned a restraint on commercial speech.[33] But, as respondent noted in a footnote, *see* TUAB at 50, n.30, the Supreme Court has defined commercial speech as communication that "Propose[s] a commercial transaction." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989). Target marketing lists comprise names and addresses of consumers. Although the lists are sold, so are many types of fully protected speech such as books or newspapers. The mere fact that speech is sold for profit, *i.e.*, is the subject of a commercial transaction, does not mean that it necessarily proposes a commercial transaction. *See Ginzburg v. United States*, 383 U.S. 463, 474 (1966).

[33] We reject complaint counsel's suggestion, CCAB at 43-44, that the speech involved here should be accorded no constitutional protection. *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985).

The Supreme Court, however, has commented on the proper constitutional standard of protection for credit reporting information, although the case concerned a defamation lawsuit. In *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the Court stressed that the test for whether speech such as a credit report was subject to less than full constitutional protection depended on whether the report's "'content, form, and context' indicate that it concerns a public matter." *Id.* at 762 n.8. The Court found that the report in that case -- which provided false information to five customers of the credit reporting agency that the subject of the report had filed a petition for voluntary bankruptcy -- was speech "solely in the individual interest of the speaker and its specific business audience." *Id.* at 762. Although the Court expressly rejected the notion that such speech should be viewed as commercial speech, *id.* at 762 n.8, the Court seemed to equate the level of protection for credit reports of purely private interest with the level of protection for commercial speech. *See id.* at 793 (Brennan, J., dissenting).

Although Greenmoss Builders was decided in a different context, the Court's plurality opinion provides some important guideposts for determining the First Amendment standard most applicable here. While the Court did not call the speech there "commercial speech," the opinion demonstrates some unwillingness to accord credit reporting speech involving purely private interests the full panoply of protections for core speech. The Court seems to be according such speech a level of protection akin to commercial speech. *Accord Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 832-33 (8th Cir. 1976) (viewing credit reports as commercial speech and upholding the constitutionality of the FCRA); *see also Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 533-34 & n.25 (10th Cir. 1987) (collecting cases finding that credit reports are not fully protected speech). Nevertheless, given some uncertainty about the proper standard to use here, we will examine the constitutionality of the order under both (1) the standard for commercial speech and (2) the standard applicable to fully protected speech. Under either standard, as shown below, we believe that the order passes muster under the First Amendment.

B. Analyzing the Speech as Commercial Speech

The Supreme Court, in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980), set out a four-prong test for determining whether restrictions on commercial speech are constitutional under the First Amendment:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

See also Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 340 (1986). In this inquiry, the burden is on the government to show by more than "mere speculation or conjecture" that the "harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993); *see also Ibanez v. Florida Dept of Business & Professional Regulation, Bd. of Accountancy*, 114 S. Ct. 2084 (1994). It is undisputed that respondent's target marketing lists do not concern unlawful activity and are not misleading. The main points of contention are over the last three prongs: (1) whether the asserted government interest is substantial; (2) whether the regulation directly advances the asserted government interest; and (3) whether the regulation is more extensive than necessary to serve that interest. We will turn now to consider each of these prongs.

1. Whether the governmental interest asserted is substantial

The government's asserted interest here is, as found by Congress in passing the FCRA, "respect for the consumer's right to privacy." Section 602(a)(4). In particular, the substantial governmental interest furthered by the order is the privacy interest consumers have in preventing communication of covered information, without a permissible purpose, by consumer reporting agencies. *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 884 (5th Cir. 1989) ("One of the central purposes of the FCRA was to restrict the purposes for which consumer reports may be used, for the simple reason that such reports may contain sensitive information about consumers that can easily be

misused."); *Zamora v. Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1370 (10th Cir. 1987) (FCRA intended to protect right to privacy); *Heath v. Credit Bureau of Sheridan. Inc.*, 618 F.2d 693, 696, (10th Cir. 1980) (FCRA designed to restrict intrusions into consumers' private affairs). We find this interest to be substantial. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir.), *cert. denied*, 464 U.S. 1017 (1983) ("[P]ublic disclosure of financial information may be personally embarrassing and highly intrusive.").[34]

Congress in passing the FCRA left a legislative history replete with instances of perceived violations of consumers' privacy by consumer reporting agencies, leaving no question that the harms here are very real.[35] Given this record, we believe the government interest asserted here is not just a speculative, conclusory or hypothetical one, but a very real one.

Respondent argues, however, that Congress' concern for consumers' right to privacy in passing the FCRA does not assist in understanding "whether Congress considered target marketing to be an invasion of privacy and, if so, why." TUAB at 54. It is not necessary to establish that Congress considered respondent's actual practices to violate a substantial governmental interest. Complaint counsel has alleged, and we have found, that respondent's practices violate the FCRA because they permit the communication of covered information without a permissible purpose. *See* Section IV. Thus, the proper inquiry here is whether the particular interests underlying the statute that have been raised by respondent's law violations -- specifically, the privacy interest consumers have in preventing access to consumer reports for an impermissible purpose -- are substantial. The legislative history of the FCRA shows that this interest is indeed weighty.

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[34] In cases involving the direct solicitation of consumers, courts have generally recognized that protecting consumers' right to privacy is a substantial government interest. *See Edenfield v. Fane*, 113 S. Ct. at 1799 ("Likewise, the protection of potential clients' privacy is a substantial state interest."); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736-37 (1970) ("[I]t seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee.").

[35] S. Rep. No. 517, 91st Cong., lst Sess. 4 (1969) ("A fourth problem is that the information in a person's credit file is not always kept strictly confidential."); *see generally* Bernard at 1324 n.34, 1326 n.41, 1334 n.80 (citing various portions of legislative history concerning breaches of consumers' privacy). *See also* 115 Cong. Rec. 33,412 (1969) (statement of Sen. Williams) ("Hearings held earlier this year before the Banking and Currency Committee showed that in some cases highly confidential and personal data had been disseminated as a result of random telephone calls or letters. In these cases not even a cursory check was made on the individual making the request for the data or its ultimate use.").

Respondent also notes that the order does not prohibit it from purchasing credit information separately from sources other than its consumer reporting database and using that information to compile target marketing lists. Respondent then seeks to argue that this undermines the asserted governmental interest in protecting the privacy of consumers' covered information. TUAB at 54-55, 57. In enacting the FCRA, Congress recognized that the databases of credit bureaus contain a tremendous amount of highly personal credit-related and other personal information, and thus it was necessary to regulate the industry that controls that information.[36] That Congress did not regulate entities other than credit bureaus does not indicate that the government's interest in regulating credit bureaus was in any way insubstantial. Again, respondent's quarrel is more properly with the statute itself than with the order.[37]

Finally, respondent urges that the Supreme Court has rejected the notion that protecting consumers' privacy from target marketing mailings is a substantial governmental interest. TUAB at 55-56. In *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), the Supreme Court found unconstitutional a ban on lawyers' solicitations to potential clients. The FCRA and the order, however, do not restrict the ability of target marketers to solicit consumers. They apply only to respondent's practice of providing target marketing lists containing covered information to its customers, who then make solicitations.

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[36] As explained by Senator Proxmire when the Senate first passed the FCRA:

> With the growth of consumer credit, a vast credit reporting industry has developed to supply credit information . . . . Few individuals realize that these credit files are in existence. However, such a file can have a serious effect on whether a man gets employment or insurance. It can have a disastrous effect, as our hearings show it has had a disastrous effect, on some individuals.

115 Cong. Rec. 33,408-09 (1969). Congresswoman Sullivan, in presenting the Conference Report to the House for its final consideration, similarly stressed the unique nature of consumer reporting agencies' databases:

> [This legislation] obligates credit reporting bureaus to protect the confidentiality of such information . . . and otherwise to operate their businesses in a responsible manner commensurate with the intimate nature of the personal data on individual consumers which is the "merchandise" which such agencies sell for a fee.

116 Cong. Rec. 36,570 (1970).

[37] In any event, as discussed in the next section concerning whether the restriction directly advances the governmental interest asserted, the Supreme Court has held that under-inclusiveness is not fatal to a restriction on commercial speech. In *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Supreme Court upheld a ban on the advertisement of casino gambling, even though it did not apply to advertising of other forms of gambling. The Court reasoned that this under-inclusiveness did not indicate that the prohibition did not advance a substantial governmental interest, since the legislature believed that greater risks were involved in casino gambling than other types of nonrestricted gambling. *Id.* at 342-43. Similarly, here, the FCRA recognizes the unique risks to privacy that are posed by the communication of covered information, without a permissible purpose, by consumer reporting agencies.

The privacy interest here, then, is not simply the right not to receive mail solicitations, but the right not to have covered information communicated by consumer reporting agencies to target marketers for the impermissible purpose of assisting them in sending out their solicitations.

2. Whether the regulation directly advances the governmental interest asserted

The third prong of the Central Hudson test is whether the regulation directly advances the substantial governmental interest asserted. While the respondent mounts an "as-applied" challenge, *see supra* p. 44,[38] questioning not whether the FCRA directly advances the interest, but whether the order does so, TUAB at 52, we believe that under either inquiry, this prong of the Central Hudson test is satisfied: we find that both the order and the FCRA directly advance the governmental interest asserted here.

The governmental interest here is in protecting consumers' right not to have covered information communicated by consumer reporting agencies to target marketers for impermissible purposes. The order directly advances that interest. The undisputed evidence, as described above, demonstrates that Trans Union's target marketing lists contain information bearing on one of the seven enumerated characteristics, that this information was originally collected for one of the enumerated statutory purposes, that this information is communicated to Trans Union's customers, and that Trans Union's customers do not have a permissible purpose in receiving this information. This order will then effectively prevent Trans Union from using covered information to distribute or sell target marketing lists.[39]

The FCRA also directly advances this governmental interest. As stated by Congress, one of the main purposes of the FCRA was to

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[38] An "as-applied" challenge questions the constitutionality of a statute as it is applied to the respondent in question and to the facts of the respondent's situation, as opposed to a broad challenge to the constitutionality of a statute itself which is known as a "facial" challenge.

[39] Respondent argues that the order here is ineffective because it does not prevent target marketing. TUAB at 60-62. Respondent notes that TransMark's revenues from the rental of target marketing lists in 1992 were only 2 to 3 percent of the aggregate revenues from target marketing of only three of TransMark's competitors who are not subject to the FCRA. IDF 47. Again, however, respondent misconstrues the substantial governmental interest involved here. As noted above, the interest is not in preventing unwanted solicitation by target marketers in and of itself, it is in protecting consumers' right not to have covered information communicated by consumer reporting agencies to target marketers for the impermissible purpose of assisting them in sending out their solicitations.

prohibit unwarranted intrusions into individuals' consumer reports. *See supra* pp. 46-47 & n.35. Section 604 of the Act directly accomplishes this by enumerating specific reasons for which consumer reporting agencies can provide covered information. Subparagraph (E) protects consumers by only allowing companies to obtain consumer reports where there is an ongoing relationship or the consumer has initiated the transaction. *See* Section IV.B. Section 607 furthers this objective by requiring that users of consumer reports certify to the consumer reporting agency the purposes for which they are seeking the information. These provisions ensure that information is obtained only for statutory purposes. Moreover, as shown above, *see supra* pp. 46-49 & nn.35-36, Congress in passing the FCRA sought to correct specifically stated harms caused by the communication of covered information, without a permissible purpose, by consumer reporting agencies.

Respondent, however, contends that the fact that the FCRA applies only to consumer reporting agencies makes the restrictions ineffective. TUAB at 61. Respondent asserts that other companies will often be able to obtain the same confidential credit-related and other personal information about consumers. The FCRA's distinction between consumer reporting agencies and other companies is not, as respondent contends, based on a "bare" assertion; rather, as shown above, the FCRA limited its reach to consumer reporting agencies in recognition of the unique risks to privacy that are posed by the disclosure, without a permissible purpose, of covered information by those agencies. The distinction enunciated in the FCRA then is a rational legislative decision to restrict the focus of the statute to address the perceived problem. *Posadas de Puerto Rico Assoc.*, 478 U.S. at 342-43 & n.8; *see supra* n.37.

3. Whether the regulation is a reasonable fit to serve the governmental interest

With regard to this last prong, the Court has explained that the test is not whether the regulation, as applied, represents the absolutely least severe means of achieving the desired end, but rather whether it has been "narrowly tailored" to serve the government's asserted purpose. *Fox*, 492 U.S. at 480-81. The "reasonable fit" inquiry focuses on the order. *Edge Broadcasting*, 113 S. Ct. at 2704 (suggesting that the proper place to judge the validity of a statute's

application to a particular respondent is whether the specific regulation is more extensive than necessary to serve the government's interest as expressed in the statute).

We are convinced that the order as applied to respondent represents a narrow restriction under the First Amendment. The order permits respondent to communicate target marketing lists created by using "identifying" information from its consumer reporting database. Furthermore, respondent may supplement this information with credit data separately obtained for target marketing purposes. Thus, the order only prohibits respondent from distributing or selling target marketing lists created by using covered information. This narrowly-crafted application of the FCRA achieves the governmental purpose in protecting information covered by the FCRA without unduly hampering Trans Union's ability otherwise to sell target marketing lists.

Respondent, however, argues that the credit-related and other personal information that Trans Union can obtain under this order will, in many instances, be the same as the covered information it already possesses, the only distinguishing characteristic being the price of the information. TUAB at 64. Respondent thus contends that the order is not a reasonable fit with the asserted governmental interest.[40] Again, however, the order properly draws the line established in the statute, in recognition of the uniqueness of covered information in the possession of consumer reporting agencies as expressed in the FCRA.[41]

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40 The Commission's consent settlement with Trans Union on the issue of prescreening also permits Trans Union to sell prescreening lists to customers so long as they promise to make a firm offer of credit to each consumer on the list. Respondent argues, in a similar fashion as above, that the consent order's provisions permitting it to sell prescreened lists so long as a firm offer of credit is made also show that the order is not a reasonable fit with the asserted governmental interest. TUAB at 64-65. As discussed above, *see supra* n.28, there are significant differences between credit prescreening in which consumers receive a firm offer of credit under Section 604(3)(A) and target marketing.

41 *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), cited by respondent, does not suggest otherwise. That case, in what the Court described as a "narrow" holding, *id.* at 1516, found unconstitutional a decision by the City of Cincinnati to remove newspaper racks used by commercial publications from certain street corners. *Id.* at 1507. The City cited visual blight and safety concerns as its justifications for the restriction. *Id.* at 1514-1515. Noting that nothing in the record suggested that news racks containing "commercial handbills" were more unattractive than news racks containing newspapers, *id.* at 1514-1515, the Court questioned whether the City's distinction between commercial and more traditional publications was justified based on a record that showed that the restriction would remove 62 out of some 1500 to 2000 news racks. *Id.* By contrast, in this case the distinction between consumer reporting agencies and other companies reflects a legislative determination, backed by a legislative record of abuses in the credit reporting industry, that there were unique risks to privacy posed by the communication, without a permissible purpose, of covered information by those agencies.

In sum, we believe that the order is constitutional. Under the Central Hudson test, the FCRA directly advances a substantial governmental interest -- namely, the privacy interest consumers have in preventing communication, without a permissible purpose, of covered information by consumer reporting agencies. The order directly advances this interest by barring Trans Union from distributing or selling target marketing lists created by using covered information. Finally, the order is narrowly tailored to the asserted governmental interest.

C. Analyzing the Speech as Fully Protected

The result would be no different if the speech here were judged under the standard governing fully protected speech. Restrictions on "non-commercial" speech are subject to a higher level of scrutiny, the strictness of which is determined based on whether the law is deemed "content-based" or "content-neutral." To justify content-based regulation, the government must "show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Boos v. Barry*, 485 U.S. 312, 321 (1988). "Content-neutral" regulations must further "an important or substantial governmental interest unrelated to the suppression of expression," and their limitation on free speech must be "no greater than is necessary or essential to the protection of the particular governmental interest involved." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984).

We believe that the order is a "content-neutral" restriction, as that term has been articulated by the Supreme Court. According to one recent Court opinion:

> As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based .... By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.

Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2459 (1994) (citations omitted).

Key to a determination of content-neutrality is the <u>purpose</u> underlying the restriction on speech.

> The principal inquiry in determining content neutrality, in speech cases generally ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted).

As Congress stated in the Act itself, the FCRA was enacted "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information...." Section 602(b). This purpose was driven in large part by Congress' finding of a need to ensure "a respect for the consumer's right to privacy," Section 602(a)(4), and to protect the continued viability of a banking system that had come to depend on "fair and accurate credit reporting." Section 602(a)(1). Thus, Congress' purpose was not to suppress expression on the basis of its message, but rather to restrict the manner by which certain commercial information could be disseminated to achieve the purposes described above.[42] Likewise, in the case at hand, the order does not restrict the dissemination of Trans Union's target marketing lists because of their viewpoint or the ideas that they express; it restrains them because their source is Trans Union's consumer reporting database,[43] and the purpose for which they are sought is impermissible under the statute.

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[42] The Supreme Court has upheld certain forms of economic regulation which only incidentally burdened speech. In *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), the Court noted that:

> This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. The right of business entities to 'associate' to suppress competition may be curtailed. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited ....

Id. at 428 n.12 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982)) (citations omitted). *See also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (noting that these examples and others "illustrate[] that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity").

[43] *See Rhinehart*, 467 U.S. at 20-37 (court protective order restraining release of information obtained by command of the court through civil discovery process did not offend First Amendment where the same information could be disseminated if obtained from other sources).

To be sure, the FCRA is not wholly without some reference to content. The definition of "consumer report" is itself hinged in part on the subject matter of the information contained therein, *i.e.*, the seven enumerated characteristics. Nevertheless, the fact remains that Congress' justification for limiting the dissemination of consumer reports to certain permissible purposes was unrelated to its agreement or disagreement with a particular message, but rather was because of its substantial concern for the privacy of individuals. *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986) (zoning ordinance aimed at adult movie theaters was "consistent with our definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech.'") (quoting, with emphasis, *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

Having deemed the order to be essentially "content-neutral," we now consider whether the order furthers a substantial state interest and is no greater than necessary to protect that interest. As discussed earlier in more detail, we conclude that there is a substantial governmental interest in preventing unwarranted invasions of the individual's right to privacy in covered information. We also conclude that the order is no broader than necessary to protect this interest. Specifically, the order does not limit Trans Union's ability to communicate similar information through means other than accessing its consumer reporting database.[44]

In conclusion, we hold that, regardless of the test used to analyze the regulation here, both the FCRA and the order are constitutional under the First Amendment as narrowly tailored regulations designed directly and materially to protect against the harm of communication, without a permissible purpose, of covered information by consumer reporting agencies.

VI. DOES THE ORDER ABRIDGE RESPONDENT'S EQUAL PROTECTION RIGHTS?

In line with respondent's earlier First Amendment argument that the FCRA and the order treat it unfairly because other companies that do not fall within the definition of "consumer reporting agencies" may sell target marketing lists containing covered information, respondent contends that this distinction is arbitrary and thus violates

[44] *See supra* n. 43.

its equal protection rights. In areas of social and economic policy, regulations that create classifications will be upheld against equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993). As discussed above, Congress had a rational basis for distinguishing between consumer reporting agencies and other companies. Consumer reporting agencies present unique problems for the protection of consumer privacy and special regulation of their activities was determined to be necessary. Moreover, the FCRA and the order are narrowly tailored to address perceived problems of privacy without unduly burdening respondent's ability to do business. Indeed, as we have noted above, the order permits respondent to use "identifying" information from its consumer reporting database in its target marketing business. Furthermore, it may supplement this information with credit data separately obtained for target marketing purposes.

Respondent cites to the fact that the Supreme Court in *Beach Communications*, 113 S. Ct. at 2101 n.6, left open the question of the precise Equal Protection test when a restriction infringes on a fundamental constitutional right. But as we found in Section V, the FCRA and the order do not violate respondent's First Amendment rights and thus do not encroach on a fundamental constitutional right. Given this determination, we do not believe that respondent's equal protection challenge fares any better.

VII. DISCOVERY ISSUES

Respondent argues that the ALJ committed reversible error by relying on the Commission's TRW consent order, the Commission's FCRA Commentary on prescreening and recent testimony by the Commission before Congress, and by refusing to permit Trans Union to obtain relevant underlying information and documents. *See* Trans Union Corp., Dkt. No. 9255, Order Denying Respondent's Motion for Access to Documents (Aug. 9, 1993). This decision relies on the statutory language, federal court case law construing that language, and relevant legislative history. We do not rely upon the TRW consent order, the FCRA Commentary, or recent testimony by the Commission. Consequently, respondent's argument that it was unfairly denied discovery of the underlying documents is now moot. One issue, however, remains. The ALJ referred to a letter sent to the

Commission by Senator Proxmire dated Oct. 8, 1971, which was not made a part of the record in the proceeding. That letter was not released to respondent during the course of the administrative litigation, nor is it available from any other source. Our decision is not based in any part, nor have we relied, on the Proxmire letter. Accordingly, any error is harmless.

VIII. CONCLUSION

We hold that there is no genuine dispute of material fact that Trans Union's target marketing lists contain information bearing on one of the seven enumerated characteristics, that the lists were created with tradeline information that was originally collected in whole or in part by respondent with the expectation that it would be used by credit grantors for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA, and that this information is communicated to Trans Union's customers. We thus hold that Trans Union's target marketing lists are "consumer reports" within the statutory definition. Furthermore, we hold that Trans Union's customers do not have a permissible purpose for receiving target marketing lists containing this information. We also hold that there is no genuine dispute of material fact about this question. We also hold that, regardless of the test used to analyze the regulation here, both the FCRA and the order are constitutional under the First Amendment as narrowly tailored regulations designed directly and materially to protect against the very real harm of communication, without a permissible purpose, of covered information by consumer reporting agencies. Finally, we hold that the FCRA and the order do not violate respondent's equal protection rights, and that respondent was not prejudiced by its lack of access in discovery to documents on which the Commission did not rely in this decision.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I join in the Commission's order and generally in the majority opinion holding that Trans Union's dissemination through its target marketing lists of information bearing on the credit worthiness, credit standing, or credit capacity of consumers violated the Fair Credit Re-

porting Act ("FCRA").[1] I write separately to note certain different views related to the analysis of whether Trans Union's target marketing lists are consumer reports under the FCRA. *See* Slip op. at 10-34. I do not support the majority opinion to the extent that it may imply that the content of the information imparted should not be examined to determine the purpose for which that information was collected. Nor do I join in the majority's discussion of the consent agreement with TRW.

Under Section 603(d) of the FCRA,[2] a "consumer report" includes any "communication" of information "bearing on credit worthiness, credit standing, or credit capacity" that was "collected for the purpose of serving as a factor in establishing [a] consumer's eligibility" for credit or insurance or one of the other transactions set forth in the FCRA. I agree with the majority that Trans Union has communicated information relating to credit worthiness, credit standing, or credit capacity to its customers or their third-party mailers by providing them target marketing lists.[3]

The next question under Section 603(d) is whether Trans Union collected the information to serve as a factor in establishing eligibility for one of the transactions set forth in the FCRA. The majority states that:

> the plain meaning of the phrase -- '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 . . .' -- makes it clear that this language was aimed at limiting coverage by focusing on . . . the consumer reporting agency's reason for collecting the information, its expectation as to how it would be used, or the reason why the requester desires the information . . . not on the actual content of the information imparted.

See Slip op. at 12. The last portion of this statement gives me pause.

It is true that the "focus" of the inquiry into why a consumer reporting agency collected information need not be solely, or even primarily, on the "content of the information imparted." The majority opinion, however, may suggest a more narrow reading. To the extent

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[1] 15 U.S.C. 1681b and 1681e.

[2] 15 U.S.C. 168la(d).

[3] I agree with the majority that Section 603(d) does not require a showing that the recipients of information had knowledge of that information to prove that "communication" occurred (*see* Slip. op. at 31 n. 23), and I do not join the part of the majority opinion (*id.* at 29 and 31) that addresses the knowledge of Trans Union's customers.

that it may suggest that examination of the content of a communication in such an inquiry would be improper or irrelevant in assessing the purpose of the communication, I cannot agree.[4]

Nothing in the statute or in the case law prohibits consideration of the content of information imparted in determining the purpose for which the information was collected. Nor is there any other apparent reason for doing so.[5] Prohibiting an examination of content in determining the purpose for which information was collected could preclude the consideration of highly probative evidence.[6] Although I would not require that content be considered in this context, neither would I exclude content from consideration absent a reason for doing so, and I see none.

I also do not join in the analysis of the majority concerning the consent agreement in *FTC v. TRW Inc.,* 784 F.Supp. 361 (N.D. Tex. 1991) (as modified on Jan. 14, 1993), except that I agree that the TRW order is not controlling in this proceeding. *See* Slip. op. at 27 n.18. Trans Union's argument on this point is based on facts not in the record in this case or in TRW. We have no Commission opinion to enlighten us regarding the TRW order and no adjudicative record to compare to that in this case. I see no necessary inconsistency between the result in this case and the action the Commission took in TRW. Attempts to explain what the Commission intended in TRW and to compare the two cases as Trans Union proposes are simply not useful.

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[4] Two of my colleagues who support the majority opinion have said in a separate statement that "[n]othing in the statute, the case law, or the Commission opinion . . . precludes the Commission from considering the content of the disseminated information as evidence of the purpose for which it was originally collected, used, or expected to be used." This *post hoc* clarification of the majority opinion, although welcome and consonant with my position, does not persuade me that the opinion could not reasonably be construed another way.

[5] The majority itself, in deciding the purpose for which Trans Union collected the information it communicated to its clients, seems to rely on the fact that the target marketing lists in question contained tradeline information. *See* Slip op. at 22-23.

[6] Although the content of information communicated may not be determinative of purpose, it can evidence purpose. For example, communication to a credit card company of a consumer's affiliation with an organization dedicated to lobbying for legislation to limit service charges by credit card companies might suggest that the purpose had little to do with assessing the creditworthiness, insurability or employability of the organization's members and perhaps more to do with purposes impermissible under the FCRA.

SEPARATE STATEMENT OF CHAIRMAN JANET D. STEIGER AND COMMISSIONER ROSCOE B. STAREK, III

We write to clarify one portion of the Commission opinion discussed in Commissioner Azcuenaga's Concurring Statement. In its argument, Trans Union attempted to deflect inquiry away from the purpose for which it had originally collected the tradeline information used in its target marketing lists. Such an inquiry, however, is plainly required by the FCRA's definition of consumer report. Thus, in responding to Trans Union's argument, the Commission noted that one portion of the FCRA's definition of consumer report "focuses" on the purpose for which the information was originally collected, used, or expected to be used. Slip op. at 12. That is, in this context, the Commission must reach a conclusion as to Trans Union's purpose in collecting the information, not as to the content of the information.

Nothing in the statute, the case law, or the Commission opinion, however, precludes the Commission from considering the content of the disseminated information as evidence of the purpose for which it was originally collected, used, or expected to be used. Indeed, the Commission considered the nature of the information Trans Union communicated through the target marketing lists in concluding that the information had been collected for the purpose of serving as a factor in establishing a consumer's eligibility for credit, insurance, or one of the other transactions set forth in the FCRA. Slip op. at 22-24. Contrary to Commissioner Azcuenaga's Concurring Statement, the Commission never stated or implied that it was prevented from considering the content of the information imparted when determining the purpose for which that information was collected.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondent Trans Union Corporation from the Initial Decision, and upon briefs and oral argument in support of and in opposition to, the appeal. For the reasons stated in the accompanying Opinion, the Commission has determined to affirm the Initial Decision to the extent that it is not inconsistent with the accompanying Opinion. Accordingly, the Commission enters the following order.

It is hereby ordered, That respondent, Trans Union Corporation:

a) Cease and desist from distributing or selling consumer reports in the form of target marketing lists to any person unless respondent has reason to believe that such person either intends to make a firm offer of credit to all consumers on the lists or to use such lists for purposes authorized under Section 604 of the FCRA.

b) Maintain for at least five (5) years from the date of service of this order and upon request make available to the Federal Trade Commission for inspection and copying, all records and documents necessary to demonstrate fully its compliance with this order.

c) Deliver a copy of this order to all present and future management officials having administrative, sales, advertising, or policy responsibilities with respect to the subject matter of this order.

d) For the five (5) year period following the entry of this order, notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution of subsidiaries, or any other change in the corporation that might affect compliance obligations arising out of this order.

e) Within one hundred and eighty (180) days of service of this order, deliver to the Commission a report, in writing, setting forth the manner and form in which it has complied with this order as of that date.

By the Commission.[1]

[1] Prior to leaving the Commission, former Commissioner Owen and former Commissioner Yao registered their votes in the affirmative for the Opinion of the Commission and the Final Order in this matter.