

IN THE MATTER OF
HOWARD ENTERPRISES, INC., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATIONS OF THE FAIR CREDIT REPORTING AND FEDERAL
TRADE COMMISSION ACTS

Docket 9096. Complaint, Feb. 8, 1977 — Final Order, June 12, 1979

This order, among other things, requires a Nampa, Idaho firm and its corporate president, engaged in compiling, publishing and distributing consumer reports through franchises and otherwise, to cease disseminating such reports without following reasonable procedures to ensure that reported information is accurate and will be used for permissible purposes. They are prohibited from furnishing "Alert Lists" (lists of consumers who have allegedly passed bad checks) to subscribers who do not have a legitimate business need for information regarding all listed consumers, unless such lists are coded to protect consumers' identity until a subscriber's need has been established. A statement advising recipients of statutory requirements and prohibitions must accompany each disseminated consumer report. Additionally, the order requires respondents to obtain from all franchisees and prospective franchisees a written agreement obligating them to comply with the terms of the order.

Appearances

For the Commission: *Dennis D. McFeely* and *Sharon S. Armstrong*.

For the respondents: *L. Kim McDonald, Smith & McDonald*,
Nampa, Idaho.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and the Fair Credit Reporting Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Howard Enterprises, Inc., a corporation, and Ralph R. Howard, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows (all allegations hereinafter made in the present tense shall include the past tense):

PARAGRAPH 1. Howard Enterprises, Inc. is a corporation organized and doing business under and by virtue of the laws of the State of Idaho, with its principal office and place of business located at 11 Third Ave., Nampa, Idaho.

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Respondent Ralph R. Howard is president of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. He also engages in the acts and practices hereinafter set forth in his individual capacity. His business address is the same as that of the corporate respondent. [2]

PAR. 2. Subsequent to April 25, 1971, in the ordinary course and conduct of their business, respondents have compiled, published and distributed lists containing, among other things, the names of consumers who have issued forged checks, who have issued checks drawn upon nonexistent accounts, or who have issued checks which have been returned by the drawee bank because of insufficient funds or other reasons.

The information contained in the aforesaid lists concerning consumers whose names appear therein, bears on said consumers' credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics and/or mode of living. Some of the information is used, is expected to be used, or is collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit to be used primarily for personal, family, or household purposes, or is used, is expected to be used, or is collected in whole or in part for use relative to other legitimate business needs for information in connection with business transactions involving consumers reported upon. Therefore, each of the aforesaid lists constitutes a series of consumer reports as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act.

Respondents are, for a monetary fee, regularly engaged in the practice of assembling such information on consumers for the purpose of furnishing such lists to third parties, and regularly use a means or facility of interstate commerce for the purpose of preparing and/or furnishing said lists. Therefore, respondents are a consumer reporting agency as "consumer reporting agency" is defined in Section 603(f) of the Fair Credit Reporting Act.

PAR. 3. Respondents furnish the aforesaid consumer reports to persons who respondents do not have reasons to believe:

A. have a legitimate business need for the information upon receipt in connection with a business transaction involving each consumer reported upon,

B. intend to use the information upon receipt in connection with credit transaction involving each consumer on whom the information is furnished and involving the extension of credit to each consumer reported upon, or [3]

C. intend to use upon receipt the information contained in each report for any of the other permissible purposes set forth in Section 604(3) of the Fair Credit Reporting Act.

Further, the furnishing of such consumer reports is not in response to a court order and is not in accordance with the written instructions of each consumer to whom the reports relate.

Therefore, respondents have violated, and are violating, Section 604 of the Fair Credit Reporting Act.

PAR. 4. Respondents fail to maintain reasonable procedures to limit the furnishing of consumer reports to the purposes listed under Section 604 of the Fair Credit Reporting Act, including failure to:

1. require prospective users of consumer reports to certify the purposes for which the information in such reports is sought,
2. require prospective users of consumer reports to certify that the information in such reports will be used for no other purposes than those which have been certified, and
3. make reasonable efforts to verify the uses certified by the prospective users of consumer reports prior to furnishing consumer reports to said users.

Therefore, respondents have violated, and are violating, Section 607(a) of the Fair Credit Reporting Act.

PAR. 5. Respondents furnish consumer reports to persons under circumstances in which there are reasonable grounds for believing that such reports will not be used for a purpose listed in Section 604 of the Fair Credit Reporting Act.

Therefore, respondents have violated, and are violating, Section 607(a) of the Fair Credit Reporting Act.

PAR. 6. Respondents fail to follow reasonable procedures to assure maximum possible accuracy of information concerning the individuals about whom respondents' consumer reports relate inasmuch as respondents fail to provide reasonable procedures to assure maximum possible accuracy in the removal from respondents' consumer report lists of the [4] names of individuals who have paid off checks which have been returned by drawee banks.

Therefore, respondents have violated, and are violating, Section 607(b) of the Fair Credit Reporting Act.

PAR. 7. Subsequent to April 25, 1971, respondents have, in the ordinary course and conduct of their business, sold franchises and business opportunities across state lines to others to engage in businesses conducted by the use of the acts and practices described in Paragraphs Two, Three, Four, Five and Six above. Since the sale of

such franchises and business opportunities, respondents have sent and received monies, papers, documents and other materials across state lines and have engaged in interstate travel and communication in connection with the continuing operation by the franchisees of their businesses in such manner as described in Paragraphs Two, Three, Four, Five and Six above. Thus, the respondents have provided and continue to provide to others a means, method and instrumentality to engage in violations of the Fair Credit Reporting Act, and respondents are accordingly engaged in acts or practices which are and have been unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce.

PAR. 8. The acts and practices set forth in Paragraph Seven above are in violation of Section 5 of the Federal Trade Commission Act; the acts and practices set forth in Paragraphs Two, Three, Four, Five and Six above are in violation of the Fair Credit Reporting Act and pursuant to Section 621(a) thereof such acts and practices constitute unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY LEWIS F. PARKER, ADMINISTRATIVE LAW
JUDGE

JANUARY 26, 1978

I. PRELIMINARY STATEMENT

A. History of the Proceeding

This proceeding began on February 7, 1977 with the issuance of a complaint charging that respondents Howard Enterprises, Inc. and Ralph R. Howard had violated the Fair Credit Reporting Act and the Federal Trade Commission Act. Respondents Howard Enterprises and Ralph R. Howard filed their answers to the complaint on May 31, 1977, denying the charges in the complaint. As an affirmative defense, they [2] claimed that they were not engaged in credit reporting and that the Fair Credit Reporting Act therefore did not apply to their activities. They also claimed that they engaged in no unfair or deceptive acts or practices in violation of the FTC Act. Finally, respondents stated that the federal laws referred to in the complaint were unconstitutional as applied to them.

A telephone conference call between myself and counsel for the parties was held on June 2, 1977, and deadlines were set for the filing of lists of witnesses and documents and for evidentiary hearings.

Hearings were held on October 3 and 4, 1977 in Seattle, Washington. Complaint counsel called 11 witnesses. Respondent Ralph R.

Howard was the only witness for the defense. The record was closed on October 31, 1977. Complaint counsel filed their proposed findings of fact and conclusions of law on November 25, 1977. Respondents filed theirs on December 5, 1977.

B. The Allegations of the Complaint

The complaint charges that Howard Enterprises and its president, Ralph E. Howard, have, in the conduct of their business, compiled, published and distributed lists containing, among other things, the names of consumers who have issued forged checks, who have issued checks drawn upon nonexistent accounts, or who have issued checks which have been returned by the drawee bank because of insufficient funds or other reasons.

The complaint states that the information contained in these lists bears on consumers' credit worthiness, reputation, personal characteristics, etc., and that the information is used in whole or in part as a factor in establishing consumers' eligibility for credit or is used in connection with other legitimate business needs for information in connection with business transactions involving consumers reported upon. Therefore, the complaint alleges, respondents' lists are "consumer reports" and respondents are a "consumer reporting agency" as those terms are defined in Sections 603(d) and 603(f) of the Fair Credit Reporting Act (FCRA). [3]

The complaint also alleges that respondents have violated Section 604 of the FCRA by furnishing their reports to persons who they do not have reason to believe (a) have a legitimate business need for the reports, (b) intend to use the reports in connection with a credit transaction involving each consumer on whom the information is furnished, or (c) intend to use the reports for other permissible purposes set forth in Section 604(3) of the FCRA.

According to the complaint, respondents have also violated Section 604(a) of the FCRA by failing to maintain reasonable procedures to limit the furnishing of consumer reports for the purposes listed under Section 604 and by furnishing consumer reports to persons under circumstances in which there are reasonable grounds for believing that such reports will not be used for a purpose listed in Section 604.

The complaint also alleges that respondents have violated Section 607(b) of the FCRA because they do not follow reasonable procedures to assure the accuracy of the information in their reports.

Finally, the complaint alleges that respondents have sold franchises and that they have provided to their franchisees a means,

method and instrumentality to engage in violations of the Federal Trade Commission Act.

The following findings of fact, conclusions of law and order are based upon the transcript of testimony, the exhibits received in evidence and the proposed findings filed by complaint counsel and respondents. Proposed findings not adopted herein verbatim or in substance are rejected as not supported by the evidence or as irrelevant.¹ [4]

II. FINDINGS OF FACT

A. Description of the Corporate and Individual Respondents

1. Respondent Howard Enterprises is a corporation organized and doing business under and by virtue of the laws of the State of Idaho (CX 1). Its principal office and place of business is located at 111 Third Ave., Nampa, Idaho (Ans. Par. 2). It is a closely held corporation whose officers and directors are Ralph R. Howard, his brother and his wife. Together Ralph R. Howard and his brother Karrell Howard own all the stock in Howard Enterprises (Tr. 147).

2. Respondent Ralph R. Howard has been president and a director of Howard Enterprises since its incorporation and has owned the majority of stock in the corporation at all times (Tr. 147-48). Mr. Howard has formulated, directed and controlled the policies, acts and practices of Howard Enterprises (Ans. Par 2). His business address is 111 Third Ave., Nampa, Idaho (Ans. Par. 2).

B. The Nature of Respondents' Businesses

3. Howard Enterprises is and has been engaged in the business of selling franchises in an "Alert List" system (Tr. 147, 151; CXs 37-46) to purchasers located in Washington and Oregon (CXs 37-41, 42-46). The corporation itself has not engaged in the distribution of Alert Lists (Tr. 148); instead, Mr. Howard operated the Alert List system in southern Idaho and eastern Oregon from December 1974 to June 1977, at which time he sold his distribution rights in those areas to Lynn J. Whitmill, a franchisee (Tr. 148-49, 151, 161; CX 46a-c).

4. The Alert Lists distributed by Mr. Howard were lists of names of individuals who had written checks drawn upon nonexistent

¹ Abbreviations used herein are:

Tr.	: Transcript of the hearings.
CX	: Commission exhibit.
RX	: Respondents' exhibit.
CPF	: Complaint counsel's proposed findings.
Adm.	: Respondents' answers to complaint counsel's requests for admissions (CXs 153A-L and 154A-L).
Ans.	: Respondents' answer.

accounts or who had written checks which had been returned by the drawee bank because of insufficient funds (Adm. 1, 3; Tr. 152). The lists were distributed weekly (CXs 54, 55; Tr. 215). [5]

C. Interstate Commerce

5. Mr. Howard's Alert Lists were disseminated by mail (Adm. 14 and 15) to subscribers in several trade areas in southern Idaho and Oregon (Tr. 151, 157, 161, 168; CXs 29-36).

6. Also, Mr. Howard, on behalf of Howard Enterprises, travelled to the States of Washington and Oregon to assist franchisees in setting up their businesses (Tr. 223, 228-29). Howard Enterprises has sold six franchises which authorize its franchisees to disseminate Alert Lists (CXs 37, 40, 42, 44, 45, 46; Tr. 205-09). These franchisees are authorized to do business in the following areas: (a) southern Idaho, two counties of eastern Oregon, and parts of Wyoming and Utah which fall into the Idaho trade area (CX 46; Tr. 102-03); (b) Oregon State, except for a few eastern Oregon counties, plus three Washington counties (CXs 42, 44; Tr. 225-26); (c) the State of Washington, excluding three counties, and northern Idaho (CXs 37, 40).

7. Sales of all of the franchises were made by respondents from their headquarters in Nampa, Idaho. The franchise territories, with one exception, are located almost entirely outside of Idaho (CXs 37, 40, 42, 44, 45, 46). In some instances, the sales were made to persons then residing outside of Idaho (CX 45; Tr. 227, 229). One franchisee, an Idaho resident, went outside of Idaho to survey the franchise area before investing (Tr. 324). In three instances Mr. Howard travelled from Idaho to other states to assist in getting the franchises started (Tr. 223, 228, 229). Executed franchise agreements were taken or sent outside of the State of Idaho (Tr. 225, 227, 347) and respondents engaged in out-of-state telephone conversations in connection with franchise sales (Tr. 226, 228-29).

8. Except for the Idaho franchisee, all the computer discs containing the program necessary to operate the Alert system were taken outside of Idaho by franchisees (Tr. 223, 227, 326-27; Adm. 63(d)). Other materials and forms necessary to begin the operation of Alert franchisees' systems were also taken outside of Idaho for use (Tr. 316, 326-27; Adm. 69). The respondents provided training to operate franchises in areas wholly or partly outside of Idaho (Tr. 135, 223, 228, 229, 325). [6]

9. Respondents have regularly received from their past and present franchisees across state lines (except for Mr. Whitmill, a franchisee of Mr. Howard) (a) payments constituting the full or

partial cost of Alert List franchises (Adm. 68(a)); (b) periodic monthly payments at the rate of \$1.25 per subscriber until early 1976, and at the rate of \$1.46 per subscriber thereafter (Adm. 68(b); Tr. 293, 332; CXs 37, 40, 42, 44, 45, 46, par. 4); (c) a monthly computer-printed summary of all amounts owed by the franchisee to the respondents (Adm. 68(c)); and (d) copies of the actual Alert Lists disseminated by the franchisees to their subscribers (Adm. 68(d)). Respondents have made interstate telephone calls in connection with the operation of the franchises between 10 and 30 times (Adm. 67(a) and (b); Tr. 231, 329) and have crossed state lines in connection with the operation of the franchises between 10 and 20 times (Adm. 66(a) and (b); Tr. 231, 318-19, 329).

10. The franchise agreements all provide that respondents shall give advice and instructions to the franchisees, most of whom are located outside Idaho (CXs 37, 40, 42, 44-46, par. 5; Tr. 210-11). In the case of at least one franchisee, this took the form of many written interstate communications from respondents offering names of subscriber prospects, potential new employees, potential groups to contact, and other advice and information (CXs 116, 129-31, 133, 135-37, 139-42, 144, 146, 148-51; Tr. 236-46). It also included assisting a franchisee in soliciting customers outside of Idaho (Tr. 130 A) and helping to collect money owed from subscribers located outside of Idaho (Tr. 130-31).

D. Sources of Information on Alert Lists

11. The information on the Alert Lists which Mr. Howard published was obtained by him from subscribers who mailed Mr. Howard report cards (pre-addressed to Mr. Howard) listing the names of consumers whose checks had been dishonored (Tr. 153). Prior to the summer of 1975, the report card required reporting only of the consumer's name (CX 51; Tr. 213). Later, the report card contained space for bank account numbers or driver's license numbers (CX 50; Tr. 213).

12. The information on the report card was the only information about the check writer Mr. Howard received (Tr. 214). [7]

E. Recipients of Alert Lists

13. There were approximately 180 subscribers in the trade areas in which Mr. Howard disseminated his Alert Lists (CXs 29-36; Tr. 151). For the most part, Mr. Howard's subscribers were retail businesses taking in a high volume of checks, such as grocery stores, clothing stores, pizza parlors, restaurants, and bars (Tr. 157). Checks

were taken by subscribers to pay for the purchase of merchandise, in exchange for cash, and to make payment on open accounts (Tr. 162). A collection agency also received copies of the Alert Lists (Tr. 157).

14. Mr. Howard also disseminated Alert Lists weekly to law enforcement agencies in Idaho and Oregon (Adm. 16, 18; Tr. 157). Lists received by law enforcement agencies were in all respects the same as lists received by subscribers, except that the law enforcement agencies received lists for several trade areas (Tr. 157, 386).

15. Mr. Howard charged a fee to all third parties other than law enforcement agencies to whom Alert Lists were disseminated (Adm. 21). The fee was \$15 per month. Later, it was raised to \$17.50 per month (Tr. 157-58). For this fee a subscriber was entitled to as many as nine copies of the list (Tr. 158).

F. The Format of the Alert Lists

16. The lists compiled by Mr. Howard bore the designation "Alert Lists" at the top, a date at the left and a geographic area at the right. The names on the lists were organized alphabetically by last name and first name or initial and arranged in columns. Between 30 and 500 names appeared on the lists, depending on the geographic area and date of the list. At the left of each name was an asterisk which designated whether the name had been added in the previous week or a number which indicated how many checks had been reported for that particular individual. At the bottom of each list appeared the post office mailing address used by Mr. Howard and a caution that the list not be reproduced (CXs 2-11, 70-78). Lists compiled and disseminated prior to the summer of 1975 did not identify the consumer except by name (CXs 2-11). [8]

17. The Alert List of July 11, 1975 for the geographic area Ore-Ida (CX 6) is typical in style and format to all Alert Lists compiled and distributed by Mr. Howard until the summer of 1975 (Tr. 172-73), after which time a bank account or social security number was added beneath each individual's name (Tr. 158-59; CXs 70-78).

G. Recipients' Use of Alert Lists

(1) Subscribers

18. The purpose for which Mr. Howard compiled and disseminated Alert Lists for subscribers was to assist them in deciding whether checks proffered to them had the likelihood of becoming dishonored (Tr. 156). It was Mr. Howard's intent that if an individual whose name appeared on the Alert Lists attempted to write a check or cash a check in the subscriber's store, the subscriber would be able to

make an informed judgment to accept or refuse the individual's check (Tr. 186; CXs 54a-b, 55) and the lists were used by subscribers for that purpose (Tr. 186, 372-73, 400-01, 410, 416; CXs 54a-b, 55).

19. The acceptance of a check is part of a business transaction between the merchant and the check writer (Tr. 165). The merchant has a legitimate need for information about the check writing habits of his customers because the information enables the merchant to avoid taking checks which are likely to be dishonored.

20. However, at the time each subscriber received a list, he did not have a use for all of the names on the Alert List (Tr. 400). Mr. Howard testified that, based on his contact with subscribers, it was likely that the subscribers dealt with between 5 percent and 85 percent of the individuals listed on an Alert List (Tr. 192). Testimony of actual users of the lists indicates lower figures. The manager of a clothing store testified that his business attracted 250 to 300 customers per day, had annual sales of \$500,000, and took 85 percent of its business in payments by checks (Tr. 405), yet during the 18 months in which his store had subscribed to the Alert Lists, only three persons whose names appeared on the lists had come into the store (Tr. 411). The manager [9] of an auto salvage business which had sales of \$40,000 per month (Tr. 413), 50 to 60 percent of whose customers paid by check (Tr. 414), had never in three years had an individual on the list attempt to write a check in the store (Tr. 417). The manager of a farm supply store which did approximately \$800,000 worth of business a year during the three years his store had subscribed to the Alert Lists had seen only one individual on the lists in his store (Tr. 397, 401).

(2) Collection Agency

21. Emma Hatfield, the manager of a collection agency which subscribed to the Alert Lists, testified that she uses the lists to see if customers from which she is attempting to collect bills are still on the lists. She does not, however, use the lists directly for the purpose of collecting bills (Tr. 393) and therefore does not use the lists in connection with a business transaction with consumers, for collection of accounts.

(3) Law Enforcement Agencies

22. Mr. Howard also disseminated Alert Lists to law enforcement officials such as local police, state attorneys general, U.S. postmasters, and the U.S. Secret Service (CX 33). He disseminated Alert Lists to these agencies although not ordered to do so by a court (Adm.

26), and without receiving written instructions to provide the lists from consumers whose names appear on the lists (Adm. 27).

23. Law enforcement officials called Mr. Howard to ask for the names of subscribers holding outstanding checks. He was able to provide this information by consulting the master list (Tr. 202-03). William Alfson, a U.S. postal inspector, testified that he scanned the Alert Lists for familiar names in connection with thefts from the U.S. mail resulting in forgeries. He did not undertake investigations as a result of consulting the lists, nor did he obtain convictions as a result of using them (Tr. 382). A detective of the Ada County Sheriff's Office received Alert Lists in connection with his theft detail (Tr. 385). He did not specifically request the lists, nor had he obtained a court order for the lists, does not use them in connection with the granting of credit, the underwriting of insurance, the employment of applicants, the providing of government licenses or benefits, or in connection with a business transaction with the consumers whose names appeared on the lists (Tr. 386-87). [10]

H. Certification and Verification by Recipients of Alert Lists

24. Mr. Howard did not obtain from law enforcement agencies which receive Alert Lists any certification that the lists would be used only for the permissible purposes stated in the FCRA nor did he verify the law enforcement agencies' uses of the lists (Tr. 250, 388). Subscribers were not required to certify that they would use the lists only for the purposes listed in the FCRA before receiving the Alert Lists, nor did Mr. Howard verify that the lists were being used only for such purposes (Tr. 160, 250).

25. User witnesses who had made arrangements for their stores to subscribe to the Alert Lists testified that Mr. Howard or his representatives did not at any time ask the subscriber what he or she intended to do with the lists, nor were any restrictions on the use of the lists discussed (Tr. 369, 394, 398, 407).

26. Mr. Howard did not require that subscribers state in writing what uses would be made of the lists or state in writing any agreement as to restrictions on their uses of the lists (Adm. 40(a), (c)). The only writing between the subscriber and Mr. Howard was the order blank (CX 53; Tr. 215), which is silent both as to the subscriber's uses of Alert Lists and as to any restrictions on the subscriber's uses of the Alert Lists.

I. Mr. Howard's Procedures To Assure Accuracy of the Alert Lists

27. Prior to placing a consumer's name on an Alert List, Mr.

Howard did not request the subscriber to send the dishonored check to him (Adm. 43), and he had no way of knowing whether all the names submitted by subscribers were individuals whose checks had in fact been dishonored (Tr. 263).

28. An individual's name appeared on successive Alert Lists until a subscriber notified Mr. Howard that the name should be deleted. Mr. Howard had no regular policy of deleting names from the Alert Lists after 90 days (Tr. 253-54), and some names remained on the lists for as long as 11 months (CX 116). [11]

29. There were two mechanisms for deleting names from the Alert Lists (Adm. 50). Subscribers could mail postcards (CXs 50, 51) to Mr. Howard requesting that a name be deleted (Adm. 45), or subscribers could indicate on an audit sheet that names which they had submitted should be deleted (Adm. 46). The audit (CX 57) consisted of a computer printout of the names of consumers the subscriber had reported with instructions that the names be deleted from the list if the check had been picked up or if the subscriber considered the check uncollectable (CX 57). The audits were mailed out quarterly (Tr. 217). The purpose of the audit was to have subscribers delete names which should no longer appear on the lists (Tr. 218). The fact that subscribers returned the audit sheets indicated that they had failed to use the postcard notification mechanism (Tr. 218-19). The audit system was necessary because the postcard system was inadequate (Tr. 219).

30. Although Mr. Howard requested his subscribers to delete names promptly (Tr. 370), he did not require that subscribers agree in writing to send in delete cards (Tr. 255), he did not impose any penalty on subscribers for failing to submit delete cards on a timely basis (Tr. 256), and he had no way of knowing if a subscriber was sending in his delete cards when he should (Tr. 257). It was also Mr. Howard's policy not to delete a name if a delete card was unsigned (CX 59; Tr. 220). Thus, unless he could recognize the handwriting of the subscriber submitting the delete card, the name could not be deleted even though the individual had already paid the check (Tr. 220).

31. Mr. Howard did not penalize his subscribers for failing to return an audit list (Tr. 256), and he had no way of knowing whether each subscriber returned the audit sheet on a timely basis (Tr. 257) because he made no attempt to keep track of which audit sheets were received. In fact, the only mechanism for uncovering errors in the system was when consumers called him to complain that their names had erroneously appeared on an Alert List (Tr. 203). In those instances, his procedure was to contact the subscriber (Tr. 256), and

he discovered in some of those instances that the subscriber had in fact forgotten to have the consumer's name deleted (Tr. 425). [12]

32. For example, detective Barnes testified that his daughter's name appeared on the Alert List in December 1976. He personally accompanied his daughter to the subscriber's place of business and paid the check. Nevertheless, his daughter's name continued to appear on the Alert Lists until March 1977. When he contacted Mr. Howard, asking that his daughter's name be deleted, he was told it was up to the subscriber to turn in a delete card (Tr. 389).

J. The Businesses Operated by the Franchisees

(1) General Description

33. The manner in which the franchisees operate their Alert List systems is essentially identical to the way Mr. Howard operated his in southern Idaho before it was sold (Tr. 133, 134, 169). Subscribers to the list send in the names of persons who have written checks which have been dishonored (Tr. 115, 306, 327; Adm. 70). These names are compiled by the franchisees into lists by geographic area and the lists are disseminated to the subscribers weekly (Tr. 101, 304, 328; Adm. 71; CXs 12-28, 54-55). The franchisees charged a fee of \$15 per month for this service until early 1976, and charged \$17.50 per month thereafter (Adm. 78; Tr. 157, 158, 331). Lists are provided free to law enforcement agencies (Tr. 113, 302, 382). Alert Lists containing 3,086 names were distributed by franchisees on July 1, 1977 (CXs 12-28a-b). This is a typical number of names currently circulated on Alert Lists (Tr. 231-32).

34. Names are taken off the lists by subscribers sending in delete cards indicating individuals who have paid outstanding checks (Tr. 119, 213, 307, 349), and except for the present eastern Washington franchise, by the return of audit lists with names marked out (Adm. 69(k); Tr. 218, 349). The current eastern Washington franchisee removes names after they have been on the list for 90 days (Tr. 308). The audit lists are mailed to each subscriber quarterly or every six weeks and contain all the names on the list which have been submitted by that subscriber. The subscriber is instructed, among other things, to delete the names of those who have paid off their checks (Tr. 121, 217-18, 348-49; CXs 57, 86, 129-30). [13]

35. The lists are used by subscribers in determining whether or not to accept checks from persons whose names appear on the lists (Tr. 105, 127, 307, 374, 410). Lists are also sent by franchisees to law enforcement agencies which review the lists for names of persons who are under investigation and for similar law enforcement

purposes (Tr. 112, 202-03, 301-02, 382, 387). The lists distributed to law enforcement agencies are identical to the lists distributed to regular subscribers and include more information than required for identification only (Tr. 113-14, 301).

36. Neither the subscribers nor the law enforcement agencies use all the names on each list at the time received or at any time thereafter (Tr. 124, 310, 353). The subscribers cannot use any of the names on the lists at the time lists are received unless at that moment someone is attempting to write a check (Tr. 191, 400). From 5 to 85 percent of the names on each Alert List are actually used, depending upon the type of outlet and other variables (Tr. 192). Testimony of recipients of Alert Lists indicated that they had actual use for none of the names, or only one to three of the names from all the lists ever received (Tr. 373, 401, 417).

(2) Certification and Verification of Purposes by Franchisees' Subscribers

37. The franchisees do not require subscribers, prior to receiving Alert Lists, to state orally or in writing the purposes for which the information on the Alert Lists will be used (Adm. 81(a); CX 53; Tr. 110, 248-50, 299, 350), nor do the franchisees require, before sending Alert Lists to subscribers, that the subscribers state orally or in writing that the information on the lists will be used for no other purposes than those listed in Section 604 of the FCRA (Adm. 81(c), 81(d); Tr. 110, 124, 248-50, 299, 350). In no instances have franchisees obtained, in connection with lists provided to subscribers and law enforcement agencies, either a court order requiring that such lists or names be provided or written permission from the consumers to do so (Adm. 80(a), (b)). Since the franchisee's subscribers have not certified any purposes in connection with using the lists, the franchisees have not sought to verify any certified purposes (Tr. 250).
[14]

(3) Franchisees' Procedures To Assure Accuracy of the Alert Lists

38. The franchisees' procedures to assure accuracy of the Alert Lists were the same as respondent Howard's (Tr. 169) with the exceptions that the present eastern Washington franchisee removes names after 90 days (Tr. 308) and that a former Washington franchisee sent his subscribers audit lists every six weeks instead of every three months (Tr. 349).

39. Franchisees have not obtained written agreements from subscribers providing that only the names of persons who had

written dishonored checks would be put on the Alert Lists (CX 53, 92a-b; Tr. 110, 215, 299, 351) and have failed to verify that bad checks were held for those whose names were sent in (Tr. 117, 214, 306).

40. Franchisees have not obtained the written agreement of subscribers to delete names when checks are paid off (CXs 53, 92a-b; Tr. 110, 215, 299, 350). Sometimes delete cards are not sent in due to poor bookkeeping on the part of the subscriber (Tr. 349). The franchisees have no way of knowing whether subscribers are sending in delete cards when they should (Tr. 120, 308). There are no penalties for failure to return delete cards (Tr. 132, 352). The franchisees were aware that Mr. Howard had reminded his subscribers to send in delete cards and should have known that their subscribers might also be ignoring or forgetting this procedure (Adm. 69(j)).

41. The return of audit lists with names marked out indicates that names could have been removed from the lists earlier (Tr. 121, 218, 349). There is no written agreement with the franchisees' subscribers that audit lists will be returned when appropriate (Tr. 110, 215, 299, 351-52). At least one subscriber simply threw the audit list away (Tr. 419). There are no procedures to help ensure return of the audit lists when appropriate (Tr. 122-23), such as the levying of penalties (Tr. 352).

K. The Purpose of the Alert Lists and Their Use by Recipients for Purposes Other Than Identifying Writers of Bad Checks

42. The purpose of the Alert Lists is to give merchants a means to identify consumers who may have written bad checks [15] (Tr. 106, 156). There is no evidence that the Alert Lists were designed to provide information about a consumer's credit worthiness, credit standing or credit capacity, or, aside from what might be inferred about the character of the writer of bad checks, any specific information about a consumer's character, general reputation, personal characteristics, or mode of living.

43. The Alert Lists were used by recipients only to identify consumers who may have written bad checks. They were not used for purposes of granting credit (Tr. 124, 315, 421) or insurance (Tr. 187, 380) or for employment purposes (Tr. 187).

44. The use by the recipients of the Alert Lists in the circumstances described above indicates that they were not used solely for purposes authorized by Section 604 of the FCRA.

45. The writing of bad checks, in the opinion of some merchants, reveals the writer's bad character (Tr. 375-76, 395, 402, 410). To some extent then, it can be said that the Alert Lists, although not

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disseminated for that purpose, do relate to a consumer's character, general reputation or personal characteristics.

III. CONCLUSIONS OF LAW

JURISDICTION

The Commission's jurisdiction over respondents' business activities depends on whether Howard Enterprises is a "consumer reporting agency" as defined in Section 603 (f) of the FCRA:

The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

[16] "Consumer reports" are defined in Section 603(d) of the FCRA:

The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (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. . . .

According to complaint counsel, respondents' bad check lists are a series of "consumer reports" and respondents' dissemination of those lists makes Howard Enterprises a "consumer reporting agency." Although complaint counsel can muster in support of their position a court of appeals decision, several consent agreements and informal advisory opinions by the Commission's staff, I do not share complaint counsel's view, for the decision of the Ninth Circuit, the consent agreements and the advisory opinions are based on a literal reading of the FCRA which I cannot accept. In addition, they ignore congressional history which tends to support respondents' claim that the Commission has no jurisdiction over their activities.

The key question in this case is whether respondents provide "consumer reports" to their customers. If I were to follow the Ninth Circuit's decision in *Greenway v. Information Dynamics, Ltd.*, 524 F.2d 1145 (9th Cir. 1975), the answer would have to be yes, for there the court of appeals affirmed a district court decision which held that a bad check reporting service almost identical to respondents' was a consumer reporting agency (399 F.Supp. 1092 (D. Ariz. 1974)).

Section 603(d)(1) and (2) of the FCRA defines consumer reports in terms of the main purposes for which they are disseminated: [17]

...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. . . .

The lower court, believing that bad check lists were not used to establish a consumer's eligibility for credit, insurance or employment, turned to another Section (603(d) (3)) to justify FCRA jurisdiction over Information Dynamics, Ltd., holding that bad check lists had a bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living and were used for "other purposes authorized under Section 1681(b)(3)(E)" (Section 604(3)(E)). Section 604(3)(E) authorizes disclosure of consumer information to a person whom the disseminator has reason to believe:

otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

The court of appeals adopted the lower court's decision but apparently to bolster its conclusion, held, in defiance of accepted understanding,² that "a check itself is, essentially, an instrument of credit." 524 F.2d at 1146. In a rather convincing dissent, Judge Wright argued that Section 604(3)(E) should not be used to establish jurisdiction over a business which provides information unrelated to credit, insurance or employment.

Judge Wright recognized that which the court of appeals and complaint counsel ignore: The main thrust of Section 604 is to limit the permissible purposes for which a consumer reporting agency may furnish a consumer report rather than to confer jurisdiction over businesses whose activities have little to do with those which Congress decided to regulate.

The evidence developed in this case reveals that while information that a person has passed a bad check bears to [18] some extent on his character or general reputation, the information was not used or collected for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance or for employment purposes (Section 603(d)(1)-(2)). The only section of the FCRA which might arguably confer jurisdiction over respondents is Section 603(d)(3), and it is this, with its incorporation of Section 604(3)(E),

² See § 3-104, *Uniform Commercial Code*; *Greenway*, *supra*, at 1146 (Dissenting opinion of Judge Wright).

upon which complaint counsel rely, just as did the court in *Greenway*.

I concede that businesses which subscribe to respondents' service have a legitimate need for the information provided and if I were to limit my inquiry to the literal wording of Section 604(3)(E), I would have to conclude that Howard Enterprises is providing consumer reports. But any business which seeks information of whatever kind has a "legitimate need" for it. Read in the way complaint counsel would have it, Section 604(3)(E) would expand the definition of consumer report to an unlimited extent. Indeed, the definitions in Section 603(d)(1) and (2) would become superfluous.

I agree with complaint counsel that Congress did intend to expand the definition of consumer report beyond that spelled out in Section 603(d)(1) and (2). See *Judicial Construction Of The Fair Credit Reporting Act: Scope And Civil Liability*, 76 Colum. L. Rev. 458, 471 and n. 84 (hereafter "Judicial Construction"). However, I believe that Congress intended the courts and the Commission to apply the language of Section 604(3)(E) with some discretion, utilizing it only where the expansion of jurisdiction is compatible with the FCRA.³

[19] Complaint counsel argue, instead, for a literal reading of Section 604(3)(E). I cannot accept this approach. Going beyond the literal language of the statute, and turning to the congressional history of the FCRA, I find that it supports respondents' claim that the Commission does not have jurisdiction over their activities. A conference report (116 Cong. Rec. 35847-35851 (October 8, 1970)) issued after the FCRA bill was added by the Senate to H.R. 15073, 116 Cong. Rec. 32639 (1970), stated:

Your conferees also intend that the definition of "consumer credit report" not include protective bulletins issued by local hotel and motel associations, and circulated only to their members, dealing solely with transactions between members of the associations and persons named in the report. 116 Cong. Rec. at 35850.

Complaint counsel discount this statement, claiming first that bad check lists such as those circulated by respondents are not "protective bulletins." Second, they argue that discussions of the conference report by Senators Proxmire and Bennett and Representative Widnall so confuse the issue that one cannot tell with any assurance what congressional intent is. It is true that Senator Proxmire "clarified" the quoted statement in the conference report by stating

³ See "Judicial Construction" at 471:

Even where there is no direct conflict [between Sections 603(d)(1)-(2) and 604(3)(E)], it must be remembered that Section [604's] primary function is to delineate the purposes for which consumer reports may be furnished. When utilized as a definitional provision in conjunction with Section [603(d)], a less than literal reading of its terms may be required to effectuate the legislative intent with respect to coverage of the Act.

that "[t]o the extent that a local hotel or motel association compiles credit or other information . . . it is making consumer reports as defined under Section 603(d)" (116 Cong. Rec. 35941 (Oct. 9, 1970)). However, Senator Bennett said: "To restrict an association from providing information to its own members or individuals who have not paid their motel or hotel bill or who have paid such bills with a check which is dishonored seems to be absurd." 116 Cong. Rec. 35942 (Oct. 9, 1970). During debate on the conference report, Representative Widnall summed up the views of the two senators and concluded with some frustration:

How does anyone interpret congressional intent with this kind of a record? I do not believe there are many of us here in the House who would deliberately vote to restrict the dissemination of the names of known criminals yet as a result of bypassing our prescribed legislative procedures we are not certain what we are voting for in title VI of this bill. 116 Cong. Rec. 36574 (Oct. 13, 1970).

[20] Although "protective bulletins" which identify known criminals or individuals who are being sought by law enforcement agencies can be viewed as "consumer reports" under a literal reading of Section 604(3)(E), the Commission has recognized, in an interpretation under the FCRA, the intent of Congress to exclude at least some protective bulletins from the definition of "consumer report." See 16 CFR 600.2. Despite the obvious harm to those who might be listed incorrectly as criminals or fugitives, the Commission held in this interpretation that protective bulletins of the kind described above were not "consumer reports" because the information was not collected for consumer reporting purposes and because it cannot reasonably be anticipated that it will be used in connection with a legitimate business transaction with the persons reported upon.

Complaint counsel argue that in contrast to protective bulletins, bad check lists are provided for a legitimate business need⁴ and that, for that reason, these lists are subject to FCRA requirements. The answer to this argument is that the conference report discussed and intended to exclude from FCRA coverage, the dissemination of

⁴ Complaint counsel are somewhat inconsistent in their use of the "legitimate business need" language of Section 604(3)(E) for they claim that the Commission has jurisdiction over bad check list services because the recipients have a legitimate business need for them, yet also argue that respondents have violated Section 604 because the recipient could *not* have a legitimate business need for all of the names on the lists (CPF Brief, pp. 14-15). I agree with complaint counsel that this is not a fatal inconsistency, but it does suggest that something more than a literal reading of Section 604(3)(E) is needed in this case.

protective bulletins (listing those who skipped without paying their bills or who passed bad checks)⁵ which [21] obviously were designed to be used in connection with legitimate business transactions between hotels and their customers. The protective bulletins referred to in the conference report were not limited to lists of names of known criminals, and I do not accept complaint counsel's arguments that Representative Widnall's reference to "known criminals" during debate calls for limiting the language of the conference report to protective bulletins listing only "known criminals."⁶

In conclusion, I find that Congress intended to exclude from FCRA jurisdiction the dissemination of information about persons who pay for their hotel bills with bad checks even though such dissemination is (a) for "other purposes authorized under section 604" (Section 603(d)(3)) and (b) even though the recipient "has a legitimate business need for the information in connection with a business transaction involving the consumer." (Section 604(3)(E)). I see no reason why respondents' business, which disseminates the same kind of information, should be treated differently.

Furthermore, the history of the FCRA reveals that what prompted congressional action was not the unregulated dissemination of information about passers of bad checks. Complaint counsel recognize this:

There is no dispute that the bulk of the testimony before Congress when it formulated the FCRA concerned abuses by giant credit bureaus maintaining files on millions of consumers. Nor can it be disputed that most of the abuses testified to concerned consumers' credit, employment and insurance transactions (CPF Brief, p. 7).

A description of the typical credit or insurance report reveals how far removed it is from the very simple information provided by respondents: [22]

The credit report typically contains information on the consumer's present and past employers, income, current indebtedness, and general financial history, including such items as past performance on credit accounts and loans, bankruptcies, suits or judgments against the subject, and tax or other liens against his property. This information is gathered from the subject's credit application, investigation of the credit sources listed, and the public record. Underwriters of insurance, as well as employers and landlords, frequently demand an even more thorough investigation of

⁵ Representative Widnall stated:

This language was included because evidence submitted to members of the Consumer Affairs Subcommittee disclosed that hotels and motels are plagued by people who skip without paying bills—or pay with checks that bounce. 116 Cong. Rec. 36574 (Oct. 13, 1970).

⁶ I take it that Representative Widnall's reference to "known criminals" was a deliberate exaggeration designed to bolster his arguments that services providing lists of persons who passed bad checks need not be subject to the requirements of the FCRA because those who pass bad checks are, in his words, "obviously dishonest." 116 Cong. Rec. 36574 (Oct. 13, 1970).

the subject. To meet these needs, a second type of consumer reporting agency has developed and, like their sister credit bureaus, these preparers of "investigative consumer reports" are thriving. Investigative reports are more concerned with the subject's character, reputation and mode of living, and may contain information on any aspect of one's personal life, ranging from housekeeping proficiency and yard care, to associates' reputation, to drinking and sexual habits. Judicial Construction at 459-60.

Of course, one must give some meaning to the "other purposes" language in Section 603(d)(3). But as I read that section, it confers jurisdiction over activities which although not explicitly referred to in Section 603(d)(1)-(2), have some connection with the underlying purpose of the FCRA. I do not believe that the dissemination of bad check lists meets this requirement. This fact, coupled with the conference report's reference to exclusion of bad check list services from coverage under the FCRA leads to the conclusion that the Commission does not have jurisdiction over respondents' activities.

ORDER

Therefore,

It is ordered, That the complaint be, and it hereby is, dismissed.

OPINION OF THE COMMISSION

BY PERTSCHUK, *Commissioner*:

I. BACKGROUND

On February 7, 1977, the Commission issued a complaint charging that respondents, Howard Enterprises, Inc. and Ralph R. Howard, violated the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681, *et seq.* and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in connection with the distribution of lists of the names of individuals who have allegedly passed bad checks ("Alert Lists"). The central question presented by this proceeding is whether the Alert Lists constitute "consumer reports" under the terms of the FCRA.

Hearings were held on October 3 and 4, 1977, in Seattle, Washington before the administrative law judge (the "ALJ"). The ALJ issued his initial decision on January 26, 1978, in which he concluded that the Alert Lists are not "consumer reports," under the FCRA, and that, therefore, the Commission does not have jurisdiction over respondents' activities. Accordingly, the ALJ issued an order dismissing the complaint. Counsel supporting the complaint filed a notice of appeal of the ALJ's initial decision on February 14, 1978. Based on the mutual consent of the parties, oral argument was omitted by our order of April 7, 1978. [2]

We have reviewed the record and examined the provisions of the FCRA, its legislative history, as well as other law pertaining to the issues raised in this proceeding. Except as indicated below, we concur in and adopt the findings of fact set forth in the ALJ's initial decision. However, for the reasons discussed below, we have concluded that the Alert Lists are "consumer reports" as defined in the FCRA and that the Commission does have jurisdiction over the Respondents' activities.¹

II. SUMMARY OF RESPONDENTS' PRACTICES

Respondents Howard Enterprises, Inc. and Ralph R. Howard, its founder, president, and majority stockholder, are engaged in the Alert List business. The corporation sells Alert List franchises in a five state area in the Pacific Northwest. (IDJ at 3, 5.) Individual respondent Howard personally operated an Alert List system in parts of Idaho and Oregon from December, 1974 until June 1977. (IDJ at 3-4.)

As the ALJ found, Alert Lists are lists of names of individuals whose checks have been dishonored by the drawee bank when presented for payment. (IDJ at 4.) The lists, which were compiled and distributed weekly by Mr. Howard, bore the designation "Alert List" at the top, a date at the left and a geographic area at the right. There were between 30 and 500 names on each list, organized alphabetically by last name. Initially the lists only identified the consumer by name; however, after the summer of 1975, a bank account or social security number was added beneath each name. (IDJ at 16.)

The ALJ also found that Alert List subscribers were generally retail businesses such as grocery stores, department stores and restaurants.² These businesses accepted checks in payment for merchandise, in exchange for cash or as partial payment on open accounts. (IDJ at 13.) [3]

Mr. Howard testified that his purpose in compiling Alert Lists was to assist subscribers in deciding whether to accept checks from their customers. (IDJ at 18.) The ALJ agreed, and found no evidence that the lists were *designed* for any broader purpose. (IDJ at 18, 42-45). However, the fact that an individual wrote a bad check could certainly be seen as bearing on credit worthiness, and some evidence in the record indicates that Alert Lists could have been used in

¹ The following abbreviations are used in this opinion: IDJ - Initial Decision of Administrative Law Judge (cited by paragraph except where otherwise indicated); TR - Transcript of Testimony; CX - Commission's Exhibit; CCB - Complaint Counsel's Appeal Brief; RAB - Respondents' Answering Brief; CRB - Complaint Counsel's Reply Brief; Adm - Respondents' Answers to Complaint Counsel's Request for Admissions.

² Other recipients included a collection agency and law enforcement agencies. IDJ at 21.

establishing a consumer's eligibility for credit. (*See, e.g.*, Tr. 376-77; Tr. 53; Tr. 314-15.)

According to the ALJ, the information on the Alert Lists was derived from "report" cards which participating merchants sent to Mr. Howard periodically, listing names of consumers whose checks had not been honored. These cards were the only information about the check writers received by Mr. Howard. (IDJ at 11-12.) He did not require that the dishonored check be sent to him, nor did he obtain any other independent verification that the individuals whose names he placed on the list had in fact written dishonored checks. (IDJ at 27.)

The ALJ also found that Mr. Howard had no regular policy of deleting names from Alert Lists after 90 days, and that some names remained on the lists for as long as eleven months. (IDJ at 28.) The only mechanisms for correcting the lists were for subscribers to mail a postcard to Mr. Howard requesting deletion of a name, or to indicate on quarterly computer printouts, termed audit lists, that a name should be deleted. (IDJ at 29.) In other words, an individual's name appeared on successive Alert Lists until a subscriber notified Mr. Howard otherwise in writing. (IDJ at 28.) With only one exception, these procedures were also used by Alert List franchisees. (IDJ at 38.)³

Although the accuracy of Alert Lists depended upon corrections submitted by subscribers, this part of the system was not policed. Mr. Howard and other franchisees made the audit lists and delete cards available, but the ALJ found that they did not require that cards or lists be returned on a timely basis. (IDJ at 30-31.) Nor was any attempt made to monitor which audit lists were returned, despite the fact that instances occurred in which subscribers neglected to request that names erroneously appearing on the Alert List be deleted. (IDJ at 31.) [4]

The record also indicates that respondents did not attempt to regulate the manner in which subscribers handled Alert Lists. For example, subscribers were not required to agree to keep the lists confidential. As a result, the lists were posted by some subscribers in places where they were visible to the public (Tr. at 123, 255, 309, 400 408 and 415).⁴

³ The ALJ noted that one franchisee does remove names after 90 days. (IDJ at 38.)

⁴ One consumer complained to Howard that "you are advertising me as a criminal or thief where all the public can see my name." (CX 62.) This letter was used by Mr. Howard as promotional material. (Adm 69(a); Tr. 350.)

III. ARE ALERT LISTS "CONSUMER REPORTS" AS DEFINED IN THE FCRA?

In his initial decision, the ALJ ruled that Alert Lists are not "consumer reports" as defined in the FCRA. The ALJ recognized that the information on Alert Lists bears on a consumer's character or reputation, that businesses which subscribe to Alert Lists have a legitimate business need for the information, and that a literal reading of the statute compels the conclusion that Alert Lists are consumer reports. (IDJ at p. 18.) Nonetheless, he rejected a literal reading of the statute, stating that the "Congress intended the courts and the Commission to apply the language of Section 604(3)(E) with some discretion, utilizing it only where the expansion of jurisdiction is compatible with the [purpose of] the FCRA." (IDJ at p. 18.) The ALJ also concluded that Alert Lists are essentially the same as "protective bulletins" and that an exemption from the statute for protective bulletins is recognized in the legislative history of the FCRA. (IDJ at p. 21.)

On this, the key issue, we reverse the ALJ's holding. The express terms of the FCRA establish that Alert Lists fall within the definition of "consumer reports." Moreover, any other interpretation, in our opinion, would contravene the purposes of the FCRA and would be inconsistent with its legislative history.

A. THE EXPRESS TERMS OF THE FCRA

In determining whether respondents' activities fall within the scope of the FCRA, it is necessary to construe certain definitional terms of the Act. Section 603(f) defines a "consumer reporting agency" to be any person or institution which "regularly engages in whole or in part in the practice of assembling or evaluating consumer-credit information or other information on consumers for the purpose of furnishing consumer reports to third parties" 5 U.S.C. 1681a(f).

The definition of a "consumer report" appears in Section 603(d) which provides, in part: [5]

a term "consumer report" means any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family or household purposes, or (2) employment purposes, or (3) *other purposes authorized by Section 604*. . . . (Emphasis added.)

As the emphasized language indicates, the definition of "consumer report" specifically incorporates by reference Section 604. Thus, Section 604 serves two functions, the primary one being to establish the permissible uses of consumer reports, and, the second, to add content to the Section 603(d) definition of a consumer report.

Under one permissible purpose, Section 604(3) authorizes disclosure of consumer reports to a person whom the disseminator has reason to believe:

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

When Sections 603(d) and 604(3)(E) are read together, as they must be for definitional purposes, the resulting standard can be stated in clear, if lengthy, terms: when a person or institution disseminates information bearing on any of the seven criteria relating to a consumer, listed in Section 603(d), to a third party, and the person or institution knows or expects such information will [6] be used in connection with a business transaction involving the consumer,⁵ then that information is a "consumer report."⁶

The information on respondent's Alert Lists satisfies the elements of this definition.⁷ First, the information disseminated in the Alert Lists necessarily bears on at least one, if not all, of the seven consumer characteristics in the definition of a consumer report.⁸ Indeed, the ALJ specifically found that Alert Lists bear upon a consumer's character, general reputation and [7] personal characteristics. (IDJ at 45.)⁹ Second, Alert Lists are used or expected to be

⁵ In the context of its definitional function, we interpret Section 604(3)(E) as including only business transactions between report users and consumers acting as consumers. This narrow interpretation is consistent with the clear Congressional intent that business reports not be classified, *per se*, as consumer reports. S. Rep. No. 517, 91st Cong., 1st Sess. 1 (1969). In light of this interpretation of Section 604(3)(E), we do not share the ALJ's concern that the incorporation of Section 604(3)(E) "expand[s] the definition of consumer report to an unlimited extent." (IDJ at p. 18).

⁶ This is the test adopted by the District Court and affirmed by the Court of Appeals in *Greenway v. Information Dynamics, Ltd.*, 399 F. Supp. 1099 (D. Ariz. 1974), *aff'd* 524 F.2d 1145 (9th Cir. 1975).

⁷ Respondents urge us to reject this interpretation of the statute, arguing that the use of the word "eligibility" in Section 603(d) demonstrates that only those purposes listed in Section 604 for which a person could be "eligible" are included in the definition of consumer report, and further that a person could not be eligible to cash a check. (RAB at 4, 5, 7.) It appears, however, that the number "(1)" is misplaced in the codified statute, since one cannot be eligible for "employment purposes" or for "other purposes." The statutory syntax is only consistent and meaningful if the "(1)" is read in between "for" and "the purpose of," thus making the first category

"... for (1) the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance. . . ."

⁸ The characteristics are credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, and mode of living.

⁹ Section 603(d) provides that the term " 'consumer report' means any written, oral or other communication *** which is used or expected to be used ***." (Emphasis added.) As the court held in *Belshaw v. Credit Bureau of Prescott*, 392 F. Supp. 1356, 1359-60 (D. Ariz. 1975):

" . . . 'consumer report' must be interpreted to mean any report . . . of information that could be used for one of the purposes enumerated in [Section 603(d)]" (Emphasis in the original.)

(Continued)

used in connection with business transactions involving consumers.¹⁰ Again, the ALJ specifically found that the acceptance of a check is part of a business transaction between the merchant and the check writer and that the Alert List information has been used by merchants to avoid taking checks which are likely to be dishonored. (IDJ at 19.)

Judicial decisions support our conclusion that the FCRA applies in this case. For example, the facts in *Greenway v. Information Dynamics Ltd.*, 399 F. Supp. 1092 (D. Ariz. 1974) *aff'd* 524 F.2d 1145 (9th Cir. 1975), are virtually identical to the facts in this case. In *Greenway*, the defendant distributed to subscribing merchants the following information concerning consumers who allegedly passed bad checks: their names, drivers' license numbers, checking account numbers, number of checks returned, and, in some cases, the reasons for the return of the checks. There, the Court of Appeals for the Ninth Circuit concluded that such information constitutes a "consumer report," as defined in the FCRA. See also *Belshaw v. Credit Bureau of [8] Prescott*, 392 F. Supp. 1356 (D. Ariz. 1975); *Beresh v. Retail Credit Co.*, 358 F. Supp. 260 (C.D. Cal. 1973).¹¹

B. THE PURPOSES AND LEGISLATIVE HISTORY OF THE FCRA

The FCRA serves important public interests by ensuring that consumer reports are prepared and disseminated in a manner that is fair and equitable to consumers. More specifically, the FCRA is intended, *inter alia*, to ensure the accuracy of consumer reports and to protect the individual consumer's right to privacy. Under Section 602(b), the purpose of the FCRA is:

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

The privacy purpose of the Act is specifically articulated in Section 602(a):

The type of information on Alert Lists and other evidence suggests that Alert Lists could be used as a factor in establishing a consumer's eligibility for credit, thus providing an additional basis for the determination that Alert Lists constitute consumer reports. See p. 3, *supra*.

¹⁰ Alternatively, the second element of the definition can be satisfied by establishing that the Alert Lists are used or expected to be used for any one of the other purposes enumerated in Sections 603(d) and 604.

¹¹ District court decisions cited in the dissenting opinion in *Greenway v. Information Dynamics, Ltd.*, *supra*, at 1147-48, are distinguishable from this case in that they pertain to credit reports in connection with a business entity in which the consumer was a principal, not one involving the consumer in his personal and individual capacity. See, e.g., *Wrigley v. Dun & Bradstreet*, 375 F. Supp. 969 (N.D. Ga. 1974), *aff'd* 500 F.2d 1183 (5th Cir. 1974); *Sizemore v. Bambi Leasing Corp.*, 360 F. Supp. 252 (N.D. Ga. 1973); *Fernandez v. Retail Credit Co.*, 349 F. Supp. 652 (E.D. La. 1972).

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.

As the evidence in the record indicates, the manner in which Alert List systems are operated has resulted in a significant invasion of the privacy of individual consumers. For example, operators of the Alert List systems do not require subscribers to agree that the lists will not be publicly displayed (Tr. 110, 299, 255, 351; CX 87, 92a-b), and some subscribers post the lists where they are visible to the public (Tr. 123, 255, 309, 400, 408, 415). *See also*, p. 4, *supra*. Additionally, the ALJ's findings of fact establish that the procedures followed by respondents were totally inadequate to ensure the accuracy of the Alert Lists and the fair and equitable treatment of consumers. (*See* IDJ at 27-32 and 38-41.) [9]

The ALJ also concluded that Alert Lists are indistinguishable from "protective bulletins" (IDJ at p. 21) and, accordingly, are exempted from the provisions of the FCRA. "Protective bulletins" are lists of the names (and sometimes photographs) of consumers who have issued worthless checks or who may have criminal records or arrest warrants outstanding. Such lists are circulated by the members of local hotel and motel associations or other such organizations.

As indicated by the discussion in the initial decision and complaint counsel's brief, the legislative history on the protective bulletin issue is far from clear. If anything emerges from that history, it is that Congress intended whatever exemption may have been created to apply only to a narrow category of bulletins. For example, the House managers of the FCRA stated that

Your conferees also intend that the definition of "consumer report" not include protective bulletins issued by local hotel and motel associations, and circulated *only* to their members, dealing *solely* with transactions between members of the associations and persons named in the report. (Emphasis added.) H.R. No. 1587, 91st Cong., 2d Sess. 28 (1970), *reprinted in* [1970] U.S. Code Cong. & Ad. News, 4411, 4414.¹²

A previous interpretation of the protective bulletin exemption by the Commission is consistent with this limited view. In 16 C.F.R. 600.2(b), the Commission stated that the FCRA does not apply to certain communications, described as:

a series of descriptions, usually accompanied by photographs, of individuals who are being sought by law enforcement authorities for alleged violations of criminal laws.

¹² However, the existence of even such a limited exemption is called into question by subsequent statements of Senator Proxmire who was the Act's author and leader of the Senate conferees. *See* 116 Cong. Rec. 35941 (Oct. 9, 1970).

However, the interpretation adds that the exemption is destroyed if such bulletins contain information used for any of the purposes described in Section 603(d).

With the purposes and history of the FCRA in mind,¹³ we do not find it difficult to distinguish Alert Lists from protective bulletins. On its face an Alert List contains [10] more detailed personal information about individuals than a protective bulletin does, including such items as social security numbers, bank account numbers, and indications of how long the name has been on the list and how many bad checks reported. (IDJ at 16-17) Additionally, the consumers whose names appear on Alert Lists are not, at least for the most part, "forgers, swindlers or other criminals" for whom arrest warrants are outstanding. See 16 C.F.R. 600.2(c). More significantly, Alert Lists are not the result of cooperative activities by local hotel and motel or other trade associations, incidental to the primary commercial purpose of their members, about which some members of Congress expressed concern. Rather, they are the product of a professional reporting company whose express and exclusive functions are to compile consumer credit information and to disseminate it to a broad range of subscribers. We therefore conclude that the information on respondents' Alert Lists constitutes "consumer reports" within the meaning of Section 603(d), and is subject to the statutory restrictions.

IV. VIOLATIONS OF THE FCRA AND FTC ACT

Under Section 603(f) of the FCRA, a "consumer reporting agency" is any person which (1) regularly assembles the specified types of information on consumers for the purpose of distributing it to third parties, (2) for a fee, (3) by means of interstate commerce. The ALJ's findings of fact establish that respondent Howard meets these three requirements. Mr. Howard regularly assembled the information on the Alert Lists for the purpose of distributing it to third parties (IDJ at 3, 4, 11, 13, 14). He engaged in these activities for a fee to each subscriber of \$15.00 per month (later raised to \$17.50) (IDJ at 15) and utilized means and facilities of interstate commerce in connection therewith. (IDJ at 5, 11, 13, 14.) Therefore, respondent, Ralph R. Howard, was acting as a "consumer reporting agency" as that term is defined in the statute.

As a consumer reporting agency under the FCRA, respondent is subject to the statutory limitations on the manner in which

¹³ Representative Widnall, a House conferee, stated that questions about the protective bulletin "exemption" should be resolved "in light of [the FCRA's] real objectives as set forth in the statement of findings and purpose in Section 602." 116 Cong. Rec. 36574 (Oct. 13, 1970).

information is compiled, maintained and disseminated. The statute requires that consumer reports be furnished to third parties only for the permissible purposes listed in Section 604. It also establishes certain "compliance procedures" in Section 607 which obligate reporting agencies to, among other things, obtain certification from recipients that the information will only be used for permissible purposes and to assure "maximum possible accuracy" when preparing consumer reports. Additionally, only limited information may be provided to governmental agencies unless Sections 604 and 607 are complied with. We now proceed to discuss whether respondents' practices violate these standards of conduct as charged in the complaint. [11]

A. DISSEMINATION OF CONSUMER REPORTS WITHOUT BUSINESS
NEED

Alert List subscribers have a legitimate business need for information about a particular individual only in the context of a consumer transaction with that individual, such as when the individual offers a check in payment for a purchase. As noted, however, each Alert List contains the names of from 30 to 500 individuals who have reportedly passed bad checks. Therefore, as the ALJ found, subscribers did not have a legitimate business need for information regarding all of the individuals on the list. (IDJ at 20.) Testimony from Mr. Howard and his subscribers indicates that, in practice, some subscribers may have dealt with 5 percent or fewer of the individuals listed and that none had dealings with all of those individuals, the highest estimate being 85 percent. *Id.*

By providing subscribers with consumer credit information for which they had no legitimate business need, respondent Howard violated Section 604 of the FCRA. The Commission has previously indicated that the permissible purpose for furnishing the consumer report must exist at the time the report is distributed; it is not sufficient that the consumer report be distributed in anticipation that a permissible purpose will subsequently arise. 16 C.F.R. 600.1(c).

We note, as complaint counsel correctly point out in their brief, that these violations would not have occurred if respondent Howard had encoded the Alert Lists. (CCB at 21.) Coding is the use of a unique identifier, other than a name, through which the subscriber may identify the consumer and decode the information in connection with a business transaction. Thus, the decoded information will become available to the subscriber only at that point when a "legitimate business need for the information in connection with a

business transaction involving the consumer" arises, as required by Section 604.¹⁴

B. DISSEMINATION TO LAW ENFORCEMENT AGENCIES

Law enforcement agencies, like other users, are entitled to receive consumer reports for the permissible purposes set forth in Section 604 of the FCRA. In addition, Section 608 provides another permissible purpose: [12]

Notwithstanding the provisions of Section 604, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former address, places of employment, or former places of employment, to a governmental agency.

The Alert Lists disseminated to law enforcement agencies contain more information than is allowed under Section 608 in that they report the consumer's alleged issuance of a bad check, the consumer's bank account or social security number, the number of bad checks written and whether the check was reported during the preceding week. In addition, the ALJ's findings of fact also indicate that the law enforcement agencies which received the Alert Lists did not have a permissible purpose for the Lists as required by Section 604. Specifically, the Alert Lists were disseminated to the law enforcement agencies by Mr. Howard even though he was not instructed to do so by a court or the consumers whose names appeared on the lists, and these agencies did not use them in connection with the granting of credit, the underwriting of insurance, employment purposes, the provision of government licenses or benefits, or in connection with a business transaction with consumers whose names appeared on the lists. (IDJ at 22, 23.) Therefore, the Alert Lists were not released for any of the permissible purposes listed in either Section 604 or Section 608.

C. FAILURE TO OBTAIN CERTIFICATION AND VERIFICATION

The ALJ found that Mr. Howard did not obtain from subscribers or law enforcement agencies any certification that the lists would be used only for the permissible purposes stated in the FCRA, nor did he verify that the lists were only being used for such purposes. (IDJ at 24.) In addition, Mr. Howard and his representatives did not at any time ask subscribers what they intended to do with the lists or

¹⁴ In this regard the Commission has previously stated:

[This interpretation] does not preclude the furnishing of information by a consumer reporting agency which is coded so that the consumer's identity will not be disclosed For example, unique identifiers such as social security number, driver's license number, or bank account number will provide adequate coding. 16 C.F.R. 600.1(e).

discuss with them any restrictions on the use of the lists. (IDJ at 25.) Finally, Mr. Howard did not require that subscribers state in writing what uses would be made of the lists or agree to restrict their uses of the Alert Lists. (IDJ at 26.) Through such omissions, respondent Ralph Howard violated Section 607 of the FCRA.

D. FAILURE TO ASSURE ACCURACY OF CONSUMER REPORTS

Section 607(b) of the FCRA requires consumer reporting agencies to utilize reasonable procedures to assure the maximum possible accuracy of the information contained in consumer reports. The ALJ found that, prior to placing a consumer's name on the Alert List, Mr. Howard had no way of knowing whether all the names submitted by subscribers were individuals whose checks had in fact been dishonored. (IDJ at 27.) More significantly, an individual's name appeared on successive lists until a subscriber notified Mr. Howard that the name should be deleted. (IDJ at 28.) [13]

As noted above, there were two mechanisms employed by Mr. Howard to delete names from the lists: delete cards and audit lists. See p. 3, *supra*. Both systems were inadequate inasmuch as Mr. Howard did not require the subscribers to agree in writing to send in delete cards and did not impose penalties on subscribers for failing to submit delete cards or audit lists on a timely basis. (IDJ at 30-31.) Mr. Howard had no system for determining whether each subscriber submitted the delete cards and audit sheets. *Id.* Indeed, the only mechanism for uncovering errors in the system consisted of contacts from consumers complaining that their names had erroneously appeared on the Alert Lists. (IDJ at 31.)

In sum, the record in this proceeding establishes that Mr. Howard employed only token procedures to detect errors in reporting information on the Alert Lists. Such procedures are insufficient to meet the requirements of Section 607(b) that reasonable procedures be followed to assure maximum possible accuracy of the information contained in consumer reports.

E. SALE OF FRANCHISES

In his initial decision, the ALJ found that respondent Howard Enterprises is engaged in the business of selling Alert List franchises. (IDJ at 4-5.)¹⁵ He also found that the manner in which the

¹⁵ The ALJ's findings of fact also establish that the sale and operation by respondents of Alert List franchises are in or affecting interstate commerce. (IDJ at 6-10.) See, e.g., *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963); *Local 167 of the International Brotherhood of Teamsters v. United States*, 291 U.S. 293, 297 (1934); *FTC v. Pacific States Paper Trade Association*, 273 U.S. 52 (1927); *Seligson v. Plum Tree, Inc.*, 361 F. Supp. 748, 751 (E.D. Pa. 1973.)

franchisees operate their Alert List systems was virtually identical to the way Mr. Howard operated his system. (IDJ at 12.) This finding is supported by the substantial influence which Mr. Howard and Howard Enterprises maintained over the business operations of their franchisees. The evidence indicates that, while establishing their systems, franchisees were trained and assisted by Mr. Howard. (See Tr. 223, 227, 318.) The computer program which franchisees used in operating their systems was supplied by Howard Enterprises (Tr. 22, 226-27, 229, 318) and could not be altered by franchisees unless Howard agreed. (Tr. 119, 317-18). Additionally, respondents supplied forms and promotional material to franchisees. (Adm. 69.)

Section 621(a) of the FCRA provides that a violation of any requirement or prohibition imposed under the FCRA constitutes an unfair or deceptive act or practice in violation of Section 5 of the FTC Act. It is a well-settled principle that one who places in the hands of another the means or instrumentality to engage in [14] an unfair or deceptive act or practice has thereby violated Section 5 of the FTC Act. See, e.g., *FTC v. Winstead Hosiery Co.*, 258 U.S. 483, 494 (1922). This principle was recently applied by the Commission in *National Housewares, Inc.*, 90 F.T.C. 512, 590 (1977) to hold respondents liable for unfair and deceptive treatment of consumers by independent distributors of respondents' products. As a factual basis for its holding, the Commission cited that respondents had provided distributors with a particular sales method, had advised and encouraged distributors to use practices which were deceptive, and had supplied materials to implement the method. *Id.*

This legal standard has been recognized in a variety of other, analogous, circumstances. See, e.g., *Benrus Watch Co. v. FTC*, 352 F.2d 313, 318 (8th Cir. 1965); *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963); *C. Howard Hunt Pen v. FTC*, 197 F.2d 273, 281 (3d Cir. 1952).

The record in this proceeding demonstrates that, by selling Alert List franchises, respondents have provided the means for others to engage in unfair and deceptive practices. As we discussed above, Alert List systems, by their very nature, are violative of the FCRA. The lists disseminate far more consumer credit information than subscribers are entitled to, fail to provide for the required certification and verification, and are not operated in such a way as to assure maximum possible accuracy. In addition, the training and assistance provided to franchisees by respondents, which resulted in methods of operation almost identical to those of Mr. Howard found to be illegal above, support respondents' liability. By franchising a business

methodology which is inherently illegal under the FCRA, respondents have violated Section 5 of the FTC Act.

Because respondents are responsible for setting in motion the FCRA violations by franchisees, it is appropriate to reach the practices of all Alert List system operators through them. Our goal is to bring the entire network of Alert List systems into compliance with the statutory requirements of the FCRA. To that end, the order issued with this opinion requires not only that respondents themselves comply, but that they obtain compliance from their franchisees.¹⁶ [15]

V. CONSTITUTIONALITY OF THE FCRA

Respondents assert that enforcement of the FCRA will unconstitutionally deprive them of their right under the First Amendment to free speech and press. (RAB at 11.) Although respondents purport to be challenging only the application of the FCRA to them, their arguments in effect challenge the constitutionality of the statute on its face. (RAB at 11-14.)

While administrative agencies are often called upon to determine whether particular applications of the laws they administer comport with the Constitution, there is considerable case law support for the view that an administrative agency does not have authority to determine the constitutionality of the statutes it enforces.¹⁷ Such precedent is rooted in a recognition that administrative agencies are created to enforce the law and effect the legislative mandate.

Were an agency to conclude that a duly enacted statute was unconstitutional, it might thereby preclude any review of that issue by the courts, thus thwarting a constitutional scheme which contemplates passage of laws by Congress, enforcement of them by the executive, and ultimate determination of their constitutionality by the judiciary. *Verrazzano Trading Corp., et al.*, 91 F.T.C. 888, 952 (1978).

At the same time, however, the Commission has recognized that there may be persuasive reasons justifying consideration of constitutional issues by administrative agencies, arising out of both the obligation of each Commissioner to "support and defend the Constitution" and of the expertise of the agency in construing the statutes it enforces, as the result of which it may be in the best position to

¹⁶ As a practical matter, because of the degree of control Respondents exercise over the way franchisees conduct business, this should not prove burdensome. Once respondents alter their Alert List format and procedures, it will be a simple matter for franchisees to follow suit. However, to ensure full compliance with the FCRA, the order also requires respondents to discontinue their business relationship with any franchisee who fails to comply. (Paragraph II.C.) We note that, if necessary, this may be accomplished through terms of the franchise agreement allowing breach if franchisees engage in any practice "detrimental to the public."

¹⁷ See, e.g., *Weinberg v. Salfi*, 422 U.S. 749, 765 (1975); *Johnson v. Robinson*, 415 U.S. 361, 368 (1974); *Public Utilities Comm'n v. United States*, 355 U.S. 534, 539 (1958); *Engineers Public Service Co. v. SEC*, 138 F.2d 936, 952-53 (D.C. Cir. 1943), dismissed as moot, 332 U.S. 788.

make the first assessment of their constitutionality. These considerations have led us to suggest that, where the underlying constitutionality of a statute is challenged, the best approach is that

administrative agencies ought not blind themselves to constitutional considerations, but in taking them into account they should give extreme deference to the implicit view of Congress that such statutes are constitutional, so as to avoid thwarting the Congressional intent by precluding judicial review of a statute's constitutionality. *Verrazzano*, *supra*, 91 F.T.C. at 953.

[16] Here, as in *Verrazzano*, we are able to offer the perspective of our administrative experience as it relates to the constitutionality of the FCRA without precluding the opportunity for judicial review.

Respondents correctly point out that in recent cases the Supreme Court has recognized that commercial speech is not wholly beyond First Amendment protection. (RAB at 12, citing *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council*, 425 U.S. 748 (1976); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); and *Bates v. Arizona State Bar*, 433 U.S. 350 (1977).) However, it is clear from those cases that the Court does not, as respondents would have us do, equate commercial and noncommercial, or "political," speech. Indeed, in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), the Court expressly reaffirmed the "limited measure of protection" extended to commercial speech, explaining that

to require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.

The Court in *Ohralik* also observed that commercial speech "occurs in an area traditionally subject to government regulation," and recognized that regulation of commercial speech is subject to a lower level of judicial scrutiny. *Id.* The approach taken by the courts in such situations has been one of balancing the First Amendment interests of the commercial speaker against countervailing justifications for the regulation. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council*, *supra*; *Linmark Associates, Inc. v. Township of Willingboro*, *supra*; and *Bates v. Arizona State Bar*, *supra*. Respondents discuss this test, but conclude that "no balancing of interest can remove the protection" (RAB at 14.)

While the FCRA does not in any sense remove the protected interest which Respondents have in disseminating Alert Lists, we believe that the FCRA will withstand their constitutional challenge. First, unlike the regulations at issue in *Virginia State Board*, *Linmark*, and *Bates*, the FCRA does not impose an absolute

prohibition on dissemination of commercial information; it merely requires that the sensitive information in consumer credit reports be handled responsibly. Thus, the FCRA requirements may be seen as reasonable "time, place and manner" restrictions on commercial speech which have been held to be constitutional. *See, e.g., Bates, supra*, at 384. Moreover, the restrictions the statute placed on [17] dissemination of consumer reports appear to be clearly justified by the interests Congress expressed in ensuring the accuracy of credit information and protecting individuals' constitutional right to privacy.¹⁸

VI. CONCLUSION

To remedy the violations found, the Commission hereby enters the attached order.

Synopsis of Determinations for Purposes of 15 U.S.C. 45(m)(1)(B)

Howard Enterprises, Inc., et al. Docket 9096

1. It is unlawful under the Fair Credit Reporting Act (15 U.S.C. 1681, *et seq.*), and therefore an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for any consumer reporting agency¹ to disseminate consumer reports²

(a) to third parties which do not have a legitimate business need for the information in connection with a business transaction involving the consumer reported on;³

(b) to law enforcement agencies except to the extent authorized by Sections 604 and 608;

(c) without obtaining from prospective users written certification that the information will only be used for the permissible purposes stated in the FCRA, and then verifying that only such uses will be made of the information; and

¹⁸ This analysis and conclusion are supported by a pre-*Virginia State Board* decision in which the Eighth Circuit ruled that certain provisions of the FCRA are constitutional based on a balancing of interests. *See Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976).

¹ Section 603(b) of the FCRA defines a "consumer reporting agency" as any person who, by means of interstate commerce, regularly assembles or evaluates specified consumer credit information and disseminates it to third parties for a fee.

² "Consumer reports" include the information on "bad check lists" sold to assist merchants in deciding whether or not to accept checks from their customers, as well as other communications defined in FCRA Section 603(d).

³ This standard does not preclude the furnishing of such lists if they are encoded through the use of unique identifiers other than names, such as social security numbers or bank account numbers, so that a user can determine the identity of any consumer reported on only through use of additional information provided by the consumer at the time of the transaction.

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(d) without following reasonable procedures to assure maximum possible accuracy of the information contained in consumer reports.

2. It is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to sell a franchise which provides the means for third parties to engage in unfair and deceptive acts or practices.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of complaint counsel from the initial decision and upon briefs in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying opinion having substantially granted the appeal; therefore

It is ordered, That pages 1 to 15 of the initial decision of the ALJ be, and they hereby are, adopted as Findings of Fact of the Commission, except to the extent inconsistent with the Commission's findings of fact and conclusions of law contained in the accompanying opinion.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

PART I

It is ordered, That respondent Ralph R. Howard, his agents, representatives, employees, successors, and assigns, directly or indirectly through any corporation, subsidiary, division or other device, in connection with the collecting, preparing, assembling and/or furnishing of consumer reports, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act (Pub. Law 91-508, 15 U.S.C. 1681, *et seq.*), and interpreted in the accompanying Opinion of the Commission, shall cease and desist from: [2]

A. Furnishing any consumer report to any person, unless such report is furnished:

1. In response to the order of a court having jurisdiction to issue such order; or
2. In accordance with the written instructions of the consumer to whom the report relates; or

3. To a person which respondent has reason to believe intends to use the information:

a. 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. For employment purposes; or

c. In connection with the underwriting of insurance involving the consumer; or

d. 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. In connection with a legitimate business need for the information in connection with a business transaction involving each consumer reported upon.

B. Furnishing "Alert Lists," or any other list, index, or compilation of consumer reports, unless encoded in such a way that a user can determine the identity of any consumer reported on only through the use of additional information and identification to be provided by the consumer at the time of the transaction with the user.

C. Failing to maintain reasonable procedures necessary to limit the furnishing of consumer reports to the purposes listed under Section 604 of the Fair Credit Reporting Act, as required by Section 607(a) of the Fair Credit Reporting Act, including, but not necessarily limited to, procedures: [3]

1. requiring prospective users of consumer reports to identify themselves,

2. requiring prospective users of consumer reports to certify the purposes for which the information in such reports is sought,

3. requiring prospective users of consumer reports to certify that the information in such reports will be used for no other purposes than those which have been certified,

4. verifying the identity of new prospective users of consumer reports prior to furnishing consumer reports to such users, and

5. verifying the uses certified by prospective users of consumer reports prior to furnishing consumer reports to said users.

D. Furnishing consumer reports to persons under circumstances in which there are reasonable grounds for believing that such

reports will not be used for purposes listed in Section 604 of the Fair Credit Reporting Act.

E. Failing to follow reasonable procedures to assure maximum possible accuracy of information concerning the individuals to whom consumer reports relate, as required by Section 607(b) of the Fair Credit Reporting Act, including but not necessarily limited to, procedures:

1. to ensure with reasonable certainty that information about consumers is accurate before placing it on "Alert Lists" or other such compilations;
2. to ensure that prospective users provide prompt notice as to information which is no longer accurate and therefore should be deleted from the "Alert List" or other compilation, and
3. requiring prospective users to agree in writing to comply with the procedures described in E.2, above.

F. Failing to include the following statement on a fact sheet to be included with any "Alert List" or other consumer reports published and distributed by respondent, with such conspicuousness and clarity as is likely to be read and understood by users of such consumer reports:

The following information is subject to the Fair Credit Reporting Act which regulates use of consumer reports. It must be used for the following permissible purposes and no other: [4]

- (1) 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 collection of an account of, the consumer; or
- (2) In connection with employment purposes; or
- (3) In connection with the underwriting of insurance involving the consumer; or
- (4) 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
- (5) In connection with a legitimate business need for the information in connection with a business transaction involving the consumer.

The Fair Credit Reporting Act, Public Law 91-508, Section 619, states "Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined not more than \$5,000 or imprisoned not more than one year, or both."

PART II

It is further ordered, That respondents, Howard Enterprises, Inc., its successors and assigns, and its officers, and Ralph R. Howard, individually and as an officer of Howard Enterprises, Inc., and

respondents' agents, representatives, employees, successors, and assigns, directly or indirectly through any corporation, subsidiary, division, or other device, in connection with the sale, or offering for sale, of franchises, licenses, or business opportunities provided by respondents to others, and in connection with respondents' continuing business relationships with such others, in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, shall:

A. Cease and desist from selling or providing in any manner franchises, licenses, or business opportunities (hereinafter referred to in Section II of this order as "franchises") to others to engage in the collecting, preparation, assembling or furnishing of consumer reports, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act and interpreted in the accompanying opinion of the Commission, unless respondents (1) obtain written agreements from the purchasers or recipients of franchises (hereinafter referred to in Section II of this order as "franchisees") in which the franchisees agree to conform their practices to the requirements of Section I of this order, (2) retain copies of such agreements during the period of any business relationship with the franchisees, and (3) make such agreements available for inspection and copying on request by Commission representatives.

B. (1) Obtain from each of the respondents' franchisees existing in such capacity on the day this order is served on respondents, the written agreements of the franchisees to conform their practices to the requirements of Section I of this order, (2) retain copies of such agreements during the period of any business relationship with the said franchisees, and (3) make such agreements available for inspection and copying on request by Commission representatives.

C. Discontinue any further business relationship with any franchisee described in paragraph II.B. above which has failed to comply with paragraph II.B. within sixty (60) days of the service of this order upon respondents.

D. Discontinue any further business relationship with any current or future franchisee which fails to comply with the terms of Section I of this order.

PART III

It is further ordered, That respondents Ralph R. Howard and Howard Enterprises deliver a copy of this order to cease and desist to all present and future employees of said respondents engaged in the preparation and/or furnishing of consumer reports, and that said

respondent secure a signed statement acknowledging receipt of said order from all such personnel.

PART IV

It is further ordered, That respondents deliver a copy of this order and a copy of the Fair Credit Reporting Act to each of their present franchise or license holders within thirty days, to all future franchise or license holders, and to any entity connected with said respondents who distribute consumer reports as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act and interpreted in the accompanying opinion of the Commission.

PART V

It is further ordered, That respondents notify the Commission at least thirty days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

PART VI

It is further ordered, That the respondents herein shall, within sixty days after service of this order, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

IN THE MATTER OF
FEDDERS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-2971. Complaint, June 14, 1979 — Decision, June 14, 1979*

This consent order, among other things, requires an Edison, N.J. manufacturer and distributor of various products, including split system heat pumps, to offer, without charge, a replacement defrost cycle switch to all current owners of split system heat pumps manufactured by Fedders between November, 1975 and June 1, 1978; to extend a full warranty on the sealed system of the heat pump until May 1, 1980 to those purchasers who elect installation of the new defrost switch; and to reimburse all past or current owners of the affected heat pumps for any repair to the sealed system of the unit for which the owner has paid. The company must mail notices to current and past owners of the affected heat pumps to let them know about the remedial program, and advertise the program in national magazines if a sufficient number of owners cannot be reached by letters.

Appearances

For the Commission: *Robert S. Blacher* and *Gary M. Laden*.

For the respondent: *Benjamin Zelenko*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Fedders Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint, the following definitions shall apply:

"Split system heat pump" shall mean a central residential heating/cooling air conditioner having a condenser section installed out-of-doors which includes an air pressure defrost cycle switch and a matching evaporator section installed indoors manufactured by

* Reported as modified by Commission order dated August 8, 1979.