

Complaint

96 F.T.C.

IN THE MATTER OF
EQUIFAX INC.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATION OF THE FAIR CREDIT REPORTING ACT AND SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket 8954. Complaint, Feb. 21, 1974—Final Order, Dec. 15, 1980

This order requires, among other things, an Atlanta, Ga. consumer credit reporting firm to cease misrepresenting the identity of its investigative personnel; improperly providing its customers with updated consumer report information; and rewarding or punishing its employees on the basis of the amount of adverse information collected and included in their reports on consumers. The order further requires that the company cease failing to make statutorily required disclosures to consumers requesting information concerning their credit status; provide such consumers with all the information in its files; and reinvestigate any disputed item of information promptly.

Appearances

For the Commission: *Robert W. Russell, Virginia M. Conway and David G. Grimes, Jr.*

For the respondent: *Willis B. Snell, Francis M. Gregory, Jr., Michael L. Denger and Shelley Zena Green, Sutherland, Asbill & Brennan, Washington, D.C.*

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 Retail Credit Company, a corporation, hereinafter referred to as respondent, has 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 in that respect as follows:

DEFINITIONS

PARAGRAPH 1. For the purpose of this Complaint the following definitions apply:

(a) "consumer reporting agency"—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.

(b) "investigative personnel"—individuals, including, but not necessarily limited to, respondent's Field Inspectors, Field Representatives, Fee Inspectors and Claims Inspectors, engaged in the preparation of consumer reports and other reports.

(c) "consumer report"—any written, oral, or other communication of any information 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, (2) employment purposes, or (3) other purposes authorized under Section 604 of the Fair Credit Reporting Act.

(d) "investigative consumer report"—a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such item of information.

(e) "claims report"—a report containing information prepared for an insurance company on an insured for the purpose of determining the validity of a claim for a benefit filed under an existing insurance policy and/or utilized in the negotiation of a settlement of said claim.

(f) "medical information"—information or records obtained directly or indirectly from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities.

(g) "adverse information"—negative or derogatory information which may have, or may reasonably be expected to have, an unfavorable bearing on a consumer's eligibility or qualification for a benefit such as insurance, including information which may result or which may reasonably be expected to result in a denial of or increased cost for such benefit.

PAR. 2. Respondent is a corporation, organized existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 1600 Peachtree St., N.W., Atlanta, Georgia.

PAR. 3. Respondent is a consumer reporting agency as defined herein, with approximately 300 branch offices and 1500 other offices

located in every State of the United States. Respondent, the nation's largest company in the consumer reporting industry, is engaged in the business of obtaining, maintaining and selling information about consumers to over 84,000 business customers. Respondent employs approximately 8500 investigative personnel who interview approximately 200,000 individuals daily and prepare about 35 million reports per year. Through its nationwide network of offices, respondent has the capacity to provide information on 98 percent of the population of the United States. Its revenues for 1972 are listed at 195 million dollars, resulting in gross income of over 17 million dollars.

PAR. 4. In the ordinary course and conduct of its business, as aforesaid, respondent causes and for some time in the past has caused reports, including consumer reports, investigative consumer reports and claims reports, as defined herein, to be distributed through the mail from its branch offices and other offices located in all fifty states and the District of Columbia, to its customers located in various other States of the United States.

Therefore, respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in the aforesaid products and services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Four above, are incorporated by reference as if fully set forth herein verbatim:

PAR. 5. In the ordinary course and conduct of its business, as aforesaid, respondent, through its investigative personnel, prepares reports, including consumer reports, investigative consumer reports and claims reports, by interviewing the consumer and others telephonically or in person. In these interviews, respondent's investigative personnel, in certain instances, represent, directly or by implication, that:

1. they are agents or employees of the company to which the consumer has applied for a benefit, such as insurance; and/or
2. the information furnished by the consumer or others during interview, will be used exclusively by the company to which the consumer has applied for a benefit, such as insurance.

PAR. 6. In truth and in fact:

1. respondent's investigative personnel are not agents or employees of the company to which the consumer has applied for a benefit; and/or
2. the information furnished by the consumer or others during an interview, will not be used exclusively by the company to which the consumer has applied for a benefit. The information is added to respondent's files for future reference in connection with any subsequent requests by other customers for reports on the consumer, who is the subject of the interview.

The practice by respondent's investigative personnel of failing to disclose both their identity and/or the full use to be made of the information obtained during the interviews, leads consumers and others into the false and mistaken belief that they are providing information directly to the agent or employee of a company which will use the information exclusively in determining the consumer's eligibility for a benefit. Some of those interviewed would have elected to provide information directly to said company rather than to respondent had the true identity of the interviewer, or the fact that the information obtained is to be added to respondent's files for future reference, been known.

Therefore, the representations set forth in Paragraph Five above, were and are unfair, false, misleading and deceptive in violation of Section 5 of the Federal Trade Commission Act.

PAR. 7. In the ordinary course and conduct of its business, as aforesaid, respondent's investigative personnel, in the preparation of certain reports such as claims reports, employ an interview technique whereby they interview consumers and others and represent, directly or by implication, that the investigation is for a specific purpose, such as a "routine credit check" or other similarly unrelated purpose.

PAR. 8. In truth and in fact, the purpose of the investigation is often other than as represented. For example, in certain instances, the purpose of the investigation is an evaluation of the consumer's claim for loss or injury under the terms of an existing insurance policy and the purpose of the interview is to observe the consumer's physical appearance, movements, or mental or physical capabilities. Such a claim for loss or injury is of high significance to the consumer. The use of the interview technique, as aforesaid, results in information being gathered under false pretenses.

Furthermore, information gathered in this way will be retained in respondent's files for possible use in reports for other customers.

Therefore, the practice set forth in Paragraph Seven above, wa

and is unfair, false, misleading and deceptive in violation of Section 5 of the Federal Trade Commission Act.

PAR. 9. In the ordinary course and conduct of its business, as aforesaid, respondent, by and through its reports, its promotional literature and other means, represents, directly or by implication, to its customers, that its reports are compiled from information obtained through in-person interviews with the consumer who is the subject of the report, or his friends, neighbors, or associates; from direct observation of the consumer's home, neighborhood, or other physical surroundings; or through interviews with the "sources" indicated on the reports. Typical and illustrative of these representations, but not all inclusive thereof, are the following statements found in respondent's actual reports:

- (1) the consumer presents a "healthy appearance with no obvious [sic] impairments or apparent tensions";
- (2) the consumer's "residence seems small and inadequate"; and
- (3) the consumer "had a white gauze bandage tacked over his eye to shield it from the light".

The representations as to the manner in which the information in the reports is gathered, i.e., through in-person interviews with the consumer who is the subject of the reports, or his friends, neighbors, or associates; from direct observation of the consumer's home, neighborhood, or other physical surroundings, or through interviews with the "sources" indicated on the reports, are relied upon by users, such as insurance companies, in evaluating the validity or accuracy of the information in the reports. Moreover, in certain instances, users rely upon the information in the reports to determine the consumer's eligibility for a benefit, such as insurance, or to increase the rate for, or to cancel the consumer's insurance coverage.

PAR. 10. In truth and in fact, in certain instances:

- (1) the consumer who is the subject of the report, or the consumer's friends, neighbors or associates are interviewed only telephonically, rather than in person, as represented;
- (2) the consumer's home, neighborhood or other physical surroundings are not observed directly as represented; and
- (3) all "sources" listed on respondent's reports are not interviewed, as represented, either in person or telephonically.

Users would not give as much weight to or rely as heavily on the information in the reports in making a decision as to the consumer's eligibility for a benefit such as insurance had the manner in which

the reports were prepared been truthfully and factually represented. In fact, in certain instances, users would not reject a consumer's application for a benefit such as insurance or increase the rate for or cancel the consumer's insurance coverage, had the manner in which the information was gathered been truthfully and factually represented.

Therefore, the representations set forth in Paragraph Nine above, were and are unfair, false, misleading and deceptive in violation of Section 5 of the Federal Trade Commission Act.

PAR. 11. In the ordinary course and conduct of its business, as aforesaid, respondent obtains from insurance companies photocopies of statements signed by consumers authorizing the release of medical information to those insurance companies, but which are silent as to the release of said information to anyone else, including respondent. With these photocopies, respondent obtains medical information from consumers' doctors, clinics or other medical facilities, forwards the information to the named insurance companies, and retains a copy of such information in its files.

PAR. 12. In connection with the above practice, respondent represents, directly or by implication, to physicians or other medical personnel, that the information is being obtained for the exclusive use of the named insurance company to which the consumer executed the authorization. Moreover, consumers executing the authorizations for release of confidential medical information believe that the information will be obtained and used by the named insurance company exclusively.

PAR. 13. In truth and in fact, in certain instances, the information is not obtained for the exclusive use of the insurance company to which the consumer executed the authorization. A copy of the medical information is retained in respondent's files and has been, in certain instances, used in the preparation of subsequent reports for other customers. Some consumers would not have authorized the release of such confidential information had they known it would be obtained and utilized by a third party such as a consumer reporting agency.

Therefore, the acts and practices set forth in Paragraphs Eleven and Twelve above, were and are unfair, misleading and deceptive in violation of Section 5 of the Federal Trade Commission Act.

PAR. 14. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute unfair methods of competition in commerce and unfair or deceptive

acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violations of the Fair Credit Reporting Act and of the Federal Trade Commission Act, the allegations of Paragraphs One through Three are incorporated by reference as if fully set forth herein verbatim:

PAR. 15. Respondent in the ordinary course and conduct of its business as aforesaid is now, and subsequent to April 25, 1971 has been, engaged in the preparation, offering for sale, sale and distribution of information on consumers, including consumer reports and investigative consumer reports, as defined herein.

PAR. 16. In the ordinary course and conduct of its business, as aforesaid, respondent provides its customers what it terms a "Voluntary Follow-Up Service". Through this and other similar services, respondent, periodically and on an unsolicited basis, submits to customers such as insurance companies, adverse information about consumers upon whom previous consumer reports have been furnished. At the time said information is furnished, respondent has no reason to believe that it will be used in connection with a business transaction such as the underwriting of insurance. Rather, this additional information is submitted to customers to demonstrate the value or utility of respondent's reporting service.

PAR. 17. By and through the use of the aforesaid practice, respondent has furnished, and is furnishing, consumer reports and investigative consumer reports, as those terms are defined herein, to persons whom it has no reason to believe intend to use the information for one of the permissible purposes set out in Section 604 of the Fair Credit Reporting Act, and respondent thereby was and is in violation of that Section of the Act.

PAR. 18. In the ordinary course and conduct of its business, as aforesaid, respondent, in certain instances, reports to its customers the existence of items of adverse information, as defined herein, which antedate the consumer report by more than seven years. Typical and illustrative of the practice described herein, but not all inclusive thereof, are the following:

1. The inclusion of the following notice in some of its consumer reports:

compliance with the Fair Credit Reporting Act no additional information can be

reported from this former employer covering employment experience prior to seven years ago.

2. The furnishing of photocopies of motor vehicle reports reflecting masked out or obliterated driving violations which antedate the report by more than seven years, but which indicate the existence of said obsolete violations.

PAR. 19. By and through the use of the aforesaid practices, respondent has reported and is reporting the existence of items of obsolete adverse information in violation of Section 605 of the Fair Credit Reporting Act.

PAR. 20. In the ordinary course and conduct of its business, as aforesaid, respondent employs certain procedures in the preparation of consumer reports and investigative consumer reports, as defined herein, which do not assure the maximum possible accuracy of the information concerning the individuals about whom the reports relate. Typical and illustrative of such procedures, but not all inclusive thereof, are the following:

(1) a salary/production system which requires or compels its investigative personnel, as defined herein, to complete or prepare an unreasonable number of consumer reports or investigative consumer reports, or to average an unreasonable number of said completed reports per day or other period;

(2) quotas for adverse information, as defined herein, which require or compel its investigative personnel to complete or prepare a certain proportion of consumer reports or investigative consumer reports, containing negative or derogatory information about the consumers who are the subject of the reports; and

(3) paying or "crediting" an investigator for a reinvestigation conducted pursuant to Section 611 of the Fair Credit Reporting Act only if the reinvestigation proves that the investigator was accurate in his initial investigation.

PAR. 21. By and through the use of these aforesaid procedures, and others similar thereto, but not expressly set out herein, respondent imposes requirements and pressures upon its investigative personnel which are inconsistent with accurate reporting and which have the tendency and capacity to promote incomplete or inaccurate reports. Therefore, respondent has failed and is failing to adopt reasonable procedures to assure the maximum possible accuracy of the information concerning the individuals about whom the reports relate, as required by Section 607(b) of the Fair Credit Reporting Act.

PAR. 22. In the ordinary course and conduct of its business, as

aforesaid, respondent has been and is being requested by consumers, who properly identify themselves, to disclose information in its files on the consumers. In response to these requests, in certain instances, respondent fails to clearly and accurately disclose the nature and substance of all information (except medical information) in its files at the time of the request. Further, unless specifically requested by the consumer in each instance, respondent fails to disclose:

(1) the sources of the information (except investigative sources, which need not be disclosed); and

(2) the recipients of any consumer report on the consumer which it has furnished for employment purposes, within the two-year period preceding the request, and for any other purpose within the six-month period preceding the request.

PAR. 23. By and through the use of the practices described in Paragraph Twenty-Two above, respondent has violated and is violating the provisions of Section 609 of the Fair Credit Reporting Act.

PAR. 24. In the ordinary course and conduct of its business, as aforesaid, respondent, in certain instances, has failed to disclose the information in consumers' files pursuant to Section 609 of the Fair Credit Reporting Act when requested to do so by telephone, or has discouraged such disclosures. Further, respondent has refused and is refusing to make said disclosures at offices designated by respondent as "Sub-Offices", even when some of those offices are staffed by full-time office personnel and a person in a supervisory capacity. Rather, respondent makes disclosures only at offices designated by it as "Branch Offices".

PAR. 25. By and through the use of the practices described in Paragraph Twenty-Four above, respondent has violated and is violating the provisions of Section 610 of the Fair Credit Reporting Act.

PAR. 26. In the ordinary course and conduct of its business as aforesaid, respondent, in certain instances:

(1) fails to reinvestigate items of information, the completeness or accuracy of which is disputed by the consumer;

(2) fails to record the current status of disputed information and to promptly delete information which can no longer be verified;

(3) fails to clearly and conspicuously disclose to the consumer his right to request that respondent furnish notification that a previously reported item of information has been deleted or that respondent furnish a statement prepared by the consumer (or a clear and

accurate codification or summary thereof) to recipients of previous reports; and

(4) fails to provide said notifications to recipients of previous reports (within the past two years for employment purposes and the past six months for any other purpose) when specifically requested to do so by the consumer.

PAR. 27. By and through the use of the practices described in Paragraph Twenty-Six above, respondent has violated and is violating the provisions of Section 611 of the Fair Credit Reporting Act.

PAR. 28. In the ordinary course and conduct of its business as aforesaid, respondent retains file copies of the information contained in the consumer reports and claims reports which it prepares for its customers. Respondent incorporates all of said information into the same filing system, making no attempt to segregate the consumer report information from the claims report information. In the preparation of subsequent consumer reports and claims reports, respondent uses all of its file information interchangeably, including the use of claims report information in the preparation of consumer reports and the use of consumer report information in the preparation of claims reports.

However, with respect to said claims reports, respondent fails to observe the provisions of the Fair Credit Reporting Act which regulate the preparation and dissemination of information which is used or expected to be used in consumer reports.

PAR. 29. By and through the use of the practices described in Paragraph Twenty-Eight above, respondent has failed and is failing to comply with Sections 605, 607(b) and 614 of the Fair Credit Reporting Act with respect to the preparation of consumer reports, and Sections 604 and 607(a) of that Act with respect to the dissemination of consumer reports.

PAR. 30. The acts and practices set forth in Paragraphs Fifteen through Twenty-Nine, above, were and are in violation of the Fair Credit Reporting Act, and pursuant to Section 621(a) of that Act, said acts and practices constitute unfair or deceptive acts or practices in commerce in violation of Section 5(a) of the Federal Trade Commission Act.

INITIAL DECISION BY THEODOR P. VON BRAND, ADMINISTRATIVE
LAW JUDGE

NOVEMBER 11, 1977

PRELIMINARY STATEMENT

This is a case under Section 5 of the Federal Trade Commission Act (FTCA) and the Fair Credit Reporting Act (FCRA). The Commission complaint, dated February 21, 1974, charges Equifax Inc., a consumer reporting agency, with violation of these statutes in connection with the preparation, dissemination and sale of consumer reports¹ and consumer investigative reports.² Respondent's answer denied the material allegations of the complaint.

Count I of the complaint, which contains the charges of Section 5, FTCA violations, involves allegations of deceptive and unfair acts. The charges are essentially the following: [3]

1. Respondent's investigative personnel, it is alleged, have misrepresented in certain instances, to consumers that they are the agents or employees of the companies to which the consumers have applied for benefits such as an insurance company and/or that the information furnished by the consumers or others during interviews will be used exclusively by the companies to which the consumers have applied for benefits. It is further alleged that some of those interviewed would have elected to provide the information directly to the companies from which benefits were sought rather than to respondent had they known the true identities of the interviewers or that such data would be added to respondent's files for future reference (Complaint, Pars. 5, 6).

2. It is alleged that respondent's investigative personnel have misrepresented the purposes of investigations by representations such as that a credit check was being conducted when, in fact, in certain instances, the purpose of the investigation was to evaluate a consumer claim for loss or injury under an insurance policy and the object of the interview was to observe the consumer's appearance

¹ "(d) 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" (Section 603(d) FCRA).

² "(e) The term 'investigative consumer report' means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information" (Section 603(e) FCRA).

and the consumer's mental or physical capacity in connection with such investigation (Complaint, Pars. 7, 8).

3. Respondent, it is alleged, has represented that interviews are conducted in person rather than on the telephone, that direct observation of the consumer's environment is conducted and that all sources of information listed are seen. The complaint charges that, in certain instances, interviews were conducted on the telephone rather than in person, that the consumer's environment was not directly observed, and the sources listed on the consumer report were not interviewed in person or on the telephone. The complaint alleges that users of such reports would not have given as much weight to the information provided by respondent had the manner in which such reports were prepared been truthfully and factually represented (Complaint, Pars. 9, 10). [4]

4. It is alleged that respondent, through the use of authorizations, for the release of medical information, obtained from insurance companies,³ represents directly or by implication to medical personnel from which such information is sought that the data is secured for the exclusive use of such insurance companies. The complaint charges that consumers executed such authorizations on the basis of that belief. It is further alleged that, in truth and in fact, the information is not obtained for the exclusive use of the insurance company to which the authorization was executed but is retained by respondent and, in certain instances, is utilized in the preparation of subsequent reports for different customers of respondent. Some consumers, it is alleged, would not authorize the release of such confidential information if they knew it would be utilized by a third party such as a consumer reporting agency (Complaint, Pars. 11, 12, 13).

The Count II charges focusing specifically on the FCRA may be summarized as follows:

1. Respondent, it is alleged, furnishes information to persons which it has no reason to believe intend to use such data for one of the permissible purposes set out in Section 604, FCRA (Complaint, Pars. 16, 17).

2. Respondent, it is alleged, reports the existence of adverse obsolete information in violation of Section 605, FCRA (Complaint, Pars. 18, 19). [5]

3. Respondent's requirements and pressures on its investigative

³ According to the complaint, the authorizations obtained by respondent from insurance companies are photocopies of originals signed by the consumers but are silent as to the release of such information to anyone other than the insurance companies, including the respondent.

personnel are inconsistent with accurate reporting and have the tendency and capacity to promote incomplete or inaccurate reporting. As a result, respondent, it is alleged, has failed to adopt reasonable procedures to assure maximum possible accuracy in its reports as required by Section 607(b), FCRA (Complaint, Pars. 20, 21).

4. Respondent, it is alleged, has violated the disclosure provisions of Section 609, FCRA, in certain instances, by failure to clearly and accurately disclose the nature and substance of all information (except medical information) in its files at the time of request. It is further alleged that, unless specifically requested by the consumer in each instance, respondent fails to disclose requested information such as (a) the sources of information (except investigative sources which need not be disclosed); (b) the recipients of any consumer report on the consumer which it has furnished for employment purposes within the 2-year period preceding the request, and for any other purpose within the 6-month period preceding the request (Complaint, Pars. 22, 23).

5. It is alleged that respondent fails to disclose information in the consumer's file pursuant to Section 609 of FCRA when requested to do so by telephone or discourages such disclosures. It is further alleged that respondent refuses to make such disclosures at its "sub offices" even when some of these offices are staffed by full-time personnel and a person in a supervisory capacity. It is further alleged that respondent makes disclosures only at those offices which it has designated as branch offices. These practices, it is alleged, violate Section 610, FCRA (Complaint, Pars. 24, 25). [6]

6. Respondent, it is alleged, has violated Section 611, FCRA, by failing to reinvestigate disputed information; failing to record the current status of disputed information and to promptly delete information which can no longer be verified; failing to clearly and conspicuously disclose to the consumer his right to request that respondent furnish notification that a previously reported item has been deleted or that respondent furnish a statement prepared by the consumer to recipients of previous reports; and finally, by failing to provide notification to recipients of previous reports (within the past 2 years for employment and the past 6 months for any other purpose) when specifically requested to do so by the consumer (Complaint, Pars. 26, 27).

7. It is alleged that respondent's filing system incorporates claim reports and consumer reports in the same file with no attempt to segregate the consumer report information from the claim report information. The complaint charges that in the preparation of

subsequent consumer reports and claim reports that respondent uses all of the file information interchangeably, using claim report information in the preparation of consumer reports and consumer report information in the preparation of claim reports. The complaint alleges that such practices violate the FCRA provisions regulating the preparation and dissemination of consumer reports in Sections 605, 607B, 614, 604 and 607, FCRA (Complaint Pars. 28, 29).

After extensive evidentiary hearings, the record was closed on June 15, 1977. [7]

This matter is now before the undersigned for decision based on the allegations of the complaint, the answer, the evidence and the proposed findings of fact, conclusions, and briefs filed by the parties. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein are rejected. The undersigned, having considered the entire record and the contentions of the parties, makes the following findings of fact and conclusions, and issues the order set out herein.

FINDINGS OF FACT

I. RESPONDENT AND THE NATURE OF ITS BUSINESS

1. Equifax Inc. (formerly Retail Credit Company, a corporation) is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal place of business located at 1600 Peachtree St., NW., Atlanta, Georgia (CX 1445A; Burge 5070).

2. Effective January 1, 1976, the name Retail Credit Company was changed to Equifax Inc. (Burge 4847, 4852).

3. Equifax Inc. is the parent corporation of some 14 companies and divisions, some of which are separately incorporated; some are autonomous operating divisions. While these companies perform in special markets, they are all in the information industry furnishing personal information to parties requiring data on which to base business decisions, primarily in connection with insurance, employment, and credit transactions (Burge 4848; CX 666Z-12). [8]

4. Equifax Services, which was the largest of respondent autonomous units, was a division of Equifax Inc. Its operations are the subject of this proceeding. This division was originally the insurance reporting and commercial reporting arm of Retail Credit Company (Burge 4848).

5. Equifax Services furnished consumer and consumer investigative reports to insurance companies for underwriting purposes.

FEDERAL TRADE COMMISSION DECISIONS

Initial Decision

96 F.T.C.

including life, health, fire, property and automobile insurance. It conducted claim investigations, furnished financial reports, and prepared employment reports, as well as credit reports, in isolated areas where there are few credit bureaus (Burge 4850-51). Reporting on insurance applicants comprised the bulk of its business (CX 679E). Insurance customers were considered its "basic field" (RX 107D).

6. Prior to January 1, 1976, Retail Credit Company had general supervision of the business which became Equifax Services (Burge 4853).

7. On April 1, 1977, Equifax Inc. created a wholly owned subsidiary corporation, Equifax Services, Inc., which provides the reporting services performed before that date by the Equifax Services division (RX 916).

8. Other affiliated companies⁴ are: Equifax Services, Limited, which performs in Canada the same activities as does Equifax Services, Inc. in the United States (Burge 4848); Atwell, Vogel and Sterling, Inc., a company providing reports for audit-inspection and loss control services for property, casualty and inland marine underwriters (RX 107G); Hunnicutt & Associates, Inc., which is in the business of property appraisal and mapping (RX 107G); Physical Measurements, Inc., which furnishes medical examinations in connection with insurance applications (RX 107G); the Credit Bureau [9]Companies, which perform the functions which their name implies (RX 107G-H); Retailers Commercial Agency, whose primary work is making credit reports on the telephone, principally in connection with mortgage loans, and which handles most of respondent's telephone reporting (Knautz 6881-82); Gay and Taylor, which is engaged in claims adjusting services (Trotochaud 6288); Credit Marketing Services, a separate corporation providing credit reporting services to credit grantors; Retrieval Services, a division of respondent providing the service of picking up credit cards from delinquent consumers; Marketing Services, a division of Equifax Inc., doing market research; and International Printing and Distributing, a division of respondent engaged in printing for respondent and commercial printing for outside customers (Burge 4848-49).

Respondent, in the ordinary course and conduct of its business subsequent to April 25, 1971, has been engaged in the preparation, offering for sale, sale and distribution of information on consumers, including consumer reports and investigative consumer reports (CX 1445C).

⁴ evidence was introduced with respect to the operations of these companies.

10. In the ordinary course and conduct of its business, respondent causes and for some time in the past has caused reports including claims reports, and subsequent to April 25, 1971, consumer reports and investigative consumer reports, to be distributed through the mail from its branch offices and other offices located throughout the United States to its customers located in various other States of the United States (CX 1445C).

11. Respondent maintains, and at all times mentioned in the complaint has maintained, a substantial course of trade in the aforesaid services, including consumer reports, investigative consumer reports, and claims reports, in commerce, as "commerce" is defined in the Federal Trade Commission Act (CX 1445C). [10]

12. In 1972, respondent's total revenues were \$195,262,000, and its income before taxes was \$17,460,000. These figures include all of respondent's operations (including Canada) and all of its subsidiaries (CX 1445C). Respondent's total claim volume was \$26,749,557 in 1975 (Trotochaud 6291).

13. Respondent sells information about consumers to business customers numbering in the thousands. As of July 15, 1974, it had approximately 17,000 customers⁵ (CX 1445B).

14. In 1971, respondent issued approximately 22.5 million reports of all types to customers in the United States.⁶ For 1973, the corresponding figure was 21 million.⁷ (CX 1445B).

15. During the period from March 1971 to May 1974, respondent maintained files containing information concerning approximately 45 million persons⁸ (CX 1445B).

II. THE REPORTS AND SERVICES FURNISHED BY RESPONDENT

16. The reports prepared by respondent may generally be categorized as follows: underwriting reports to facilitate underwriting by insurance companies, employment or personnel selection reports, financial control reports and claim reports (see generally Stansbury 6735 [11]et seq.; Hopp 6683 et seq.; Knautz 6870 et seq.; Trotochaud 6724 et seq.).⁹

⁵ These figures pertain to respondent's operations in the United States, and do not include figures obtained from respondent's subsidiaries (CX 1445B).

⁶ This does not include figures obtained from respondent's subsidiaries (CX 1445B).

⁷ This figure pertains to respondent's operations in the United States, and does not include figures obtained from respondent's subsidiaries (CX 1445B).

⁸ This figure pertains to respondent's operations in the United States, and does not include figures obtained from respondent's subsidiaries (CX 1445B).

⁹ This section is not intended to catalogue exhaustively all of respondent's reports. It is intended to be illustrative and to generally outline the range of services available and the more significant reports which respondent offers.

A. The Underwriting Reports

17. Respondent's underwriting reports fall into two major groups: Life and Health reports and Fire and Casualty reports (see RX 316A-D, 315A-D). For such reports, respondent charges basically two rates: a "L & H charge for standard or regular reports in any given locality" (RX 315A) and a "fire and casualty rate charge for standard or regular reports in any given locality" (RX 316A). In addition, an hourly fee "per hour for time required on special or expanded investigations" may be charged (RX 315A, 316A).

18. In 1973, the L & H charge was \$5.35 and the fire and casualty charge was \$5.60 (RX 566 III-7, 315, 316).¹⁰ Reports charged at the basic rate, e.g., \$5.35, are also referred to in the record as "single fee" reports.

19. Respondent considers two of its underwriting reports, the Regular Life report and the Regular Auto report, which are the most frequently handled reports, as its two basic services (RX 566 III-6).

(1) Life Reports

20. CX 422A is the Form 1 basic life report used until the end of 1975. It was used to aid respondent's customers in the underwriting of small life insurance applications (Stansbury 6746). The basic rate was charged for this report, and there was a requirement that two sources be contacted as part of its preparation. [12]

21. The applicant or an adult member of his household counted as a source. If the applicant were contacted and interviewed, then a minimum of one additional source had to be interviewed¹¹ (Stansbury 6747). The basic life report could be handled at either the applicant's business or neighborhood location or at both (Stansbury 6748).¹² Time coverage¹³ in the case of this report was 2 years, meaning that the sources interviewed had to have been acquainted with the applicant for 2 years (Stansbury 6745, 6748).¹⁴

22. The basic life report was to be completed by in-person handling by the field representative, but if this proved impossible, the telephone could be used (Stansbury 6750).

23. The Streamlined Life report was a report whose rate was 25

¹⁰ In certain locations, the L & H and F & C charge may have been higher or lower (RX 315B, 316B).

¹¹ An employment source would then be sufficient to complete the report.

¹² The term "location" in this context means the general area where the interviews were to be handled. In the case of some reports, the interviews may have been required at more than one location, i.e., a business and neighborhood location (Stansbury 6748).

¹³ Time coverage is the total time sources need to have known the subject of the report required in the case of a particular report service offered by respondent (Stansbury 6745).

¹⁴ Such coverage for a 2-year period could have been achieved even though each source knew the applicant for only one year provided that together they covered the 2-year time span (Stansbury 6745).

cents less than basic. It was designed to meet the desire for a full scope investigation with limited feedback at a lesser price. Remarks were not covered in narrative form, and the answers were given by checking various blocks. The report could be handwritten, and the heading on the report was prepared by the customer (Stansbury 6765-66). [13]

24. The NORS Service or Notification or Report Service was a service where a notification, but no report, was filed when there were no unfavorable facts found and the insurance application was relatively small. This service was used in connection with basic rate reports or reports less than basic rate (Stansbury 6775-76).

25. The RAPCON Service, like NORS, was designed to speed up handling and to limit clerical functions. It was transmitted by telecommunications if the report was completely favorable to the subject. In the event that the case was not favorable, a report was filed (Stansbury 6776).

26. The NORS Service was generally priced at less than the basic rate while RAPCON was a few cents over the basic charge (Stansbury 6777).¹⁵

27. Other life reports calling for more information or greater detail were priced at multiples of the basic rate; such reports are referred to in the record as multiple fee reports. For example, CX 487, the "Intermediate Life or Health Report" was priced at double the basic rate; its time coverage was 3 years, and the minimum number of sources to be seen was three. On this report, two locations were required; namely, a business and a residential location. The purpose of this report was to give more information than the basic life report on applications for insurance policies with larger limits (Stansbury 6770-71).

28. The Special Narrative Life report, CX 412, one more step up the ladder, had time coverage of 5 years, the minimum sources to be contacted were four, and the required locations were business and residential. It was priced at three times the basic rate. The telephone [14] could be used only after personal efforts had been made to complete the handling (Stansbury 6771-73). This report had greater detail than the Intermediate report because of the narrative treatment (id.).

29. CX 420, the Special Life Specific Rate report, was priced at six times the basic rate. The required number of sources was six. Tim

¹⁵ The NORS Service was less than basic because no report had to be filed. In the case of RAPCON, the NOI rate applied, but there was a surcharge for the RAPCON telecommunications service. Generally, NORS was 25 cents less than the basic charge (Stansbury 6777).

coverage was 7 years, and the locations to be covered were two or more (Stansbury 6779).

30. CX 432, the Special Life report, was an hourly rate report. The time coverage was a quarter of the applicant's lifetime, and as many sources and locations as needed to develop the information were required. This report was the "Cadillac" or the top of the line of the Life Series. It was a service designed to get complete information in the case of larger insurance applications with particular emphasis placed on finances (Stansbury 6781).

31. Subjective features, such as the habits of the person being reported on, were covered equally on all the reports (Stansbury 6780).¹⁶

(2) Health Reports

32. CX 413 was the basic health report. It was priced at the basic rate, had time coverage of 1 year and required a minimum of two sources. It was comparable in scope to the basic life report but put emphasis on factors bearing on morbidity, viz., frequency of disability, rather than mortality. It was used in connection with disability or loss of time insurance (Stansbury 6785-87). There was greater emphasis on finances in this health report than in the basic life report in order to throw light on the motivation to work following a disability (Hopp 6786-87). [15]

33. CX 427 was the Special Narrative Health report. It was priced at triple the basic rate, had time coverage of 5 years and required a minimum of four sources (Hopp 6795). The depth of the report was greater because of the additional time coverage and because more emphasis was placed on finances than in the case of single fee reports (Hopp 6796).

(3) Casualty and Property Reports

34. Respondent serves the entire property and casualty insurance industry embracing some 27 different types of insurance policies ranging from automobile through property insurance (Hopp 6784).

a. Automobile Reports

35. Respondent's automobile reports fall into two general categories and, within each, there are a variety of different reports whose use depends upon the coverage desired by a particular insurance

¹⁶ Subjective information is information obtained through outside sources and pertains to an individual's personal activities (Stansbury 6780-81).

company. In the first group, respondent offers full automobile services which consist of reports of an investigative consumer nature, including general information on the applicant. The second category comprises the classification type service, focusing primarily on the uses and drivers of vehicles in a household, *e.g.*, number of cars and their principal operators (Hopp 6685).

36. There are several basic full auto reports. The principal of these reports is Form 6033, CX 479, which is the most frequently used full auto report form (Hopp 6685, 6698).

37. In a full auto report, the general requirements are a year's time coverage and generally an interview with the applicant and one outside source. In the event that the applicant cannot be interviewed, then a minimum of two outside sources is required (Hopp 6686).

38. Respondent has approximately 16 to 18 report forms for its full or basic auto reports (Hopp 6687). Most of the full reports are at the flat rate or property and casualty rate. There are also some reports at multiples of that rate (Hopp 6688). [16]

39. Certain of the full automobile reports may be filled out in longhand, and these are referred to as streamlined reports (Hopp 6689).

40. The classification reports facilitate the insurance company's classification and rating system; namely, the determination of in which classification category a particular risk falls. This decision is based on such information as age group, marital status, usage of car, approximate mileage and where the car is kept (Hopp 6690).

41. In terms of the number of auto reports completed in 1972, classification type reports represented approximately 5 percent of respondent's total volume (Hopp 6691).

42. There is a wide variety of classification report forms because classification categories differ by insurance companies and in different parts of the country. For example, the institution of "no fault" insurance in certain states necessitates separate forms for those states. Respondent uses approximately 50 different report forms in connection with the classification and rating services (Hopp 6691). Some auto classification reports are telephone reports, whereas others are to be handled on the street (Case 6023-24).

43. In the case of the classification service, requirements as to interviews with the applicant, time coverage and other factors vary widely depending upon the desires of the particular customer of respondent (Hopp 6691-92).

44. The classification reports are completed in longhand since they primarily consist of "yes" or "no" answers with few or no

narrative remarks. Generally, they are less expensive than the full auto reports (Hopp 6692). There is a wide variety of prices available in this category of reports based upon the effort required (Hopp 6693). [17]

b. Property Line Services

45. In the property line services, respondent offers five basic services (Hopp 6708-09), but 100 or more reports are available in this line (Hopp 6716).

46. The first group is comprised of the Modified Short Form report, which requires only observation of the property to be insured and a photograph, if requested.¹⁷ No interview is required, and such reports are completed in longhand (Hopp 6708-09). These reports are charged at less than the basic rate because the effort factor is not considered as great as in the standard report (Hopp 6709).

47. The second category is respondent's Dwelling, Fire Short Form report, which is also an observation service. This report, over and above the Modified Short Form information, includes an estimated replacement cost figure and certain construction features. Outside sources are not involved in the preparation of this report, but an interview with the applicant is to be attempted. This report also is priced at less than the basic fee (Hopp 6709-10).

48. The third category is the Dwelling Fire report, which is respondent's standard service and is considered a full scope report requiring a year's coverage, contact with the insured and outside sources, or with outside sources only, if the insured cannot be interviewed. It is rated at the property and casualty rate and is typed (Hopp 6710). [18]

49. The fourth category is the Streamlined Homeowner's report, the cost of which is somewhat greater than the fire report. This report, in addition to information relevant to fire coverage, includes information on theft and liability exposure (Hopp 6711). The Streamlined Homeowner's report requires an interview with the applicant and an outside source, or one outside source if the applicant can't be interviewed. One-year coverage is required, and it is done in longhand (Hopp 6711).

50. The fifth report is a Full Homeowner's report. The scope of the information covered is basically the same as in a Streamlined report, but the report is typed. It is more expensive than a Streamlined report (Hopp 6711).

¹⁷ In the case of all property reports, a photograph is available, but there is an extra charge for that service (Hopp 6712).

B. Employment or Personnel Selection Reports

51. Prior to January 1, 1976,¹⁸ respondent offered three basic employment reports to the insurance industry. The Agent L & H report, the Special Narrative Agent report and the Special Agent report (Knautz 6873).

52. The Agent L & H report had a year's time coverage, and the minimum sources were the subject of the report and file information or two outside sources. The report was priced at the personnel rate¹⁹ (Knautz 6873-74).

53. The Special Narrative Agent report had time coverage of 5 years, and the minimum number of sources to be contacted was three. It was priced at three basic L & H rates (Knautz 6874). [19]

54. The Special Agent report, priced at an hourly rate, had time coverage of a quarter of a subject's lifetime, and as many sources as necessary were to be seen. The customer had the option of setting a limit on the amount of time spent by the field representative (Knautz 6875).

55. Reports in the personnel selection area not confined to the insurance industry, afforded a similar spectrum for depth of coverage. Prices for these reports ranged from a single fee "personnel rate"²⁰ when the investigation was conducted at one location, to multiple fee and hourly rates²¹ and flat rate reports²² (RX 328A; Knautz 6878-81). [20]

¹⁸ Subsequent to this date, respondent restructured the agency services (Tr. 6875).

¹⁹ See page 18, for definition of "personnel rate."

²⁰ The "personnel rate" as of January 1, 1972, was \$4.85; the "security personnel selection rate" was \$5.25; and the hourly rate was \$10.20 (RX 328B).

²¹ The number of fees or personnel rates to be charged for certain reports depended on the number of locations visited by the field representative. *E.g.*,

<i>Service</i>	<i>Charge Basis</i>
PERSONNEL SELECTION REPORTS	
A. One location	Personnel Rate
B. Two or three locations	Double Personnel Rate
C. Four or more locations	Triple Personnel Rate
D. Correspondent territory	Maximum Charge Double Personnel Rate

(Price List—June 1, 1972, RX 328A.)

²² If a customer chose a "flat rate report," he received a full 5-year report regardless of the number of locations visited. The field representative would be compensated for normal amount of time spent and on a per-location basis. If the field representative went to more than one location, he would be compensated on the number of locations visited (Knautz 6879-80). Respondent had the following flat rate personnel selection services available as of June 1, 1972:

PERSONNEL SELECTION REPORT (Report covers most recent 5 years)	\$21.45
SECURITY PERSONNEL SELECTION REPORT (Report covers most recent 5 years)	\$24.50
SPECIAL PERSONNEL SELECTION REPORT	

(Continued)

C. Financial Control Services

56. Respondent's financial control services include audit and validation services, credit reports, and collection aid services (Knautz 6892).

57. The audit and validation service is essentially a physical audit of inventory for institutions such as banks, which engage in inventory financing (Tr. 6893).

58. Respondent also offers business credit reports, character financial reports and individual credit reports (Knautz 6893).

59. Respondent's collection aid services include current asset and income reports, slow payer reports, credit card pickups and location reports (Knautz 6895).

D. Respondent's Claim Service

60. Respondent's claim service generally includes investigations relating to death, health, disability, sickness, accident and continuing disability claims (Trotochaud 6291). Respondent's claim service is sold to two segments of the insurance industry: the life and health companies and those firms engaged in the fire and casualty field (Trotochaud 6291-92).

61. In the life and health fields, respondent does primarily reports on first-party claimants, viz., a claimant insured by the company with whom he has filed a claim. Third party claim investigations involving individuals filing claims against companies other than the ones with which they are insured, are generally conducted for casualty insurance companies such as auto insurers (Trotochaud 6298). [21]

62. Respondent charges for its claim reports on a flat rate and an hourly basis. Approximately 65 percent of respondent's claim revenues are derived from hourly rate investigations where a charge is made for the time spent. The remaining claim investigations are charged at a flat rate which may be a single claim rate or multiples thereof²³ (Trotochaud 6300-01).

63. The Late Progress report is an example of a single flat fee report. It is designed to give the insurance company information as to whether a total disability claimant is still disabled and still alive.

(Report covers most recent 1/4 lifetime)	\$47.00
SALESMEN SELECTION REPORT	
(Report covers most recent 1/4 lifetime)	\$49.00
EXECUTIVE QUALIFICATION REPORT	
(An exhaustive tailor-made investigation, specially presented)	\$350.00
(RX 328A.)	

²³ In 1972, the single claim rate was \$4.85, and the hourly rate charge was \$10.20 (RX 337B).

On this type of investigation, two outside sources are to be contacted (Trotochaud 6301).

64. A Continuance of Disability report is an example of a double claim rate report. On that report, respondent attempts to determine whether a claimant, accepted as disabled, is still disabled. In the case of this report, at least two outside sources and the claimant are to be seen (Tr. 6301-02).

65. The Personal Injury report is an example of a report for which four single claim rates are charged. It is used in the case of third-party claimants; outside sources and the claimant are to be interviewed. The service also includes a record check for such items as past accidents (Trotochaud 6302-03).

66. Hourly rate claim reports are termed "special investigations." Typically, in the case of a death claim investigation, there is a limit of \$95.00. The field representative may expend time up to the limit, and the customer is contacted for authorization to continue in the event the investigation is not completed (Tr. 6303). There is no minimum number of sources to be contacted in the case of an hourly rate claim report (Tr. 6304). [22]

67. Field representatives have, as a practical matter, set a time limit on flat rate claim reports. The charge for a double claim rate report is approximately the same as the hourly charge. In the case of a double fee report, the field representative generally works the case for an hour, and if more remains to be done, the customer is requested to advise whether additional work is desired (Trotochaud 6306-07).

68. The Underwriting Medical History report is a service within the jurisdiction of the Claims Department, although it is not a claim report. In it, respondent secures medical information from sources such as physicians and hospitals, in order to expedite the flow of medical information to insurance companies (Trotochaud 6282).

III. RESPONDENT'S ORGANIZATION AND STRUCTURE

69. Respondent operates essentially at three levels: its Home Office; the operating regions; branch offices, suboffices and detached local units (DLUs) (CX 666D).

70. The Home Office, located in Atlanta, Georgia, formulates policy for the company, controls its operations and performs service functions such as accounting, sales, research, education and other staff work, which can be best done from a central point (CX 666D).

71. There are 15 regions in the United States, which have

administrative and supervisory responsibility over the branch offices located in their territory (Jones 5125).

72. Branch office managers report to a Regional Vice President, who generally is responsible for 13 to 15 branch offices (Jenkins 5644).

73. A Regional Vice President, in turn, reports to a vice president and associate operating manager in respondent's Home Office in Atlanta (Jenkins 5645). [23]

74. A Regional Vice President, who supervises the branch office managers directly, is the extension of respondent's home office management, responsible for meeting quality and financial objectives in the region. In this connection, he is also responsible for the movement of business, meeting time service, employee morale and maintenance of facilities individually for the branch offices and collectively for the region. Other responsibilities include staffing the offices and manpower development for the corporation (Lieber 8978-79).

75. Preparation of the consumer and consumer investigative reports under consideration here is carried on by respondent's branch offices in the field and their related suboffices (numbering respectively some 219 and 1,000 in April 1976) (Jones 5125).²⁴

76. The personnel in branch offices varies with the size and type of office. A branch office always has a manager and sometimes one or more assistant managers.²⁵ It also has a number of firstline supervisors responsible for supervising, on a daily basis, the work of one to six field representatives. Such supervisors spend part of their time supervising and the balance of their time preparing reports (Jenkins 5697-98). A branch office may also contain a claim director and a supervisor of the unit making employment reports—a personnel selection director. Included in supervisory personnel is the branch office trainer who trains new field representatives (Jenkins 5698). [24]

77. Branch offices also employ service reviewers who have the responsibility of reviewing written reports after they are dictated by the field representative and typed by the stenographer. The reviewer is generally the most experienced and highly trained clerical person in the office. If she finds a discrepancy in a report, such as an

²⁴ Respondent had 272 branch offices as of February 25, 1972, while the corresponding figure for May 10, 1974 was 229. In both years, at least one such office was located in each state with the exception of Vermont and the District of Columbia (CX 1445A). In addition, as of March 31, 1972, respondent had approximately 1,055 suboffices, the corresponding figure for December 31, 1973, being 994 (CX 1445B). These figures pertain to respondent's United States' operations and do not include figures from its subsidiaries (CX 1445A-B).

²⁵ Branch managers, in addition to their other duties, also have a responsibility to obtain and keep local business from agents in their area (Shaffer 8396).

incomplete report, it is her responsibility to get the report back to the supervisor of the field representative involved (Jenkins 5699).

78. Most branch offices contain "regular" units which include the field representatives designated to handle basic rate reports, which are distinguished from claim investigations, special life reports or personnel reports. The regular units contain a cross section of respondent's employees. New employees enter these units, as a general rule, but they may also contain those field representatives with greater experience who have not shown an aptitude for handling claim investigations or the more sophisticated reports (Jenkins 5711-12).²⁶

79. In addition to the regular units, branch offices may have specialized units such as special life units, personnel units, property line units and claim units (Curtis 7093, 7115). Once expertise and length of service are developed, field representatives are usually given more specialized investigations (Deibig 13752).

80. A suboffice is an office within a branch office's territory located at a distance from the branch office.²⁷ Suboffices do not maintain full file storage systems and do not have full responsibility over their territories other than in producing reports (Jones 5125). Detached local units function like suboffices but are in closer geographic proximity to the branch office (id., Jenkins 5828). [25]

81. It is respondent's policy that field representatives in suboffices should be "better than average" because they work without direct supervision. Their work requires the ability to operate successfully away from close contact with management (RX 107Z-140). The detached local unit, while it operates like a suboffice, receives close supervision from the branch office management because of its proximity to that office (RX 107Z-142).

82. Respondent's claim services are under the jurisdiction of the Claim Department in the Home Office, which has been in existence since 1973 (Trotochaud 6331).²⁸

83. In the field, respondent has 17 Regional Staff Managers, Claims, approximately 200 claim directors in the branch offices and 600 to 650 full-time claim field representatives (Trotochaud 6276-77).

84. The regional claim supervisor or staff manager shares responsibility with the branch manager for superintending and

²⁶ In the case of the more sophisticated special life reports, for example, it is necessary for the field representatives to be able to read financial statements and be acquainted with concepts such as unearned income (Jenkins 5713).

²⁷ Suboffices are divided into two categories. The Class A suboffices are the larger suboffices while the Class B suboffices are smaller and in more remote and less populous areas (Matthews 5568).

²⁸ Prior thereto, the claim operations were conducted by a division of the Operating Service Department (Trotochaud 6331).

developing claim personnel. In addition, he has sales responsibility for the claim service in his region (Jones 5135-36).

85. The branch office claim director, who reports directly to his branch manager, has complete responsibility for the claim service in his office. He directly supervises the claim field representatives in the branch and suboffice territory (Trotochaud 6279). In a small branch office, the claim unit may consist of the claim director alone (Trotochaud 6284).

86. Claim work is considered a specialty program in the branch office. It particularly lends itself to specialization in terms of placing field representatives into specialized units for developing job skills in that particular area (Jones 5136-37). A full-time claim investigator is a field representative who devotes 80 percent or more of his time to claim work (Trotochaud 6285). [26]

87. Field representatives engaged in claim work need more expertise and talent than those field representatives working in a regular unit such as the life and auto unit (Monarch 8570, 8574).

IV. RESPONDENT'S FIELD REPRESENTATIVES

A. General Characteristics

88. Respondent's field representatives perform the investigative work underlying the reports with which this proceeding is concerned. Field representatives are either full-time, salaried employees or part-time employees paid on a per unit basis.

89. As of May 10, 1974, respondent had approximately 4,635 salaried field representatives out of its total of 7,413 salaried employees (CX 1445B).²⁹ During 1971, it had an average of 4,486 non-salaried employees (excluding subsidiary employees); of this total, 1,775 employees were regular part-time field representatives (CX 1445B).³⁰

90. A new salaried field representative must be 21 years of age and a high school graduate, although respondent prefers that he or she has more education (Jenkins 5715). A background check is conducted on every employee (Tr. 5717).

91. Respondent's field representatives, in terms of educational achievement, may be grouped as follows for the period 1971-1975: [27]

²⁹ As of January 27, 1971, out of a total of 9,249 employees, respondent had 5,910 salaried field representatives (excluding U.S. subsidiaries).

³⁰ The function of the regular part-time field representatives is primarily to handle volume in peak periods (RX 107Z-80).

Educational Levels of Retail Credit Company
Field Representatives On Hand at
End of Each Year
(United States and Canada)

Calendar Years 1971—1975

<i>Educational Level</i>	<i>1975</i>	<i>1974</i>	<i>1973</i>	<i>1972</i>	<i>1971</i>
High School Graduate	36%	39%	39%	42%	42%
College Undergraduate	39%	36%	37%	37%	39%
College Graduate	25%	25%	24%	21%	19%

Educational Level of New Retail Credit Company
Field Representatives Hired Each Year
(United States only)

Calendar Years 1971—1975

<i>Educational Level</i>	<i>1975</i>	<i>1974</i>	<i>1973</i>	<i>1972</i>	<i>1971</i>
High School Graduate	17%	15%	15%	27%	17%
College Undergraduate	40%	44%	43%	37%	45%
College Graduate	43%	41%	42%	36%	38%

(RX 728.)

92. Respondent's Branch Manager's Manual, dated December 1968, indicates that education plays the following role as a consideration in hiring:

Particularly in view of the Company's practice of promoting from within, it is desirable that a good proportion of Inspectors have some college training. However, high school graduation is acceptable, *providing the applicant had a credible scholastic record*. In hiring men with college training, it is generally desirable that this training shall have been acquired at a small college, since men from such schools would be inclined to be more satisfied with average earnings and difficult working conditions than would men from the larger, more socially prominent institutions.

(CX 673Z-10.) [28]

93. Respondent views single applicants for employment favorably for the following reasons:

In view of the moderate starting salary paid to Inspectors, many married men with family responsibilities would be hard pressed to make a go of it. Also, single men

Initial Decision

96 F.T.C.

afford more flexibility of organization—transfer, changes in location, etc. An ideal single man, however, is one who needs a job in order to support himself and whose financial house is in order. Obviously, a married man whose salary needs are moderate should also receive full consideration.

(CX 673Z-11.)

94. The record shows the following length of service distribution for respondent's field representatives at the end of 1973:

Field Representative Length of Service Group	Actual Field Reps. at Year-End	
	Number	Percent
0 ----- 1 yr	741	14.4%
1 ----- 5 yrs	1,007	19.6
5 ----- 10 yrs	1,094	21.3
10 ----- 15 yrs	768	14.9
15 ----- 20 yrs	721	14.0
20 ----- 25 yrs	481	9.3
25 ----- 30 yrs	248	4.8
30 ----- 35 yrs	61	1.2
35 ----- 40 yrs	20	.4
40 ----- over 40 yrs	4	.1
	<u>5,145</u>	<u>100.0%</u>

(RX 566V-4.) [29]

B. Functions Performed

95. The field representative's job may be roughly broken down into three main functions: the morning workup, the street investigation, and post-investigative work.

96. The morning workup involves picking up the mail containing requests for reports (Jenkins 5726; Curtis 7103-04, 7110-11), checking the files to determine whether there is already a file on the subject of the inquiry, separating inquiries by lines of business and by locations of the subjects of the reports (Jenkins 5726-27, Curtis

7103-04) and "diagnosing" reports to determine need for special handling (Jenkins 5726-27).³¹

97. The cases in a branch office and within a given line of business are separated geographically by the areas where they are to be worked and assigned to the field representatives by the supervisor (Jenkins 5726-27).

98. The field representatives list the reports assigned to them on a Form 930 identifying their cases by customer, subject of report, and type of report (Curtis 7124). Field representatives should then line up their cases geographically in order to save travel time as well as to use reference materials to identify possible sources (Jenkins 5726-28, Curtis 7130). As part of the pre-investigative work, the field representative may confer or have a "put-up"³² with his supervisor concerning possible problems in connection with the cases to be investigated (Curtis 7105-06). [30]

99. Field representatives may be either on a "once-a-day" or a "twice-a-day" schedule. This refers to the number of times that field representatives are required to report to the office per day (Jenkins 5728-29, Curtis 7107-08). Branch managers are free to determine whether their office should be on a once-a-day or a twice-a-day system (Brothers 7374).³³

100. The field representative's schedule for street investigation is governed by whether he is on a once-a-day or a twice-a-day schedule (Curtis 7236, Jenkins 5729). The time actually spent on the street varies and may range from 3 to 6 hours.³⁴

101. After the street investigation, the field representative may make telephone calls to secure information from sources he was unable to interview or to set up appointments. Such calls may be made in the afternoon, evening or the next morning (Getz 12353, Matthews 12789, Maust 8268-69, Rawls 11056-57, Clark 4003-05, Milligan 4577, Silar 3896, Wallace 2999-3000). The field representative may also confer with his supervisors concerning [31]problems

³¹ Depending on the office, certain of these tasks may be performed by clerical personnel, a supervisor or by a field representative (Jenkins 5726-27, Curtis 7110, Guse 12045-46, Case 5287).

³² "The term 'put-up' is peculiar to the Retail Credit Company—it means literally the practice of taking matters up with (or putting them up to) another person for advice or a decision." (CX 666K).

³³ On a once-a-day schedule, the field representative in the morning initially finishes handling cases from the day before. He may make telephone calls; he discusses his cases with his supervisor if necessary, and then dictates (or types) the reports. He then receives his new cases, prepares for his work on the street, and then leaves to do the street investigation, going directly home when he finishes (Jenkins 5729). On a twice-a-day schedule, the field representative receives his cases for the day in the morning, goes out on the street to investigate, and returns in the afternoon to conclude the handling and to dictate (or type) his cases (Brothers 7373, Jenkins 5729).

³⁴ *E.g.*, depart office between 10:00 a.m. and 12:30 p.m., finishing between 4:00 to 4:30 p.m. (Garza 9174-75); leave office between 10:00 to 12:00, finishing street work between 3:00 to 5:00 p.m. (Tr. 12328-29); depart for street at 9:00 a.m., completing street investigations by 12:45 p.m. to 2:00 p.m. (Guse 12646-47); leave office between 11:00 to 12:00 and finishing usually at 4:00 p.m. (Hinton 9618-19). In Boston, normal departure time for street was noon with the normal workday ending at 5:00 p.m. (Haakey 1576).

encountered during the investigation (Curtis 7212-13, Brothers 7370-71). After completing the handling of the reports, the field representative dictates the reports (Curtis 7128). Some field representatives on the once-a-day schedule dictate some or all of their reports at home in the afternoon or evening (Cooke 9962-63, Guse 12047, Chambers 1934, Clark 4019, Milligan 4551). Others dictate all of them the following morning (e.g., Monson 3246, Pollard 312, Silar 3896, Wallace 2999-3000, Getz 12328).

V. COMPENSATION

A. Full-Time Salaried Field Representatives

102. Field representatives are compensated by a monthly salary, overtime, a mileage allowance and, if eligible, a quarterly bonus (Case 5273).

103. Salary ranges are established for various classes of respondent's branch offices and suboffices and for various classifications of field representatives within such offices (Case 5236; RX 107J).

104. Field representatives work on a fluctuating hourly basis; their set monthly salaries cover the 40 hours in the week they work. The field representative is reimbursed at the rate of one-half of his hourly rate of pay for the hours he works overtime (Case 5273). As overtime increases, the field representative's compensation on a per hour basis of effort decreases (Case 5514-15).³⁵ [32]

105. Respondent does not believe there should be great amounts of overtime. Overtime claims running more than 10 hours beyond a 40-hour week are examined (Jenkins 5723).

106. A field representative is expected to produce a certain amount of revenue each month from the reports he prepares (see *infra*).

107. The revenue credit which a field representative earns is computed by multiplying the price of the report charged to respondent's customer by the number of reports at that price prepared by the field representative (Hakey 1594, Case 5279-80).³⁶

108. Respondent refers to the amount the field representative is

³⁵ E.g., if the field representative makes \$600 a month, overtime would be computed as follows: divide the annual salary of \$7,200 by 52 weeks and then divide that number of hours actually worked in that week; e.g., 45 hours to arrive at the hourly rate of pay for the week. One-half of that hourly rate would be paid for each hour of overtime (Case 5274). In practice, this works out as follows: a field representative working a 40-hour week at the rate of \$600 a month would average per hour for that week, \$3.46. But if he works a 45-hour week, he would average \$3.08 an hour, and would be compensated for the 5 hours overtime at the rate of \$1.54 (1/2 of \$3.08) per hour overtime (Case 5509-10).

³⁶ Whether the field representative is credited with the full price of the report charged to the customer depends on the report (Case 5281). E.g., on a report priced \$5.75, the field representative may receive a revenue credit of only \$5.00. The remaining 75 cents would be termed "No Fee Allowed" (to the field representative) or "NFA." Respondent may use the amount designated as NFA for items such as quality control, additional

expected to produce as the production standard (Case 5276). The field representative has a predetermined production standard, which is a dollar amount, set on a monthly basis to cover his "expenses," which are salary, mileage,³⁷ overtime, and stenographic [33]charges³⁸ (Case 5274). The production standard fluctuates month to month with the field representative's expenses (Case 5276).

109. The production standard for a month is computed as follows: assume \$600 salary and \$200 for expenses for a total of \$800. This is divided by the field representative's reporting standard which may be 50 percent on the dollar, resulting in a production standard or amount for that month of \$1600 (Case 5276).

110. The reporting standard is a percentage varying in general from 45 percent to 60 percent (e.g., RX 727W, 716M). Branch offices in different code classifications have different reporting standards (Case 5317, 5326-30). A DLU has the same reporting standard as its branch office, but the reporting standard of a suboffice may differ from that of its branch office (Case 5535-36). Within each class of office, the reporting standard increases with the length of service of the field representative at 5-year intervals (Case 5321; RX 727W, 715W, 716G).

111. The higher the reporting standard, the fewer reports a field representative has to produce. Assuming expenses are the same, a field representative with a reporting standard of .55 would have to produce fewer cases than another field representative with a reporting standard of .50 (Case 5970). [34]

112. The field representative reaches the break-even point on his production if the revenue or earnings with which he is credited match salary, other expenses, and overtime (Hakey 1593-94). If his earnings credit exceeds the break-even point, he has a gain; if they fall below, then he has a loss.

113. A field representative's "gains" and "losses" are computed as follows: for each month, the field representative's total revenue

supervision, etc. (Case 5282). NFA, however, does not exist on all reports (Case 5283). A field representative may receive extra compensation or a surcharge in the case of some reports for performing certain services, such as taking a photograph (Case 5280).

³⁷ "Field representatives are reimbursed for the automobile expenses associated with their work. Automobile expenses are reimbursed by applying one standard rate per mile to miles reported by the field representative up to a certain maximum per week, and another standard rate per mile to all miles reported above that maximum per week." (RX 566 IV-2.)

E.g., 15 cents per mile for the first 125 miles a week and 8 cents per mile for mileage in excess of 125 miles for the week (id. at IV-3). This was in effect January 1973 (Case 5477).

³⁸ "The costs of secretarial assistance associated with preparation of reports are, in effect, charged to field representatives in the comparison of actual performance to standard. Stenographic expenses are calculated based on a standard rate applied to units of stenographic effort, and a certain number of stenographic units are associated with each type of report." (RX 566 IV-3.)

The stenographic charge per life and auto report was 44 cents in 1973 for a Code 04 office (ibid., RX 715).

credit is multiplied by the reporting standard. The product of that computation is the field representative's "dollar standard." The excess, if any, of the dollar standard over the expenses is a "gain." Conversely, if the expenses exceed the dollar standard, he has a "loss" (Case 5274).³⁹

114. A field representative is generally expected to produce enough reports to meet his production standard on an annual basis and, except for factors beyond his control, on a quarterly basis (Case 5275-76, N. Smith 13225-26, Curtis 7163-64). Normally, field representatives are expected to break even in a 40-hour week (Jenkins 5841).

115. A unit supervisor is responsible for seeing to it that the field representatives under his supervision prepare enough cases to satisfy their salary and other expenses (Hakey 1587-88).

116. An experienced field representative is expected to be able to complete more reports than a new employee (Jenkins 5715).

117. Field representatives receive their normal compensation whether they meet the production standard or not (Buckley 1311-12, Wallace 3025-26, Silar 4050-51). [35]

118. In computing whether a field representative meets his production standard, he may be given credit in certain instances for absences from work and allowances for certain tasks performed in the office which reduce the time available for the preparation of reports (Case 5287; RX 107Z-105-110). These include vacation credits, illness credits, disaster credit where time is lost because of adverse weather conditions, vacation on own time,⁴⁰ and absences for jury duty (Case 5287, 5517, 5892, 5288-89, 5293, 5287-88).

119. An allowance is given for time spent in supervision, and the amount is determined by the branch manager in consultation with the person involved. The amount of credit per hour of time is the credit which would be given for working an hourly rate report in the particular office (Case 5287, 5293-94; Brothers 7477-79, 7575-76; Curtis 7108-09).

120. Trainers are similarly given an allowance for the time they spend training new field representatives. This allowance is computed on the basis of the production credit for preparing an hourly rate report (Case 5287, 5294). Trainees are also given an allowance while in training (Case 5330-31).

121. Field representatives may be given similar allowances for performing various clerical duties in the office (Case 5287).

³⁹ E.g., if the field representative has expenses (including salary, overtime, mileage, etc.) of \$900 and his dollar standard is \$1,000, he has made a gain for the month of \$100 (Case 5274).

⁴⁰ Time off without pay (Case 5892).

122. The Unit Supervisor Advanced normally produces two-thirds of his salary to cover his expenses, and the remaining third is made up by the branch office because he is expected to spend roughly one-third of his time in the office supervising employees (Case 5372). He and the Claim Director Advanced receive a guaranteed bonus of 10 percent of their monthly salary irrespective of their production (Case 5303, 5527-28). [36]

123. If the field representative's earnings credit exceeds salary and expenses over a quarter, then he is eligible for a bonus in that amount up to 20 percent of his salary for the quarter (Case 5274-75; RX 566 at IV-5).⁴¹

124. Eligibility for a 10 percent bonus commences with 3 calendar months of employment and for the full bonus of 20 percent, after 6 months of service (RX 107Z-63-64).

125. The decrease in compensation in terms of the hourly rate as a result of overtime (Finding 104) may be offset if, as a result of extra hours worked, the field representative is able to produce extra cases entitling him to a bonus or additional bonus (Case 5552-53). Overtime, if reported, increases the ceiling for bonus (Case 5302). [37]

126. If a field representative fails to record overtime, his expenses will be less, and having less expenses to cover, he needs to work fewer cases to show a gain for the month (Case 5384). The same would be true if he were to understate his mileage (Tr. 5384-85).

127. An overgainer is a field representative who prepares a number of reports so that his production credit is greater than his expenses and the maximum bonus of 20 percent (Curtis 7175).

128. Respondent's policies for salary increases generally require (other than in a general rate increase or an increase in a per dollar standard) a demonstration on the part of the field representative of

⁴¹ This is illustrative by the following hypothetical example:

	<i>Month 1</i>	<i>Month 2</i>	<i>Month 3</i>	<i>Total</i>
Earnings Credit Amount	\$954	\$828	\$885	\$2,667
Mileage Expense	(127)	(127)	(127)	(381)
Stenographic Expense	(152)	(132)	(141)	(425)
	-----	-----	-----	-----
Earnings Credit Available to Cover Salary	\$675	\$569	\$617	\$1,861
Monthly Salary	610	610	610	1,830
	-----	-----	-----	-----
Available for Bonus	<u>\$ 65</u>	<u>\$(41)</u>	<u>\$ 7</u>	<u>\$ 31</u>

(RX 566 IV-5.)

The "earnings credit," it should be noted, was computed by multiplying the reporting allowance or standard total revenue credit (e.g., in the case of Month 1 .505 (reporting allowance) $\times$ \$1890 (revenue credit) = \$ earnings credit (RX 566 IV-4)).

his ability to produce the reports needed to cover his salary (Brown 14416-17). As a general rule, a field representative is not given a salary increase unless his average monthly gain for the preceding 6 months is at least equal to the amount of the salary increase, which would increase his production standard by the same amount (Case 5419-21, N. Smith 13267-68, Curtis 7175,⁴² Jenkins 5837-38, Hakey 1740-41).

129. As a practical matter, after the salaries of respondent's field representatives reach a certain point, they hit a plateau where the salary cannot continue to rise further if Company financial standards are to be met (CX 1409).⁴³

B. Regular Part-Time Field Representatives

130. Part-time field representatives are paid on a per report basis. The ratio of compensation to report charge [38] may vary by office (CX 679E; RX 107Z-56). If earnings per report do not result in the hourly minimum wage, then the Home Office brings such earnings up to the minimum rate of pay (RX 107Z-56).⁴⁴

131. The regular part-time field representatives produce the same revenue per report as full-time salaried field representatives, but since they have a lower reporting standard, there is less reporting cost per report prepared by the part-time employees (Case 5388-89).

VI. BRANCH OFFICE FINANCES

132. In respondent's view, the Company's financial success rests largely in the hands of branch office management; the need for careful cost control at the branch office level is, therefore, considered very important (RX 107Z-80).

133. Respondent "operates its business on a budget basis." The budgets for branch offices are figured and operated on an income basis, *i.e.*, standards per dollar of income, rather than on the flat budget basis used in the case of respondent's budgets for other than branch offices (RX 107E). [39]

⁴² Exceptions may be made for reasons such as low volume of available business (Curtis 7175).

⁴³ In his letter of resignation, one field representative stated, "I personally passed this point some two years ago and have been literally knocking myself out every month, month in and month out, to continue to show financial gains and to make bonus money." (CX 1409).

⁴⁴ A regular part-time field representative is assigned a reporting standard, which is applied against his gross revenue produced during the month to arrive at a gross figure. From this are subtracted the reimbursable expenses incurred by the field representative such as mileage. Taxes are paid on this net income; the reimbursable expenses added back into net income to arrive at the part-time field representative's gross income for the month (Case 60-11). For example, a part-time field representative in one of respondent's Code 03 offices would receive .44 of every dollar produced as earnings credit. In the case of a report priced at \$5, he would receive .44 of that amount. In this amount, the expense items would be deducted (Case 5323-24).

134. Before the beginning of each year, respondent determines its expected costs. These are correlated with the needed profits and expected revenue, and cost objectives are set (RX 107Z-73). The starting point in the budgeting process is the Company as a whole. The same process is then followed at the regional and branch office levels (Case 5351-52, 5502-03).

135. Such cost objectives are predetermined standards, set by respondent's Home Office for every cost item in a branch office and are formulated after input from the field (Bresnahan 560, 686). A regional cost budget is then transmitted to the Regional Vice President by the Home Office (Lieber 9038-39). This official has some flexibility in varying the overall cost objectives for different branch offices in his region provided he stays within the regional budget (Bresnahan 684-86; Lieber 9038-40).⁴⁵ Financial objectives in the region may vary from office to office (Case 5552).

136. Since cost figures are predicated on a predetermined amount of revenue, if actual revenue falls short, this may impose increased financial pressure on the branch office in the attempt to meet its objectives (Lieber 9037).

Branch Office Cost Reports

137. The Branch Office Cost Report, which is filed monthly, is a tool for determining whether the branch office has met the financial objectives set for it in its budget (see *infra*). [40]

138. The Branch Office Cost Report is a statement of the business and expenses of the branch office for the financial month.⁴⁶ This report classifies expenses in a number of major groups and compares each group with standard cost. The business for the financial month represents the total charges for all inquiries received by the office through the last business day (RX 107Z-70).

139. A cost standard, as used in the Cost Report, is the maximum amount of money available on a given cost item. All cost items are allotted a certain portion of incoming revenue. Such standards are shown in decimals which are percentages of each dollar of incoming revenue. This decimal system is referred to by respondent as the

⁴⁵ The regional budget generally has a 2 to 3 mill spread, permitting the Regional Vice President to allocate this amount among his branch offices provided that the regional "bottom line" comes out the same (Lieber 9038). *E.g.*, the Mid-West Region's budget is \$8 million; \$24,000 (or 3 mills of the budget) may be allocated among the region's branch offices if the Regional Vice President so desires (Lieber 9040, see also Case 5504-06).

⁴⁶ Respondent's financial month consists of 21 working days (RX 107Z-70).

"per-dollar" system of accounting. Cost standards vary by rate of office and classification of business (RX 107Z-73).⁴⁷

140. Expenses are shown both in actual amounts and on a per-dollar basis. The gain-loss standard for each item of cost is shown for the current month and the year to date, in actual dollar amounts and on a per-dollar basis (RX 107Z-70).

141. Expected revenues and costs for the year are broken down into individual months, and monthly objectives are determined as part of the budgeting process. Monthly objectives and variations from such objectives appear on the second and third line from the bottom on the front page of the Cost Report (RX 107Z-73).

142. A gain or a loss on a given item is equal to the difference between the assigned standard and actual cost (RX 107Z-73). The important figure with respect to a branch office's financial performance is the one which shows whether it has met its overall cost objective (Bresnahan 686). [41]

143. Respondent's branch managers are instructed that their overall goal is to operate within their assigned financial objectives and to give good service. To accomplish this, the office must be properly organized so that sufficient manpower is available. The determining factor on the number of employees necessary is the revenue handled. Respondent's branch managers are instructed that "[b]y closely estimating revenue and applying the standards, a budget can be established for individual cost items and also for total cost." (RX 107Z-80).

144. A branch manager may compute his budget for a particular cost item as follows if he has an objective for a gain on the cost standard:

Example: (Establishing Postage Budget)

Rate Office: \$4.60—Rate Code 02

Estimated Revenue: \$35,000

Objective Gain: .003 per \$

<i>Class</i>	<i>Est. Rev.</i>	<i>Per \$ Std.</i>		<i>Standard</i>
Local	\$20,000	× .018	=	\$ 360
DLU	5,000	× .026	=	130
Sub-office	10,000	× .035	=	<u>350</u>
				\$ 840

⁴⁷ Classification of business means that all incoming revenue is classified in one of the following categories such as local (i.e., within the branch office), suboffice or DLU. This classification depends primarily on the location of the field representative producing the revenue (RX 107Z-73).

Initial Decision

<i>Est. Rev.</i>	<i>Per \$ Gain</i>		<i>Obj. Gain</i>
\$35,000	× .003	=	\$ 105
<i>Standard</i>	<i>Obj. Gain</i>		<i>Budget</i>
\$ 840	- \$ 105	=	\$ 735

i.e. The office will meet its objective postage gain of .003 per dollar provided the office handles \$35,000 revenue and operates within the budget of \$735.

(RX 107Z-80.) [42]

145. Reporting cost is the branch office's major cost item (RX 107Z-84). It includes the field representative's salary, overtime, carfare, gains or losses on reporting standard, as well as charges and credits for supervision and training (RX 107Z-71). Field representative losses are charged against the branch office (Case 5519).

146. Training costs can drain branch office finances if there is extensive and heavy training over a short period of time (Eldred 11302). And, if training costs become unexpectedly high, it may be difficult to stay within branch office financial objectives (Lieber 9125).

147. Respondent's system of setting cost objectives for its branch offices necessarily limits the resources available for training and supervision in the field⁴⁸ and thus, the branch manager's discretion in this area. [43]

148. The Cost Report also includes detailed work records for all salaried field representatives and a comparison of the total expense incurred by each field representative with his reporting standard (RX 107Z-70). In the context of the Cost Report, the reporting

⁴⁸ E.g.,

Frankly, the Home Office has not yet set in concrete your final cost objective for the year; although when the objectives were sent out about a month ago, this was the original intent. However, we have raised such a clamor from the regions that there has been agreement that some further considerations will be given to certain office situations, and your office was one of them.

I have recommended that your office be raised from .724 to .727 or .003. This does not seem much, but it is better than the original figure that was spewed out by the computer.

In view of the fact that the objectives have not been finalized, there will still be further adjustments during the month of June; therefore, we do not know exactly where you or the other offices stand on the accumulative variations, etc. *It is too early to become too upset with what happened in May until every cost objective and all adjustments have been finalized for the year.*

Until then, sit tight and do everything you can humanly do to hold costs to the bare minimum as there will not be any monies for some of the things we would like to have, such as more money for supervision, training, etc. Such a large portion of the additional money available from the increase went to employees that there is just not much left to provide the branch with a great amount of leeway for the remainder of 1974.

As soon as I get further word in regard to your objectives for the remainder of the year, I will let you know.

(Regional Vice President to Manager, Albuquerque office, June 21, 1974, CX 813; emphasis supplied).

standard for salaried field representatives is based on a percent of revenues handled. This standard provides for all expenses incurred by the field representative including salary, overtime, car expense, stenographic cost (RX 107Z-73).

149. Gains on the reporting standards are added into the reporting cost figures for the financial month and are set up in a reserve for payment of bonus each quarter.⁴⁹ The reporting standard for field representatives varies by length of service and location (RX 107Z-73). [44]

150. The Branch Office Manager's Manual states in connection with the control of field representative work:

Control of Field Representative Work: The Field Representative's work should be controlled by the Manager from two standpoints. First, to see that the number of reports each Field Representative makes is limited to his experience and ability. Second, to see that each Field Representative makes enough reports to show a gain on reporting standards after his three-month training period; and that during the training period, his loss on reporting standards will not exceed the training allowance.

(RX 107Z-80.)

151. Accumulative field representative losses and field representative losses made up are to be considered together on the branch cost report since they are respectively treated as charges and credits to the branch office (RX 107Z-115). In short, where the field representatives of a branch office accumulate a loss, that loss is charged to the branch office as part of the cost of operating that office (Bresnahan 571).

152. Where training costs exceed the applicable cost standard, this is shown as a loss to the branch office (RX 107Z-84, 95)⁵⁰ [45]

⁴⁹ A field representative's gain-loss on his cost standard for purposes of the cost report may be computed; e.g., assume the following:

Business for the month produced by field representative	\$1613
A per dollar standard of	.525
Expenses of \$674	
Multiplying the per dollar standard of .525 times his business produced of \$1613 gives a per dollar standard of \$847 in dollars.	
Subtracting actual expenses of \$674 from \$847 shows this field representative has made a gain on his cost standard of \$173. (Case 5377-78; RX 673Z-107).	

⁵⁰ The training allowance for all new field representatives for the first 12 weeks was \$525 in 1973, broken down as follows:

Week	21 Day Month
1st	147
2nd	86
3rd	69
4th	52
5th	42
6th	34
7th	29
8th	19

(Continued)

153. Individual field representative losses are carried forward until the losses are made up by the field representative or other management action is taken. When a field representative transfers from one office to another, his losses are dropped in all instances. Field representatives transferring within a branch continue to carry their losses until they are made up. Field representative losses are carried forward into any number of months and quarters until they are made up (RX 107Z-115). As a general rule, no gains by a field representative are carried from one quarter to the next; but if gains are carried, they are carried over in the unit bonus pool and not by the individual field representative (RX 107Z-64).⁵¹

154. As a general rule, a field representative should gain on the reporting standard before being paid bonus. And:

A Field Representative is not eligible to receive bonus until losses are made up by subsequent gains. Any exception to this requires a complete put-up to the Regional Vice President-Operating. If he approves, he will forward the request to the Home Office for final approval.

(RX 107Z-64.)

155. Since exceptions to the general rule require consultation with the Regional Vice President-Operating and final approval by the Home Office, the award of a bonus to a field representative carrying losses is an unusual occurrence. [46]

156. It is the branch office manager's responsibility to meet or do better than the cost standards applicable to his office (Bresnahan 562).

157. If a branch office manager did not meet his financial objectives for the year, it affected his bonus adversely. If, in addition, his performance was questioned in other areas, such as personnel management or quality service, then his capacity to manage the office may have been brought into question (Lieber 9144).

VII. REPRESENTATION OF IDENTITY BY RETAIL FIELD REPRESENTATIVES (PARAGRAPHS 5-6 OF THE COMPLAINT)

158. Respondent's 1973 Field Representative Manual instructed

9th	17
10th	11
11th	11
12th	8
13th-17th	—
Total	525

(Rates and Financial Guides United States Effective March 1973, RX 715Z-1).

⁵¹ One of respondent's officials testified, however, that the branch manager had discretion to give such credit in the next quarter to the same field representative who earned the excess bonus (Case 5296).

the field representative to state his name and Retail Credit's name when interviewing the subject of a report (RX 102Z-4).⁵² The field representative was permitted to mention the name of the company requesting the report and was encouraged to do so.⁵³ In interviews of sources other than the subject of the report, neither the name of Retail nor the requesting company was required to be given (RX 102Z-11). In both instances, the manual pointed out that the field representative should never misrepresent his identity (RX 102 Z-11) and that he was to avoid "any impression that [he was] employed by the insurance company" (RX 102Z-4). [47]

159. Prior to the 1973 amendments, the Field Representative Manual stated that the name Retail Credit should be used when interviewing the subject of a report. However, it also suggested that when the requesting company desired use of its name in the introduction, then "the Field Representative should state that he is 'calling for the X Insurance Company' " (CX 666Z-4).⁵⁴

160. Respondent's name, Retail Credit Company, sometimes confused consumers and led to the impression that credit rather than insurance was the reason for the investigation (CX 666Z-4, 666Z-10; Stubbs 9293). Respondent recognized this fact and instructed field representatives to explain Retail's "role in the insurance field" when confusion occurred (RX 102Z-4, see also RX 102Z-11).

161. In practice, the name Retail Credit was not always used in the field representatives' introductions even in interviews with subjects of reports (CX 748, 1243A; Jenckes 98-99, Hakey 1633-34, Dodson 3072-73, Feriante 4441, Pollard 321-22, Boyd 13156-57). Many field representatives did not identify themselves as employees of Retail because they did not want to become involved in explaining Retail's business.

The assumption people made, I was making some type of credit report because of the name Retail Credit Company, and usually it involved, or my experience was that it involved an explanation of what a credit company is doing here. As a result, by introducing myself as an insurance inspector and not by contradicting myself by saying I am from what they consider to be a credit company or loan company, it would save me a lot of hassle, and of course when you are on the road, time is of essence. (Hakey 1634-35; see also Dodson 3072-73, Pollard 321). [48]

162. Consumers were told by the field representatives contacting them that they were "from", "with" or calling "for" the insurance

⁵² Field representatives were issued Retail ID cards, but the corporate instructions did not require that they be produced at interviews (RX 102Z-4; see also Jenkins 5852-54).

⁵³ "It is not necessary to volunteer the name of the requesting company unless this information is asked by the subject. But, doing so in most instances should facilitate the interview." (RX 102Z-4).

⁵⁴ While the manual drew a distinction between saying the field representative was calling "for X Insurance Company" and "from X Insurance Company," either introduction would misrepresent, by implication, the identity of the caller if Retail Credit were not mentioned (see Finding 163).

company or other customer of respondent (who had requested the report), that the interviewer was "conducting an investigation for" the insurance company or that the interview was in connection with a particular insurance application (Epperson 3939, *in camera*; Luster 3167, 3179; T. Gracey 1889, 1891-92; CX 1448A-B; McCreary 1860;⁵⁵ Hall 1909; Grabher 3412, 3416-17, 3420; E. Sattler 4269; Baker 3108). The field representative contacting consumer Byers stated his identity without mentioning Retail Credit and questioned her regarding her automobile and automobile insurance for which she recently applied. Ms. Byers formed the impression that he was from the insurance company (Byers 4472-73, 4476).⁵⁶

163. An introduction by a field representative stating that he was "from" or making contact "for" an insurance company, that he was calling in connection with an insurance application or a similar introduction unaccompanied by the disclosure that he worked for Retail, had the tendency to create the impression that the field representative was an insurance company employee or agent rather than the employee of a third party consumer reporting agency. [49]

164. Whether an interviewer was an employee of a company with which the consumer or subject of the report had already established a relationship (such as an insurance company) or an employee of Retail, was a significant fact to a consumer being interviewed in determining whether to furnish the information requested. Some consumers who discovered that the interviewers were actually employees of Retail refused to continue with the interview or answer any more questions (Hall 1910-11, McCreary 1863). When consumer Sattler discovered the field representative was a Retail employee, he felt the introduction had been "misleading and deceptive" (E. Sattler 4270). Consumer Byers was not sure she would have answered the questions asked her had she known the true identity of her interviewer (Byers 4474, 4476-77).

165. Inherent in the belief that the interviewer is an employee or agent of the insurance company, or other requesting organization, is the belief that information provided during the interview will be used exclusively by the requesting company. In fact, respondent keeps a file copy of each report its field representatives prepare, and

⁵⁵ Consumers Gracey and McCreary were interviewed in connection with a survey of people on municipal disability retirement requested by the City of Miami (Tr. 6562-A-B). A Retail memorandum states that the city requested "that the inspector is to tell the claimant that he is calling in behalf of the City of Miami Welfare and Pension Department, during the interview." (RX 486C).

⁵⁶ The witnesses testifying in rebuttal to the testimony of consumer Hall did not dispute the portion of her testimony on which this finding is based. The testimony of consumers Epperson, Grabher, Sattler and Byers was not outweighed by the rebuttal witnesses called, the field representatives who contacted the consumers. These witnesses did not testify regarding the particular contacts in question, but rather related the introductions they generally used (Tr. 12080-81, 11741-42, 11152-53).

these file copies may be used in subsequent reports prepared on the same consumer (CX 666K-O; RX 102I-J). Field representatives do not affirmatively state or volunteer in an interview that respondent keeps file copies of its reports (Pollard 322, Boyd 13175-76, Hakey 1634). Respondent's field representatives, by misrepresenting their identities, also misrepresent the use to be made of the information obtained during an interview.⁵⁷

166. By its field representatives' misrepresentations of identity, respondent violated Section 5 of the FTC Act. [50]

VIII. REPRESENTATION OF PURPOSE BY RETAIL FIELD REPRESENTATIVES
(PARAGRAPHS 7-8 OF THE COMPLAINT)

167. Since 1966, respondent has used the "indirect approach" in its interviews with third-party claimants on whom claim reports are being prepared (RX 651A). As defined and set forth in the 1966 Claim Reports Manual, the indirect approach involved the following:

Method Used on the Indirect Approach: The accepted and sanctioned approach is for the Inspector to give the name "Retail Credit Company" and indicate that he is making inquiry, ostensibly for credit purposes. To help the investigator validate his position, he is supplied with a form described as the Credit File Audit, Form 4958, which permits him to record pertinent data without arousing suspicion. If the claimant is supposed to be disabled, the credit put-up enables the investigator to ask whether he has been working steadily, whether he has had any recent heavy expense which might come from illness or injuries, and other questions which will lead into a discussion of activities, background, and claim or medical history.

(RX 651A.)

168. The Credit File Audit procedure instituted in 1966, supplanted Retail's previous procedure for interviewing third-party claimants—the "pretext" interview, which had been used for many years (Stubbs 9257-58).⁵⁸ [51]Mr. Trotochaud, who wrote the 1966 indirect approach amendments to the Claim Reports Manual, explained the change:

Over a period of many years, our instructions provided that in the handling of claim investigations on third party claimants, we would use a suitable pretext, but the

⁵⁷ This finding of misrepresentation as to the use of information is based on the finding of misrepresentation of identity by field representatives, rather than solely on respondent's failure to affirmatively disclose to consumers that it keeps a file copy and may subsequently use it. The record permits no finding as to what a consumer would believe regarding the use of information, if he were aware that the interview was being conducted by a Retail employee.

⁵⁸ In addition to its use in claim reporting, the pretext interview was used in some work other than claims, e.g., attempting to locate individuals for failure to pay on credit cards, or attempting to locate uninsured motorists (Jenckes 78-79).

instructions did not go beyond that. So, therefore, the field representative was left on his own as to how he would proceed.⁵⁹

I felt strongly that this was not a proper procedure and had made up my mind that, given an opportunity, I would correct that to lay out clearly and completely how he should approach an investigation on a third party claimant.

I was given that opportunity, and this claim reports manual was written in 1966. I wrote it and at that time implemented instructions that they would handle these investigations on what we termed an indirect approach basis. And that indirect approach basis was spelled out, and it stated that the field representative must, must, in every instance, identify himself as being with the Retail Credit Company. (Trotochaud 6347; footnote added).

169. Though the 1966 revision was intended to result in deletion of the term "pretext" from the vocabulary of Retail personnel, many employees used the term pretext interview in connection with the Credit File Audit interview (Bresnahan 612-13, see also Buckley 1261-62).⁶⁰ [52]

170. The Credit File Audit Interview form used by respondent in the indirect interview was the following:

RETAIL CREDIT COMPANY

CREDIT FILE AUDIT

DATE _____ FILE NO _____

AUDITOR: We are attempting to confirm that our files are correct on this individual. Conduct a direct interview with the subject or an adult member of the family.

NAME _____ AGE _____

ADDRESS _____

FORMER ADDRESSES (if any) _____

PRESENT OR LAST KNOWN EMPLOYMENT _____

PRESENT OR LAST KNOWN JOB TITLE _____

NOTE: IF PRESENTLY UNEMPLOYED, WHAT IS REASON? CHECK ONE:

TEMPORARY LAY OFF — SICKNESS OR ACCIDENT — OTHER REASON —

LENGTH OF TIME OFF WORK _____ OTHER INCOME _____

NUMBER OF DEPENDENTS _____ NAME _____ AGE _____

(include name and age) _____

⁵⁹ As an example of a pretext used, one field representative stated, "I would go the claimant's home and say that I was looking for a person I believe that resided in the neighborhood, and had they ever heard of that person." (Jenckes 77-78).

⁶⁰ As late as 1972, respondent was still engaged in purging the term "pretext" from its reports (CX 1323A).

Initial Decision

96 F.T.C.

HOME OWNER YES _____ NO _____

CAR OWNER YES _____ NO _____ (MAKE AND MODEL) _____

IS SPOUSE EMPLOYED, IF SO, WHERE: _____

AUDITOR: Make any notes here to clarify any of the above questions.

Form 4958-9-60
Printed in U.S.A.

(RX 651B.) [53]

171. The primary purpose of direct contact with a claimant is to observe the physical condition of the consumer (Jenckes 77; RX 119Y-Z; CX 1323D; Murray 9572).

172. The Credit File Audit form was designed so that when seen by the interviewee (Stubbs 9259, Trotochaud 6348), it would give the impression that the investigation being conducted was a credit investigation (Bresnahan 700-01). The information recorded on the form could be useful to Retail in its claim report (e.g., the form contained a blank for unemployment due to illness). However, the basic purpose of the form evidently was to create the impression that the reason for the field representative's visit was to conduct a credit interview.

173. Respondent's name made the representations concerning the ostensible subject of the indirect interview more convincing since "Retail Credit" connoted credit to consumers (Finding 160).

174. Respondent's rationale for pretext, and later indirect, interviews was as follows:

The person claiming is not their insured, it is a third party, maybe there's a lawyer in the picture, maybe there isn't, but that person is making a specific claim that they need to know the background on, and in so many instances the cooperation in getting medical to them and full details has not been the best, and just generally a person in that situation, if you went up to them, a person who is claiming a whiplash injury and say I am here from the X insurance company to question you about your whiplash, are you working anywhere, are you still playing golf, or so forth, it just wouldn't be—if that person had anything speculative on his or her mind it would not be in the interests of that person considering what they are trying to do to say yes, I am working the midnight shift somewhere, or play golf three times a week, this is basically the background of that. (Stubbs 9253).

[54]In short, with the pretext or indirect interview, "You would acquire information that you might not normally acquire." (Bresnahan 615).

175. The Credit File Audit indirect approach had the capacity to

mislead consumers as to the purpose of interviews. This procedure was unfair and deceptive within the meaning of Section 5 of the FTCA.

176. In 1971, respondent modified its indirect approach procedure and abolished the Credit File Audit interview (RX 575A-C; Trotochaud 6355). Under the new procedure, the field representative was instructed to state only his name and that he was from Retail Credit. He was to complete a "Personal Interview" form (RX 575C) which was essentially the same as the Credit File Audit form but contained the title "Personal Interview." Like the Credit File Audit form, the Personal Interview form was designed to be seen by the claimant, and field representatives were instructed that they could "even let the individual personally handle the form if he [were] so inclined." (RX 119V). If the field representative were asked the purpose of the interview, he was to state that he was not permitted to divulge the purpose or the source of the request (RX 575A). The new procedure, as codified in the 1973 manual, was as follows:

... The accepted and sanctioned approach is for the Field Representative to give the name 'Retail Credit Company'. To help the investigator validate his position, he is supplied with a form described as the Personal Interview, Form 4958, which permits him to record pertinent data. If the claimant is supposed to be disabled, this put-up enables the investigator to ask whether he has been working steadily, whether he has had any recent heavy expense which might come from illness or injuries, and other questions which will lead into a discussion of activities, background, and claim or medical history.

(RX 652A.) [55]

177. Field representatives were later instructed to use this indirect approach in all claim or loss investigations unless the requesting company had given specific authorization to the contrary (RX 653A). Respondent's policy favoring indirect interviews was so strong that when the Regional Claims Manager discovered that a branch office manager had permitted his claim field representatives to use the direct approach instead, he "very strongly suggested" that the indirect approach be used (Stubbs 9256).

178. The field representative's instructions in 1971, stated that, "*It is imperative that our approach not include any misrepresentation*" (RX 575A, emphasis in original), and field representatives were told not to affirmatively state the purpose of their interview. However, the indirect interview approach itself, providing for use of the Personal Interview form, had the capacity to mislead consumers as to the purpose of the interview and to lead them to the belief that credit was being investigated (Murray 9596-97). That respondent intended that consumers be led to believe the interview was for

credit purposes is shown by the fact that, in contrast to the direct interview instructions (Finding 160), the indirect interview procedure did not include a requirement that field representatives clarify any confusion created by the name Retail Credit (Edland 11759).

179. Respondent's 1971 modifications of the indirect interview did not cure the deception inherent in the pretext and Credit File Audit interviews. The "Personal Interview" format, while not involving affirmative misrepresentations, had a tendency to create the same impression as did the Credit File Audit. Like the Credit File Audit, this approach, when used in conjunction with Retail's name, was likely to lead the consumer to believe the purpose of the interview was to obtain credit information, rather than data about the [56]health and activities of a claimant in an insurance claim.⁶¹

180. Respondent's indirect interview procedure has the capacity to mislead and is unfair and deceptive within the meaning of Section 5 of the FTCA.

181. While respondent engaged in unfair practices within the meaning of Section 5 of the FTCA (Findings 175, 180), such practices were engaged in as part of the business of insurance and, therefore, are exempt from regulation by the Federal Trade Commission to the extent that they are regulated by state law.

IX. ALLEGATIONS THAT RESPONDENT HAS MISREPRESENTED THE MANNER IN WHICH ITS REPORTS ARE PREPARED (PARAGRAPHS 9-10 OF THE COMPLAINT)

A. Use of the Telephone in Interviewing

182. Respondent's procedures for interviewing and securing information vary depending on the report involved.

183. Certain of respondent's reports are designed and intended to be handled by one or more telephone interviews (Jenkins 5776). *E.g.*, various types of automobile classification check reports are to be handled primarily or exclusively through telephone interviews and the instructions on the form so state (Moore 8854, Jones 12953, Lindgren 11456, Mayo 10752-53, L. Jones 10440, Rawls 11059, Saltzgaber 11967, Getz 12345, J. Moss 11033-34, Hakey 1581-84). In the case of these reports, the extent to which the telephone is used may be specified by the customers (Hopp 6691-92, [57]Zack 8257). Certain credit line reports and some employment reports are also

⁶¹ Complaint counsel offered three consumer witnesses to support the allegations of paragraphs 7 and 8 of the complaint. The testimony of these witnesses contained facts showing departures from respondent's established procedures. There is no need to make findings on the testimony of these witnesses in light of the finding that respondent's established procedures themselves were misleading.

handled by telephone (Knautz 6881-82, 6896-97; Chambers 1957; Hille 4526).

184. Use of the telephone in the case of claim reports is limited, and violation of such rules results in dismissal (Trotochaud 6310). When the telephone is used in preparation of claim reports, its use must be shown on the report (Trotochaud 6309-10).

185. In the case of the majority of the reports made by respondent, such as life and health reports, regular automobile reports, property reports and most personnel reports, the telephone is used to some extent (Jenkins 5776, Lieber 8998).

186. In the case of these reports, it is respondent's basic policy that telephone use has been "limited to the degree that you can limit it and good judgment dictates" (Jenkins 5776-77). Some telephone use is permitted in the case of these reports because "[f]or limited price reports we cannot obviously make repetitive return trips" (Tr. 5777).

187. Managers and supervisors have discretion when to permit use of the telephone in the preparation of such reports (Jenkins 5777). Respondent has no written guidelines on use of the telephone in specific situations because this might interfere with the exercise of discretion and judgment on this question at the branch office level (Browning 6074-75).⁶²

188. Branch offices authorized telephone contact for specific classes of sources under certain conditions, *e.g.*, the applicant's employer (Hilderbrand 12006, Jones 10440-41, Martin 10512). Telephone interviews could also be used with professional persons such as attorneys whose schedules might not permit in-person interviews (Garza 9163-64, Jones 10441, Mayo 10753). [58]

189. Certain branch offices permitted use of the telephone to interview managers of apartment complexes who requested telephone contacts (C. Hood 6498-99, Larson 12518, Guse 12063); in obtaining public or school record information (Volrath 11001); in setting up appointments for face-to-face interviews (Brothers 7406, A. Brown 7742-43, E. Jones 12923, J. Moss 11037-38, Cain 9464, Nazarchyk 8032, Tew 13368-73); in locating the residences of subjects or sources in rural areas (Brothers 7406, Cain 9464); when bad weather conditions prevented street investigation (Horner 9887-88); when speed was required due to an insurance company's request for expedited handling (Getz 12345); where applicants or sources were outside of, or about to leave, the area (Larson 12545); when evening contacts were required (A. Brown 7743-44, Zack 8216); when

⁶² It is respondent's position "that first line supervision must concur when a telephone is used to meet the logical source" (Browning 6075).

a source or subject could only be reached by telephone (Browning 6077, Landreth 12133); or when a direct interview with the applicant was required to obtain necessary information (Browning 6076, Zack 8216-17).

190. The general policy in effect in most branch offices on reports not specifically designed for telephone handling was that field representatives had first to make a reasonable effort to handle the case on the street by attempting to obtain face-to-face interviews but that the telephone could be used if such attempts were unsuccessful (e.g., Vogen 12202-03, Volrath 11000-01, Dodson 3054). First-line supervision was to concur when the telephone was used for that purpose (n. 62, *supra*).

191. It was the responsibility of the branch office manager to exercise supervision enabling him to determine whether use of the telephone had been excessive (Lieber 8999).

192. Use of the telephone had increased significantly because of social and economic changes occurring in the 1960's and 1970's. Such factors include the greater frequency of both spouses working during the day (Coleman 7923-24, Ross 9349), the increase in apartment complexes (Jenkins 5730-31) and increasing danger to the physical safety of field representatives in certain urban areas (Murray 9574, Laugavitz 10334-35). [59]

193. The objective in preparing reports was to obtain face-to-face interviews with applicants and outside sources whenever possible (e.g., Brothers 7406, Vogen 12203, Ross 9348).

194. Field representatives were instructed to so indicate on respondent's file copy of the report after identification of the source when the interview had been conducted by telephone (e.g., Baranek 9697-98, Coleman 7925, Moore 10046-47). Respondent did not normally place a notation that the telephone had been used in its underwriting reports going to customers (Jenkins 5777-78,⁶³ Browning 6077).

195. There was a requirement, however, that customers be specifically notified of telephone use on intermediate, special narrative and special life reports (Crepeau 1756, Ledum 4683, Curtis 7137, Lauer 10155-56, M. Martin 10512).

196. In addition, telephone use was shown on the customer's copy of the report if the customer had made a request to that effect (Browning 6077). And, in certain branch offices, a decision was made locally to indicate telephone handling on the customer copy (e.g., Eldred 11221, Saltzgaber 11990).

⁶³ "[W]e have always taken the position on underwriting reports that we sell information and not systems" (Jenkins 5778).

197. In respondent's "Pro Series Life" reports introduced in 1976, all reports in the series showed whether the interview was conducted "in person" or "by telephone" (Stansbury 6821-22, 6826). Respondent was informed by customers that:

it would be helpful to them to know how the information was obtained. [60]When they evaluate the information and handle it with their field forces or within their own organization, they have a better idea about it, based on knowing how it was obtained. (Stansbury 6821-22).⁶⁴

B. Respondent's Representations Regarding Face-To-Face Interviews and Personal Observations Made by Field Representatives In the Preparation of Reports

198. Respondent's customers were told that normally respondent attempted to obtain information in person but that, if necessary, the telephone was used to interview applicants and outside sources (Drennan 6218, Vogen 12214).

199. Respondent, in its brochures to customers, has represented:

(a) **You see** your applicants even though you aren't able to visit each one yourself. Retail Credit Company's Hospitalization Interview Service is the next best thing to being there. This service affords you an in-depth view of your applicant, his living conditions and answers to such health and environment questions as:

- Is he impaired?
- Overweight?
- When did he last visit a physician?
- Hazards in the household?
- Are living conditions sanitary?
- Does he live in crime and vice area?
- Plus much more . . .

(CX 384B.)

(Brochure entitled, "The Next Best Thing To Being There", CX 384A-D). [61]

⁶⁴ Such customers, while they "were not concerned or are not concerned overall" whether the telephone was used did want to be informed of such use so "they [would] have a better idea about it" (ibid).

- (b) HEALTH HABITS: He presents a normal, healthy appearance. He is not impaired or handicapped

(Quotation from specimen, "PERSONNEL SELECTION INVESTIGATION" report in promotional brochure, "a crucial moment in any training operation", CX 386A-B).

- (c) The best method of obtaining business and marketing information is through personal interviews or by direct observation

(Brochure entitled, "RETAIL CREDIT COMPANY EXECUTIVE REFERENCE MANUAL a straight line to facts about people for better business decisions", CX 387M).

- (d) He (the investigator) checks files and public records. He then performs an on-the-street investigation interviewing logical sources for the information needed. These are usually neighbors and business associates and sometimes the applicant himself. A report is written and sent to the underwriter.

(Brochure entitled, "LOOK TO THE FUTURE", CX 389E).

- (e) It [Retail Credit's Life & Health Insurance Service] is based on an interview with the applicant as the primary source of information, allowing for an in-depth interview of the applicant. It helps to:

- Establish age and identity
- *Observe the applicant's physical appearance and environment*

(Brochure entitled, "88% personally interviewed," CX 398A-B; emphasis supplied). [62]

- (f) We have found the most dependable reporting method, for whatever purpose, is the personal interview . . .

When field representatives call personally on these logical sources, they introduce themselves as representatives of Retail Credit Company

(Brochure entitled, "THE WHY AND THE HOW", CX 399N; emphasis supplied).

200. Respondent, in its brochures to prospective users of its reports, through language such as: "the next best thing to being there" and "[y]ou see your applicants even though you aren't able to visit each one yourself . . . [t]his service affords you an in-depth view of your applicant, his living conditions and answers to such health and environmental questions as: Is he impaired? Overweight?" and similar language has represented that, as a matter of standard procedure, its reports are compiled through face-to-face interviews

with the sources listed and upon the basis of the direct observation of the field representative making the report.⁶⁵

201. Entries on report forms such as:

Is there anything unhealthy about appearance, such as being very thin or having excess weight?

Any deformity, amputation, blindness, deafness, or other defects?

(CX 422A.) [63]

also impliedly represented that the field representative who supplied such information had observed the subject of the report.

202. The inspection report is one of the more important documents that an underwriter uses in evaluating an insurance risk (Hartzler 801).

203. Certain underwriters assumed residential sources were usually interviewed face-to-face (Davison 2634-35, 2676).

204. If a life report indicated that the applicant was interviewed, certain users of reports construed this as meaning that there had been a face-to-face interview (Hartzler 826).

205. If a report contained information as to an applicant's physical appearance, underwriters expected that such information was obtained through direct observation (Snore 3658, Davison 2638).

206. Certain underwriters believe in-person interviews are more reliable than telephone interviews (Hartzler 826, 873; Davison 2637).⁶⁶

207. Certain underwriters expected to be informed that the telephone was used to interview an applicant or a neighbor when the source was interviewed in that manner (Snore 2655-56). Certain users of respondent's reports believe that knowledge as to whether a source was interviewed by the telephone or in person is important in determining how much confidence to place in the information reported (Nietzholt 13045, Dower 2142). [64]

208. Some underwriters do not care whether the telephone is utilized on a case small enough to require only a regular report (Paine 13439-40).⁶⁷ In the larger cases, however, even these underwriters would place greater reliance on or prefer a face-to-face

⁶⁵ Respondent urges there is no testimony that any underwriter has read or relied on its promotional literature (RPF 186). There is, however, a presumption when brochures of this nature are prepared and disseminated, that the intention is that they be relied upon.

⁶⁶ A number of respondent's employees also preferred in-person interviews (Baranek 9717-18, Cooke 9981, Brothers 7482, Hartfield 10497, L. Jones 10472, M. Martin 10542, Muth 9948, Pregler 9210, Crofford 8118, Garcia 13133-35). That preference is generally based on the fact that in-person interviews allow them to observe the physical appearance of the applicant (L. Jones 10472, Muth 9948, Zack 8927, J. Curtis 7249); or his or her demeanor and expressions in responding to questions (Baranek 9717-18, Muth 9948); or, occasionally, the interior living conditions of the applicant's residence (Ross 9348, Brothers 7483).

⁶⁷ In such small cases, such underwriters would not put a different degree of reliance on information received by telephone as opposed to a face-to-face interview (Paine 13439-40).

interview because of the opportunity for direct observation (Paine 13406-07; Taylor 10860-61, 10881-82).

209. The preference for face-to-face interviews on the part of such users in the higher-priced cases compels the inference that the "how" of preparing a report viz., telephone as opposed to face-to-face contact, does significantly affect the manner in which report information is evaluated. The reason that it is a matter of indifference to some report users in the case of lower priced reports is inherently economic.⁶⁸

210. If the inspection report contained adverse information pertaining to the applicant's home or physical surroundings, certain underwriters expected the field representative to have physically observed them (Snore 3659-60, Davison 2638-39).

211. Certain of respondent's field representatives have reported information concerning the appearance of the subject of the report or his home or physical surroundings, when they did not personally observe the subject of the report or his physical surroundings (Buckley 1349, Dodson 3064, Hakey 1560, Woicik 2874-75, Wallace 3004-06).⁶⁹ [65]

212. Information derived from telephone interviews concerning physical appearance and physical environment may be accurate even though the telephone is used; sometimes such information can be cross-checked with other sources (e.g., Stansbury 6751-52). But this is not the optimal method. As one insurance company executive testified:

Q. Isn't this information [the build of an individual] that might be best obtained by personal observation of the insurance applicant rather than by talking with the insurance applicant over the telephone?

A. Yes, personal observation would be of more merit than a telephone conversation. It would be difficult to obtain someone's build by phone. (Taylor 10860-61).

213. The manner in which interviews are conducted; namely, telephone or face-to-face, is a significant factor in evaluating consumer investigative reports.⁷⁰ [66]

⁶⁸ "On a small case, frankly, we can't afford it. We can't pay for that" (Paine 13407).

⁶⁹ Even assuming that a field representative was familiar with the living conditions in the area in which he prepared reports, such general familiarity with a neighborhood is no substitute for direct observation of the particular physical surroundings of the specific individual being reported on. *E.g.*, one report asked, "Premises poorly kept?" (CX 477A). Generalizations about the neighborhood "would not necessarily apply to the applicant's own dwelling or his own individual living conditions" (Stansbury 6753).

⁷⁰ This finding is compelled by the following: respondent's brochures represented that personal observation is the standard procedure (Finding 200). Branch office managers are to determine whether telephone use is excessive (Finding 191). Telephone use is to be noted on respondent's file copies (Finding 194) and telephone contact is to be noted on the customer copy of the more expensive reports such as intermediate special narrative and special life reports (Finding 195). Respondent, in 1976, commenced showing on all reports in the Pro Life Series whether the telephone had been used because "Customers told us . . . it would be helpful" and because respondent's customers felt "when they evaluate the information they have a better idea about it based on knowing how it was obtained"

214. The failure to indicate on the customer's copy of the report that the telephone had been used when a source had been interviewed in that manner constituted the failure to state a material fact and was misleading.⁷¹

215. The failure to disclose that descriptions of the appearance of a subject or his physical surroundings had been obtained from other than by personal observation, *e.g.*, by telephone or general knowledge of the area, also constituted the failure to disclose a material fact in violation of Section 5 of the FTCA.

C. Dissemination of Reports Listing Sources Not Interviewed

216. The listing of a source on a report represents that that source has actually been interviewed (*e.g.*, see Question 3 on CX 422). Some report users give more credence to reports where information contained therein is based on more than one source (Dower 2141). It was the expectation of report users that all the sources listed in a report were, in fact, interviewed by field representatives who prepared such reports (Davison 2686). If fewer sources were interviewed than listed on the report, this necessarily detracted from the confidence to be placed in the report.

217. Certain field representatives listed sources not contacted in reports which they filed (see Finding 405). To the extent that reports listing sources not interviewed have been sold, the users thereof have been misled as to the accuracy of the report. [67]

X. ALLEGATIONS CONCERNING RESPONDENT'S USE OF CERTAIN AUTHORIZATIONS TO SECURE MEDICAL INFORMATION AND ITS SUBSEQUENT USE OF SUCH INFORMATION (PARAGRAPHS 11, 12, 13 OF THE COMPLAINT)

A. Nature of Medical Information

218. Medical information on a given consumer may appear in either hospital or physicians' records. Such records show the diagnosis, treatment and progress of the patient (Pheasant 11391).

219. Medical records may include laboratory and x-ray results and findings of consultant physicians (Pheasant 11399). The records should include objective findings and clear reasoning as to why a diagnosis was chosen or a certain treatment selected (Gabrieli 1400).

(Finding 197). Even those underwriters who do not care whether the telephone is used in lower priced reports of necessity must be deemed to place greater reliance on information derived from face-to-face interviews in view of their preference for this method of investigation when the economic risk is higher (Finding 209).

⁷¹ This does not apply to those reports which were designed for telephone handling and sold on that understanding.

They may also contain information about the patient's habits (Gabrieli 1401), his emotional or physical activities and condition (Elmendorf 4247A, Pheasant 11396), or psychiatric condition (Gabrieli 1402-03). A psychiatric record gives a history of the patient's lifetime pattern, including not only his symptoms but also his ideas, dreams, and thought processes. It may include correspondence, information received from and about his family and other people, and the patient's experiences (Grossman 4168-69). Other medical records may also include such psychiatric information, since many symptoms and illnesses have an emotional basis (Grossman 4173-74). In addition, medical records may contain the subjective impressions and opinions of the physician on matters such as the honesty of the patient (in relation to revealing matters such as alcoholism or sexual problems), or his level of intelligence (Gabrieli 1400-02, Grossman 4175-77).

220. Medical records are maintained for the benefit of the patient. They identify his problems and what treatment he has had, to provide continuity of care (Elmendorf 4247, Grossman 4174-75, Pheasant 11391). In addition, such records may be kept for use in teaching in hospitals, for research findings and reports and as protection to the physician in the event of a threat of a malpractice action (Grossman 4175). [68]

221. Medical ethics emphasize the sanctity of the patient-physician relationship and require that information divulged to a physician be kept confidential and not disclosed without the patient's authorization (Pheasant 11392-93, Gabrieli 1407-08, Grossman 4185).

222. Confidentiality is important to encourage free communications between physician and patient (Grossman 4177, 4195-96, Elmendorf 4247, 4247A-48).

223. If medical records could be disclosed, physicians might not keep complete records (Grossman 4176-77, Gabrieli 1410-11). Disclosure of such records could also adversely affect the individual patient (Pheasant 11393-95). For example, disclosure in the case of emotional problems might interfere with the patient's adjustment to society and his personal career (Gabrieli 1409-10).

B. Respondent's Acquisition of Medical Information

224. There are valid reasons for disclosure of confidential medi-

cal information, including disclosure to an insurance company in the case of an application for a policy.⁷² Under such circumstances, the physician is obliged to disclose confidential medical information if authorized to do so by the patient (RX 641A-D, "Opinion and Reports of the Judicial Council" of the American Medical Association; Gabrieli 1413, Grossman 4181).

225. Respondent obtains medical information from physicians, hospitals and clinics in connection with two of its services: the Underwriting Medical History (UMH) report and certain claim reports (Trotochaud 6404-05, 6289). [69]

226. Respondent's UMH service was initiated in 1966, and established as a standard service in 1967 (Trotochaud 6282, 6369; RX 654, 655). Prior to 1972, respondent also had an attending physician's statement service; this service was similar to and eventually replaced by the UMH service (Trotochaud 6281-82, 6369-70).

227. In securing medical information in the case of UMH reports, respondent performs a courier service (Trotochaud 6404-05). The objective of the UMH service is to speed the flow of medical information from medical source to the insurer (Trotochaud 6282, 6367-68; Hawkins 1052-53).

228. In preparing UMH reports, the medical authorizations used by respondent are generally part of the application forms provided by the particular insurance company (Davison 2643-44, Hawkins 1050, N. Taylor 10824-25). The application forms used by insurance companies, of which the authorization is an integral part, are filed, approved and reviewed by the insurance departments of the states where they do business (Davison 2665-66, Hawkins 1076-78, N. Taylor 10825-26). The exact language of the authorizations has varied, since different companies are subject to the regulations of different states (Trotochaud 6408) and because, at least in the past, most companies themselves prepared the forms submitted for approval (Davison 2645-46). Currently, most companies use virtually identical forms (Davison 2645). Some of the authorizations furnished by customers to respondent (from insurance applications) have mentioned Retail Credit Company by name (and respondent has encouraged the use of such forms) (Trotochaud 6408-09; A. Brown 7754; Converse 4638; Guse 12070-71; Harden 1382, 1386), while others have authorized release of medical records to the "bearer"; to the named insurance company or its "representative" or "agent"; or to the named insurance company (A. Brown 7754, Davison 2643-44,

⁷² Insurance companies seek medical information in determining whether to issue or rate a life or health policy and in determining what action to take when a claim is filed (Davison 2657-58; Hawkins 1018; Taylor 10831-33, 10856; Hankin 10629-30, 10637-38).

Harden 1386-87, Hawkins 1050, Trotochaud 6408). The authorizations which refer only to a named insurance company are in the minority (Trotochaud 6408). [70]

229. In connection with claim investigations, in some instances, the insurance companies obtain authorizations from the claimants and furnish them to respondent (Trotochaud 6405-06, Hankin 10649). For example, Occidental Life required a claimant to execute and submit an authorization as part of the proof of claim (Hankin 10649-50). However, in a majority of cases, the insurance company does not supply an authorization, and respondent obtains an authorization directly from the claimant. Also, certain hospitals require the signature of the doctor in addition to the signature of the claimant; in these instances, respondent cannot use the authorization furnished by the insurance company, and it obtains one signed by both the claimant and the doctor (Trotochaud 6407). Respondent, when it obtains an authorization, uses its own form, which specifically authorizes release of the information to Retail Credit Company (or, since January 1, 1976, to Equifax Inc.) (RX 633; Trotochaud 6406). The practices of insurance companies in handling claims are subject to state legislation. In California, any resident who is dissatisfied with the handling of a claim can register a complaint with the Insurance Department, which has access to the insurance company's complete file (Hankin 10633-34). In addition, in several states, insurance companies are subject to triennial examination by the insurance authorities, and this examination includes a detailed study of the company's claim operations (Hankin 10634, Davison 2667).

230. In the relevant period, field representatives were instructed not to represent themselves as employees of the insurance company (Burk 10382). In introducing themselves to medical personnel, field representatives regularly gave their names and stated they were employed by respondent (Baranek 9699, A. Brown 7749, Burk 10382, Cooke 9974-75, Guse 12052-53, Hartfield 10494, E. Jones 12927, L. Jones 10448, J. Moss 11024, Pregler 9218, Silar 4039).⁷³ [71]

231. In the course of securing medical information, respondent's field representatives regularly returned to the same medical source for medical records on different patients requested by different insurance companies (Burk 10383, Guse 12054, Harden 1388-89, Hartfield 10495). In addition, several field representatives testified that, on one occasion, they would present to a single doctor or

⁷³ The witnesses who testified on this point stated that they had never represented themselves to a medical source as an employee of an insurance company (Burk 10382, Cooke 9975, Guse 12054, Hartfield 10495, Jenckes 82, L. Jones 10449, J. Moss 11025, Pregler 9218).

hospital, authorizations from several different insurance companies on different patients (Cooke 9975, Huntington 12602, E. Jones 12928, L. Jones 10449-50, J. Moss 11024, Pregler 9217-18).

232. Under the circumstances, it appears that those medical sources contacted for information with respect to several different patients for different insurance companies were on notice that respondent's field representatives seeking medical information were not insurance company employees.

233. The UMH report is a three-part form which has, since the inception of the service, carried respondent's name (formerly Retail Credit Company and now Equifax Inc.) in bold print at the top of each page (RX 634B-D; Trotochaud 6388-89, A. Brown 7749, Baranek 9700, Cooke 9975, Guse 12053-54, Huntington 12601, Pregler 9217). The usual procedure was to give this form to the doctor, or the member of his staff whom he had designated to fill in the information requested (Trotochaud 6290, 6452-53). One part of the form, which bears the name of Retail Credit Company, is marked "Doctor's Copy," and the procedure has been to give this copy to the doctor or other medical source for his or her records (RX 634D; Trotochaud 6386-88, 6404; A. Brown 7749-50; Baranek 9700; Cooke 9975; Huntington 12602; Pregler 9217). Consequently, the doctor and his staff could, by reading the forms which they filled in and retained, determine that the information was supplied to respondent and not to an employee of the insurance company.

234. In obtaining medical information for a claim report, the preferred method was for the field representative to interview the physician. The field representative recorded the information on a company form, which had the name "Retail Credit Company." This form was then given to the doctor for his review and signature (Burk 10383-84, Trotochaud 6290). The physician could, by reading the form, determine that the information was being furnished to respondent. [72]

235. The record will not sustain a finding that respondent's employees represented themselves as insurance company employees when they sought medical information from medical sources such as physicians or hospitals (Findings 225-34).⁷⁴

C. Retention and Use of Medical Information by Respondent

236. The filing procedures for UMH reports and the rules as to

⁷⁴ Two of respondent's field representatives testified they stated that they represented a particular insurance company but did not affirmatively claim to be employees of such companies (Jenckes 82, Harden 1383). The testimony of these two witnesses is outweighed by the other evidence showing no deception on this point.

what use could be made of file copies, changed during the relevant period.

237. When the UMH service was first instituted, respondent retained copies of the UMH reports in the regular reference alphabetical files along with claims and underwriting reports. The file copy was stamped "PRIVILEGED FILE Do Not Use or Quote. See Mgr. or Claim Dir." (RX 654, 655; Trotochaud 6369, 6382, 6402; A. Brown 7755; Coleman 7917-18; Jenkins 5797-98). Field representatives were not permitted to quote verbatim from a UMH report in a subsequent underwriting report (Trotochaud 6381). A field representative could read the UMH report and use the information therein as a "tip" in preparing underwriting reports (Trotochaud 6382-83).⁷⁵ It was also permissible to supply a new requester with the date and name of the recipient of a prior UMH report. In April 1972, the procedure was changed to permit giving only the date (and not the name or account number of the prior recipient) (RX 656A-B; Trotochaud 6372-73, 6381). [73]

238. This procedure was changed by a memorandum dated July 11, 1972 (RX 636A-C), effective immediately, which gave instructions to "discontinue copying, quoting from, or using in any way in subsequent reports, information from UMH reference files." (RX 636A). Each branch office was supplied with a form which had to be returned to the Home Office, stating that the memorandum was received and the date on which it was received (RX 636C; Trotochaud 6384-85). Under the new procedures, the file copies were placed in a separate file drawer, filed chronologically by customer mailing date, and kept for 90 days (RX 636A-C; Trotochaud 6379-80). In addition, existing UMH reports in the reference files were purged when they were discovered in the preparation of new reports or in the course of the experting and destroying procedure (Trotochaud 6480). The change was instituted because the Company had not always been successful in assuring outsiders that UMH reports would not be used in subsequent reports (Trotochaud 6378-79). The file copy was retained for 90 days in order to take care of situations where the original report was lost (either in the mail or by the customer) and of any question by the customer as to billing (Trotochaud 6379). The field representative no longer had access to completed UMH reports because a file clerk could find a report on a given consumer in the chronological file only by thumbing through the entire file; no index of the file was maintained (Trotochaud 6380, 6383).

239. This procedure was changed by a memorandum dated

⁷⁵ Using information from a report as a tip meant "the information could not be used directly from the report, but could be used in the process of conducting the current inspectional investigation." (Trotochaud 6382).

November 26, 1973, which provided that no file copy of a UMH report was to be retained (RX 635A-B; Trotochaud 6385-86). The UMH form was revised by adding a "control" sheet (RX 634A), which contained the name of the subject of the report, the name of the customer, the medical source contacted, whether a fee was paid, and when the handling was begun and concluded; it contained no medical information (RX 634A; Trotochaud 6385-86). This control sheet was then retained in the file; the copy of the report previously designated "file copy" was redesignated "review copy" (RX 634C; Trotochaud 6386, 6400) and was to be destroyed as soon as the supervisor had reviewed it and assured himself that the report had been completed in accordance with Company instructions [74](RX 634C; Trotochaud 6386). At the same time, the procedure of leaving a copy of the report with the physician was made mandatory (Trotochaud 6388). In making this change, the Company recognized that there would be instances in which a report would be lost in the mail and that in those cases, the respondent would have to bear the cost of rehandling (Trotochaud 6387). Respondent made the change because the 90-day retention procedure led some people to think that information in the report could be used in subsequent reports. It wanted to demonstrate there was no way in which confidentiality could be violated because once the information was sent to the insurance company, respondent no longer had it (Trotochaud 6386-87). This revision of the filing system was implemented in the field (Jenkins 5797, 5803-04; A. Brown 7751-52, 7759; Coleman 7917; Paladino 8726-28; Zack 8253-54).

240. The filing procedures for claims reports which contain medical information and the rules as to what use could be made of such information, also changed in the relevant period.

241. Since at least 1960, any claim report containing medical information was stamped "privileged", with a legend stating that the claim director or manager should be consulted (Trotochaud 6420-21, 6437-38; A. Brown 7755; Eldred 11236-37; Jenkins 5798; Cf. RX 654). Prior to May 1974, claim reports were filed in the regular reference alphabetical files. Medical information in such reports could not be quoted verbatim in a subsequent report but could be used as a "tip" (CX 666N; Trotochaud 6314; *e.g.*, Burge 5097, Jenkins 5801-02, Lieber 9003, Hakey 1567-68, Laudumiey 1852-53). It was also permissible to state in a new report that a prior claim report had been made (including the customer and date) and giving the name of the doctor and hospital, dates of confinement and the cause (CX 666N, 667Z-29; Trotochaud 6314). [75]

242. Prior to February 21, 1974, if respondent received an inquiry

from a customer who supplied a valid authorization and there was medical information in the claim file concerning the subject of the inquiry, respondent supplied the medical information in the file to the second requester. This procedure was changed by a memorandum dated February 21, 1974, to provide thereafter that the information would be furnished in these circumstances only after receiving permission to do so from the medical source originally supplying the information (RX 639A-B; Trotochaud 6409-10). If such permission was refused, then respondent would recontact the source and obtain the information again (Trotochaud 6410). The change was made to comply with the rules, regulations and ethical procedures as to confidentiality which the medical profession was urging on the insurance industry (Trotochaud 6410-11).

243. Beginning in May 1974, new claim reports were placed in a separate file from other reports. During the separation process, which took approximately a year (RX 660A, 637A; Tr. 6598), previously prepared claim reports were pulled from the regular reference files and placed in the separate claim files (RX 580A-B, 638A-B; Meyer 6596-98, Trotochaud 6423-24). In June 1974, prior to completion of the separation, respondent's employees in the field were instructed to cease quoting insurance history to a current underwriting customer from previous claim files (RX 637A-C; Trotochaud 6426-28). Claim reports (including medical information therein) were not available to field representatives preparing underwriting reports after their segregation in the claim files (Cooke 10006-07, Baranek 9700-01).

244. On December 4, 1975, instructions were issued, effective immediately, that no medical information was to be kept in the claim files. All such information had to be set forth on separate forms (other than the claim report itself) and all copies of the medical attachment were to be destroyed as soon as the report was mailed to the customer (RX 647A; Trotochaud 6411-12). Again, each branch office was required to return to the Home Office a form stating that the memorandum had been received and the necessary action taken to implement the new procedure (RX 647B; Trotochaud 6412). [76]The purpose of the change was to offer the medical profession assurance that respondent would not use medical information other than to provide it to the customer requesting it, because there were still those who felt that respondent might use medical information for other purposes as long as it had such information in its possession (Trotochaud 6415).

245. In short, until July 1972, UMH reports were kept in the regular alphabetical files. And from July 1972 to November 1973, file

copies of UMH reports were kept for 90 days in a separate file (Findings 237-39). Respondent's separation of claim files from other reports began in May of 1974, the procedure taking about a year (Finding 243).

246. Prior to July 1972, information in UMH reports could be used as a tip (Finding 237). Before the separation of the claim and underwriting files, field representatives were permitted to use medical information contained in the claim files as a tip or lead in conducting their investigations (Finding 241). It was contrary to respondent's policy, when using prior medical information as a tip in a current investigation, to ask leading questions based thereon (e.g., Lieber 9004, 9054-55). Field representatives were to ask open-ended questions. Nevertheless, violations of this policy occurred.⁷⁶

247. Information from claim reports could be used as provided in respondent's manuals. [77]CX 666, the Field Representative Manual contains the following instructions pertaining to medical reports in claim files:

Previous Claims Reports in our reference files are valuable assets in making a current report. Some give details of previous health conditions; some point to finances or previous automobile accidents.

Physician Reports and Hospital Records are 'privileged files.' Direct quotations from privileged reference files and copies of them can be made only when you have an authorization signed by the subject *for the customer to which you are reporting*. The authorization should be retained in your reference file.

If the current report is a Claim Report or an L&H Underwriting Report and you have no authorization, the reference file information may be used as a tip. Do not make verbatim quotations from the reference file in writing the report. Limited factual information may be given in a special paragraph and should be written as follows:

NOTE: On 7-1-68, we reported to the Blank Insurance Company, Lincoln, Nebraska, Claim #8956, in connection with a claim for sickness benefits. We found that the subject was confined to the Mercy Hospital from 4-2-68 to 4-13-68 and was attended by Dr. George White. Ailment was kidney trouble and an operation was necessary to remove a stone.

(CX 666N.) [78]

See also Claim Director Instructions, CX 676Z-14, and the Branch Office Manager Manual, CX 673Z-229. (The printer's dates are 3-70

⁷⁶ Although only three ex-employees testified that they asked leading questions in connection with the use of prior medical information as a tip, there was a potential for abuse in permitting such use of the information (Wines 379, Woicik 2888, Silar 4040-41). In view of the proclivity of substantial numbers of respondent's field representatives to utilize unauthorized shortcuts (Finding 405), the potential for such abuse during the relevant period when such records were available in the general files was substantial.

for CX 666, 3-71 for CX 676 and 3-69 for CX 673; RX 102N-O (printer's date 4-73)).⁷⁷

248. Similar instructions were given in the L&H Manual for incorporating privileged medical information in case respondent had no authorization to quote it in a current underwriting report. These instructions were not limited to claim reports and would encompass all medical reports obtained by respondent (CX 667Z-29, printer's date 9-71). These instructions also permitted disclosure of diagnosis such as "kidney trouble" and of treatment such as "operation was necessary to remove a stone" (ibid). Respondent's procedures also permitted field representatives to use information from UMH reports as a tip prior to July 11, 1972 (Trotochaud 6382-83).

249. Respondent's instructions, even with the prohibition against direct quotation, permitted disclosure of confidential medical information pertaining to diagnosis from privileged medical reports in claim and UMH files without authorization therefor.⁷⁸ The permit-

⁷⁷ These instructions on this point in RX 102N-O are identical to those in CX 666N. However, as of July 1973, the instructions no longer permitted quotations from claim medical reports pertaining to diagnosis and treatment, disclosure being limited to dates of admission or treatment by physician or treating institution (Claim Director Instructions, RX 109B).

⁷⁸ Respondent requests a finding that:

... [T]here are certain basic facts [in medical records] which are not privileged, i.e., the dates of confinement to a hospital, the name of the hospital, dates of treatment by a physician, the name of his physician and admitting diagnosis, which may be disclosed without authorization (Trotochaud Tr. 6468; A. Brown Tr. 7908-09, 7912-13; Mr. Jerome Tr. 9657-58). [79]

This finding is not adopted since the testimony relied on pertaining to diagnosis is apparently in conflict: Ann Brown testified that hospitals would give admitting diagnosis without authorization (Tr. 7909, 7912-13).

The Trotochaud testimony seems to include diagnosis in the privileged category:

Q. Would you define what you mean by privileged medical information?

A. *'Privileged medical information' is that information that directly relates to the treatment or the nature of the illness. It does not include dates of confinement to the hospital, name of the hospital, dates of treatment by a doctor, name of a doctor. That information is available to the general public.*

I suggest that the recent publicity given to the Hughes situation would bear that out. The hospital disclosed the fact Hughes had been admitted to the hospital and date he was admitted but did not disclose diagnosis or cause of death. That is the difference between 'privileged' medical information and 'non privileged.' (Tr. 6468; emphasis supplied)

Gerald Jerome testified:

Q. What information was privileged?

A. Medical information that required authorization to obtain.

Q. Was any information that was received from a doctor, or hospital that might not be privileged?

A. *Only dates of admission and discharge and the name.* (Tr. 9657-58; emphasis supplied).

See also Model State Legislation prepared pursuant to the directions of the House of Delegates of the American Medical Association defining "confidential medical information" as follows:

(d) The term 'confidential medical information' means: (1) all information regarding a patient's medical history, condition, or treatment communicated by the patient or other person on the patient's behalf to the patient's physician or his agents or employees during the course of the physician-patient relationship or to a hospital or other health care facility or its agents or employees, and (2) all information developed by the patient's physician, his agents or employees, or by a hospital or other health care facility or its agents or employees relating to the diagnosis or treatment or medical evaluation of the patient.

(RX 672D-E; Pheasant 11378-79.)

ted use [80]of respondent's medical reports as tip information, if leading questions were asked in the absence of a valid authorization, would also result in unauthorized disclosure of confidential information. In addition, the permitted use as tip information in unrelated transactions without an authorization breached confidentiality even when leading questions were not asked.⁷⁹

250. Respondent's brochure entitled, "Reporting Medical Information," urging the medical profession's cooperation in furnishing such data, represented: [81]

We handle thousands of hospital and medical records every month in a tactful, responsible, and confidential manner.

(CX 397A-C, printer's date 10-71.)⁸⁰

The brochure was disseminated at a time when respondent's procedures permitted using privileged medical information in its files as tip information and disclosing nature of diagnosis and treatment.

251. Respondent's brochure disseminated to the Medical Profession, CX 397 (October 1971), represents that such reports will be kept confidential. This implies no subsequent unauthorized use will be made thereof in unrelated transactions. Such representations conflicted with instructions as to respondent's employees that such information could be used as tips in preparing other reports and that the diagnosis therefrom could be disclosed in connection with other reports even though there was no authorization for such use (e.g., CX 666N). The failure to disclose such procedures to medical sources constituted the failure to disclose a material fact and was misleading.

252. In view of the sensitive nature of the information contained in medical records and the possible adverse effects on patients from disclosure of such information, the patients' consent to the release of such information should be informed (Findings 218-23; see also CX 1481A; Elmendorf 4250⁸¹). [82]

253. In view of the sensitive nature of the information and the

⁷⁹ It is self-evident that use of tip information necessarily influences an investigation irrespective of whether leading questions are asked.

⁸⁰ This brochure, which pertains to reporting medical information for insurance purposes, encompasses respondent's medical reports in general.

⁸¹ CX 1481A states:

The consent of the patient to release information should be informed; that is, the authorization form should state unequivocally by whom the information might be used, including the requesting company, its representative, or other organization related to that requesting company.

(These and other related principles contained in CX 1481A-B were adopted by the California Medical Association Tr. 4245-46, 4254).

consequences of its release, the fact that such information would be secured by a third party consumer reporting agency which kept copies thereof, was a material fact which should have been disclosed to the consumers signing such authorizations.⁸²

254. Authorizations secured by insurance companies and utilized by respondent have used language such as the following:

To the extent permitted by law, I expressly waive on behalf of myself and each family member proposed for insurance under this application all provisions of law prohibiting any physician, hospital official or employee, or any other person who has attended or examined me or them, or who has been consulted by me or them from disclosing any knowledge or information thereby acquired and from testifying with reference thereto, and I expressly authorize such person to make such disclosures.

(RX 666, see also 667, 668.)⁸³

255. The language in such authorizations would not put the consumer on notice that disclosure would be made to a third party consumer reporting agency which, for a portion of the relevant period, kept copies of such reports in its files and which could use such data in connection with unrelated transactions for which no [83]authorization had been given. Consumers signing such authorizations did not give informed consent to the disclosure of such information to respondent.⁸⁴ Respondent should have been aware of that fact, and its use of such forms was an unfair practice within the scope of Section 5 of the Federal Trade Commission Act.

256. The extensive changes in respondent's procedures which ultimately eliminated the retention of medical reports, has effectively prevented further unauthorized use of medical information.⁸⁵

257. In any event, respondent, when it secures medical information for insurance companies, either in the form of UMH reports or in the course of a claim investigation, is engaged in the business of insurance. Respondent's acts and practices in obtaining medical information for insurance companies are, therefore, exempt from Federal Trade Commission regulation to the extent that they are regulated by state law. [84]

⁸² Essentially, there is no consumer testimony on this point. The finding that this is a material fact is based on finding 252.

⁸³ The foregoing authorizations were in use by the Occidental Life Insurance Company and were furnished to respondent (Taylor 10855-57).

⁸⁴ The finding that consumers signing certain authorizations did not give informed consent when the authorization did not name the reporting agency is based on the confidential nature of the subject information and a review of the language in the authorization. This compels the inference that the consent given was confined to the transaction for which the authorization was given.

⁸⁵ Respondent instituted procedures to eliminate retention of UMH reports in November 1973, and to eliminate retention of claim medical reports in December 1975 (Findings 239, 244).

XI. ALLEGATIONS THAT RESPONDENT HAS FURNISHED CONSUMER
REPORTS AND INVESTIGATIVE CONSUMER REPORTS TO PERSONS WHO
IT HAS NO REASON TO BELIEVE INTEND TO USE THE INFORMATION
FOR ONE OF THE PERMISSIBLE PURPOSES AS DEFINED IN FCRA
(PARAGRAPHS 16-17 OF THE COMPLAINT)

A. Voluntary Follow-Up Service

258. Respondent formerly furnished a voluntary follow-up service pursuant to which it transmitted to certain customers to whom a prior consumer report had been furnished, additional adverse information on the individual who was the subject of the report. Voluntary information was not furnished to any customer to whom a consumer report on the individual had not been furnished previously (Jenkins 5780-81, Jones 5184-85).

259. Field representatives were instructed:

Voluntary Follow-Up Information is information which we voluntarily submit on a person upon whom we have previously reported. Any information known to the Field Representative personally or received from reliable sources, which has an unfavorable bearing on an individual on whom he has made any kind of a report, should be submitted; for instance: death, serious illness or disease, accident, bankruptcy proceedings, change in occupation which involves a hazard, arrest for some serious offense, suits or judgments, fire, fire or theft of car, etc.

(CX 666Z-35.)

260. The Voluntary Follow-Up Service was discontinued on April 29, 1974 (Jenkins 5781-82). [85]

261. Voluntary information generally consisted of public information found in newspapers or public records (Ivey 2005-06; R. Jones 5236; Jenkins 5780-81; Ledum 4663-64; Fuentes 2075-76, 2086; A. Pierce 2581; Hawkins 1085-86). It was not necessarily limited to public information, however, and could include "[a]ny information known to the field representative personally or received from reliable sources which has an unfavorable bearing" (CX 666Z-35; Jenkins 5855).⁸⁶

262. No charge was imposed for the transmittal of voluntary information (Fuentes 2075, A. Pierce 2596, R. Jones 5188, Jenkins

⁸⁶ As one of respondent's officials testified:

Q. Might another example [of Voluntary Follow-Up] be information on which was developed through a representative or by a field representative during subsequent investigations and different reports?

A. Certainly. The field representative could very well have developed the accident or sky diving or fire. It does not have to be a newspaper clipping.

Q. Does that also apply to monetary savings?

A. Yes.

(Jenkins 5885).

5784). Respondent expected to be rewarded by increased business as a result of the service (CX 666Z-35) and, the dissemination of such information must be deemed a promotional device.

263. Insurance companies receiving voluntary information sometimes had a policy in force in connection with the individual who was the subject of the voluntary follow-up and, at other times, did not (Davison 2642-43, Hawkins 1056-57).

B. Monetary Savings Program

264. Respondent's Monetary Savings Program was in effect during the period 1971 to present (RPF 248). [86] Under the Monetary Savings Program, respondent, in certain instances, transmitted to its sales force information about the subjects of previously prepared reports. This was done if it was discovered that an event had occurred which would cause an insurance company a loss and if such insurance company had earlier been furnished with one of respondent's reports which would have allowed it to identify such risk and rate or decline the application of the subject of the report (Jenkins 5783-84, R. Jones 5188, L. Smith 10576, Ledum 4665, A. Pierce 2583).⁸⁷

265. Respondent's sales representatives sometimes used such monetary savings information as a promotional device to demonstrate the value of its reports (H. Smith 8434-35, 8443-44; L. Smith 10576; Fuentes 2074-75).

266. Most of the information transmitted to customers pursuant to the Monetary Savings Program was of a public nature, e.g., newspaper clippings, police and court records, etc. (Fuentes 2086; R. Jones 5186, 5237; Ledum 4665; Hawkins 1086). Such information could also, however, be derived from subsequent investigations (Ledum 4665, Jenkins 5855). No charge was made for the transmittal of such information (R. Jones 5188, Jenkins 5784).

267. Monetary savings information could be transmitted to an insurance company which had no policy in effect on the individual involved. It could have rejected the application on the basis of the original report previously submitted (Jenkins 5856, L. Smith 10588-39). [87]

268. Respondent knew or should have known that information furnished under the Voluntary Follow-Up Service and Monetary Savings Program was sometimes furnished to insurance companies who had no insurance policy on the individual involved or who were

⁸⁷ The Voluntary Follow-Up Service differed from the Monetary Savings Program in that the initial report preceding the voluntary follow-up did not identify a risk or a hazard.

not at that time considering an insurance application on that individual (Findings 263, 267).

269. Respondent, under both the Voluntary Follow-Up Service and the Monetary Savings Program furnished information about consumers to insurance carriers when there was no request for such information and, in some instances, to customers who had no need for the information as defined by FCRA.

270. Respondent, under its Voluntary Follow-Up Service and Monetary Savings Program, furnished consumer and consumer investigative reports to persons who it had no reason to believe intended to use the information for one of the permissible purposes set out in Section 604 of FCRA (Findings 268-69).

XII. ALLEGATIONS THAT RESPONDENT HAS INCLUDED IN ITS CONSUMER REPORTS OBSOLETE INFORMATION IN VIOLATION OF SECTION 605, FCRA (PARAGRAPHS 18-19 OF THE COMPLAINT)

A. Employment Records

271. When respondent is requested to prepare employment reports covering employment experience for more than seven years and when respondent obtains adverse information more than seven years old from a former employer, as a matter of established procedure or usual and customary practice, respondent states in the reports "In compliance with the FCRA, no additional information can be reported from this former employer covering employment experience prior to seven years ago" or otherwise indicates that the Fair Credit Reporting Act does not permit the reporting of such information.

(CX 1445D, ¶ 23; CX 675U.) [88]

272. Such stock sentences were to be used only in connection with employment records (CX 675U). The stock sentence that FCRA does not permit the furnishing of information covering employment experience prior to 7 years ago was utilized only in the case of those reports where adverse information had been uncovered (CX 1445D, 675U). The limiting of the use of this stock sentence to those situations where adverse information had been uncovered indicates that its use was intended as a signal to disclose the existence of such information.⁸⁸

⁸⁸ There are a number of ways respondent could have apprised customers of the limitations imposed on its services by FCRA without signaling the existence of adverse information in particular cases. One method might have been simply to routinely provide all users of its employment reports with a brochure setting forth the relevant text of Section 605. Such a brochure could have been enclosed with *all* reports or it could have been sent to users of the reports on a one-time basis.

273. The practice violated Section 605 of FCRA.

B. Motor Vehicle Reports

274. Respondent sometimes furnished photocopies of state motor vehicle reports with portions of the report masked out (Answer, Par. 18). Such reports dealing with individual consumers were purchased from state motor vehicle departments for transmission to respondent's insurance company customers (Hewey 6514).

275. Prior to April 25, 1971, 21 state motor vehicle departments provided motor vehicle records containing information more than seven years old. Some states provided such information as a matter of procedure; in other states, the systems to prevent the reporting of such information were not always effective (Hewey 6514-15). [89]

276. Respondent was aware that such practices by certain state motor vehicle departments made it difficult to comply with the provisions of Section 605 of the FCRA (Burge 4993-94, 4996).

277. Respondent, for a period of time after FCRA became effective, was uncertain whether motor vehicle records were subject to Section 605 (Hewey 6516). It was not until 1973 that the Federal Trade Commission interpreted FCRA to apply to state agencies which issued motor vehicle records (Hewey 6532).

278. Respondent's officials contacted state motor vehicle departments to encourage them to change their systems so that respondent would not be provided with old information (Hewey 6517). Respondent's attempts to have the states change their procedures were not always successful (Hewey 6518). Respondent persisted in its attempts to secure such changes (Hewey 6521-22). Currently, no state reports information over 7 years old in motor vehicle reports (Hewey 6529).

279. Respondent's masking out of obsolete information on state motor vehicle reports was a reasonable response to the situation facing it in the case of those states reporting such information. The record discloses no intent to signal the existence of such information in violation of Section 605, FCRA.⁸⁹ [90]

XIII. ALLEGATIONS THAT RESPONDENT DOES NOT FOLLOW REASONABLE PROCEDURES TO ASSURE MAXIMUM POSSIBLE ACCURACY OF THE INFORMATION CONCERNING THE SUBJECTS OF ITS REPORTS (PARAGRAPHS 20-21 OF THE COMPLAINT)

A. Pressure To Produce Protective and Declinable Information and Respondent's System of Quality Audits

⁸⁹ Alternatives to the procedure actually followed, such as retyping the information on a non-official form would have made it obvious that the original record had been altered (Hewey 6521).

(1) Protective and Declinable Information

280. Respondent's Branch Manager's Manual states:

Actionable Information: This is the basis on which we sell our services. The terms "Protective/Declinable" and "Actionable Information" have become descriptive of the information we develop for our customers and the terms are used interchangeably. Insurance companies must have information to properly rate each acceptable risk, as well as to decline or cancel the "poor risk."

(RX 107Z-153; CX 673Z-166.)

281. Declinable information is adverse information on the subject of a report which might cause the company to which he is applying for an insurance policy to refuse to write such a policy (Bresnahan 583).

282. Protective information is information which is not sufficiently serious to make the case declinable but which may have an effect on the way the insurer rates it (Bresnahan 583).⁹⁰ [91]

283. Significant information is used in connection with claim reports to refer to information that would be helpful to respondent's customers in evaluating claims (Monarch 8565, 8573). Protective and significant information are considered synonymous (Stubbs 9279).

284. Selective information is a term used by respondent in connection with its employment reports. It refers to particular qualities or skills which would make a person a desirable prospect for employment (Jenkins 5790, 5858-59; Hale 12681-82, 12730; Bresnahan 692-93).

285. Respondent's normal procedure is that adverse information must be confirmed by at least two sources (Jenkins 5789). An exception to the rule occurs when only one person, because of his peculiar relationship to the subject, has access to the information.⁹¹ In that case, it is reported with an indication that it came only from the one source. Normally, protective and declinable information from one outside source, which cannot be confirmed, is not reported (e.g., Baranek 9713-14, 9725-26; Garcia 13131; Fuentes 2030; Johnston 12320). Such information, although derived from a source other than an employer, may be reported, however, with a confirmation note stating that the information was obtained from only one source and the reasons why it could not be confirmed (Horner 9893; Todd 9769-70, 9788-89; Lowitz 8791-92; Tilden 11817).

286. The general rule, as stated in respondent's Field Representative's Manual (March 1970), is that unfavorable information received

⁹⁰ The terms "protective" and "declinable" are no longer used by respondent. A current term used by respondent is "features" which combines the concepts of protective and declinable (Lieber 9106).

⁹¹ An example of this would be an employer (Vogen 12206).

from the applicant or insured should be confirmed just as carefully as though received from outside sources (CX 666Z-2 and 3). If the information is personal, covering health, habits or personal reputation and cannot be confirmed, then the field representative is to make a put-up to his supervisor (ibid; see also RX 102Z-3). In practice, adverse information coming from the applicant himself is to be confirmed if possible. If it cannot be [92]confirmed, it is to be attributed to the applicant, noting that it could not be confirmed elsewhere (Jenkins 5789).⁹²

287. Public record information does not need to be confirmed by a second source (Maust 8278, Vogen 12205).

288. The confirmation of protective and declinable information may require the field representative to contact one or more sources over and above the number otherwise required for the particular report (Garcia 13130-31, Getz 12388, Vogen 12205-06).

289. Respondent's determination of whether a case is protective or declinable is based on its estimate of the action that a majority of its customers would take. Respondent recognizes that not all companies take the same action on the basis of the same information (CX 1029A).

290. Respondent kept records of field representative and branch office performance in the development of protective and declinable information. The purpose was to monitor performance by respondent and to determine the value of its service to customers (Jenkins 5790).

291. Respondent's field representatives, as a matter of established procedure or usual and customary practice, recorded daily on standardized forms (Form 930) whether each completed report contained information which the field representative believed to be "declinable" or which he believed contained a "protective feature" (CX 1445D; RX 107Z-155).⁹³ [93]

292. Respondent's branch office managers were instructed that:

... [t]he 930 should be reviewed regularly throughout the month to insure that all Field Representatives are developing a reasonable percentage of actionable information. Local management can judge from his territory and the types of cases he handles what range this should fall. . . .

Branch Manager's Manual, CX 673Z-169.)

293. Branch office officials maintained on respondent's Form 105-A, total figures derived from the field representative's Form 105s, showing the percentage per month of protective/declinable

⁹² However, many witnesses testified that if the adverse information is secured from the applicant, there is no need to seek additional confirmation (e.g., Brown 7007-08, Hilderbrand 12009, Vogen 12205).

⁹³ This practice was discontinued January 1, 1976 (Browning 6065-66).

information he developed, as well as information concerning his production (Curtis 7148-51).

(2) Utilization of Quality Analyses or Audits

294. The audit division of the home office Research Department, in the relevant period, conducted quality analyses audits. Generally and traditionally, respondent conducted audits by branch offices and grouped those offices for regional results (Browning 6054).⁹⁴

295. Such audits measured on a statistical basis, branch office performance with respect to the production of protective and declinable information and the branch office's performance with respect to "below standard underwriting" and "below standard operating"⁹⁵ (Browning 6053, Jenkins 5791, Sandor 6912-13). [94]

296. Respondent kept historical records based on the quality audits of percentages of protective and declinable information obtained by the Company as a whole, by regions and by branch offices (Jenkins 5790, Fausold 10224-25, Eldred 11247-48). The corporate averages were based on analyses of thousands of reports (Loar 12835-36, Eldred 11247-48, Golderer 8646) and changed yearly (Loar 12857; Bresnahan 715; Fausold 10229, 10244-45).

297. In 1975, respondent changed the audit procedure so as to get regional rather than individual branch office results (Sandor 6915, 6938). Effective January 1, 1976, it ceased auditing protective and declinable information, as well as the below standard operating and underwriting items (Sandor 6920, 6928; Brown 6975-76, 7002). Currently, the audits cover source selection and completeness, as well as report wording and clarity of presentation (Browning 6052-53; J. Brown 6975-76, 7002).

298. In the life and health line, a branch office was the subject of one or two quality audits a year in the period 1971 to 1974 (Sandor 6912, Hermo 8586). Also, a quality audit of a branch office's automobile reports was conducted once or twice a year in that period (Yox 8537).

299. Respondent's officials were concerned with performance on the below standard operating and underwriting categories as measured in the audits (*e.g.*, see CX 1229A-B, 1269A, 1127A). However,

⁹⁴ Branch offices might also conduct report audits independently at the local level (Jenkins 5819).

⁹⁵ "Below standard operating" refers to deficiency in clerical detail (*e.g.*, typographical errors) in the report, while "below standard underwriting" refers to deficiencies in content such as failing to ask certain questions (Browning 6053; Sandor 6913, 6916).

"quality" to respondent's employees in this context, referred primarily to protective/declinable information (Hakey 1724-25).⁹⁶ As stated by the Regional Vice President for the New York Metropolitan Region in a memorandum to his managers on May 8, 1974: [95]

Notice the big questionmark where it counts the most. In Protective and Decline we didn't have a single office listed, and that's god awful to say the least.

(CX 1290A-B.)

300. The Seattle branch manager who, in a regional Automobile Quality Analysis, came up with 78 percent of its reports containing protective information and 9.1 percent containing declinable information was congratulated on his performance in "this all-important area" (CX 1229A).

301. The only measure of usable information in the home office audits in the period 1971 to 1974 was the recorded percentages of protective/declinable information (Curtis 7334-35, Moore 10094).⁹⁷

302. The branch office received no notice of an audit, and the cases to be sampled were selected by the Research Division (Sandor 6912, Jenkins 5791).

303. Once the package of cases was received from the branch office, each case was reviewed by an analyst measuring usable or protective and declinable information and the below standard operating and underwriting features (Sandor 6913). Certain audits measured only the protective/declinable information feature (CX 1123A; Sandor 6927-28).⁹⁸

304. After completion of the analysis, the results were tabulated and summarized on a cover sheet showing the number of cases sampled, the dates the audit was taken and the percentages of the items measured. The entire package was then turned over to the home office Operating Department for handling in the field (Sandor 6916, 6918). The audit results were transmitted to the Regional Vice Presidents by the Operating Department with such comments as it deemed appropriate. The Regional Vice Presidents then took up the audits with their respective branch offices (Jenkins 5791). [96]

305. Branch office performance was measured against historically determined levels. The branch offices were ranked for the performance category tested, in upper, middle, or lower thirds. The ranking was determined by relating current performance of a

⁹⁶ One field representative was informed by his assistant manager on April 17, 1973, "You know that the words quality and decline are now synonymous and we are being paid for developing actionable information . . ." (CX 982B).

⁹⁷ Employment reports were an exception (Finding 284).

⁹⁸ This procedure has been discontinued (Sandor 6928).

particular branch office to the performance of all branch offices in the preceding year (RX 710).

306. The following figures from CX 1254B, a Life and Health Report Quality Analysis for the Tulsa branch office in the Southwest Region, are typical of the statistics detailed in a home office quality analysis or audit in the relevant period:

	<i>Current Analysis</i>		<i>1972 Combined Results</i>	
	<i>Prot./Dec.</i>	<i>Completed</i>	<i>B.O.</i>	<i>Org.</i>
Number of Reports		70	-	52,970
Total Protective		15.7	20.0	19.0
Major Features:				
Habits		0.0	.5	1.0
Reputation		1.4	2.0	2.3
Reckless Driving		1.4	2.0	9
Declinable		1.4	3.4	4.5
% of Protective Reports Having:				
Over 20 points		0.0	2.4	1.3
11-20 points		0.0	4.9	9.1
8-10 points		18.2	22.0	16.9
5-7 points		27.3	24.4	21.6
Under 5 points		54.5	46.3	51.1
Below Stand. Underw		32.8	21.2	19.2
Below Stand. Oper.		18.6	21.2	16.3
# Pts. Graded BSU & BSO		36	-	-

[97]307. In this instance, the Tulsa office was in the lower third for all categories, viz., protective and declinable information and below standard operating and below standard underwriting (CX 1254B). The foregoing figures show that, in this audit, 70 reports were analyzed; that 15.7 percent of the Tulsa office reports had some protective information and 1.4 percent, declinable information. The respective percentages for below standard underwriting and below standard operating were 32.8 and 18.6 percent (CX 1254B; Loar 12853). The corresponding figures under the heading 1972 Combined Results under "Combined BO" are the consolidated figures for the combined branch offices in the region for the previous year. The last column, "Result Org." sets forth the corresponding figures for the

preceding year for the entire organization (Loar 12853-54, 12856-57; CX 1254B).⁹⁹

308. Branch office performance with respect to protective/declinable information was included in the assessment of whether an audit was satisfactory (Jenkins 5818). And, managers were concerned with passing audits and obtaining acceptable levels of protective/declinable information (Hakey 1723).

309. Respondent's employees were told in connection with their appraisals of their unit's performance on audits with respect to production of protective/declinable information, that it is the production of such data which sells the service and keeps respondent in business (CX 778A,¹⁰⁰ 1116B, 1187A, 1254A). [98]

310. Respondent's employees in the field were "extremely sensitive to analysis results—good or bad. They [had] a definite effect on the Manager's morale, the Manager's individual bonus, and the morale of the [Employees]" (Letter, August 27, 1973, from a Regional Vice President to a Home Office official, CX 766, 770).

311. There was considerable rivalry among respondent's offices, and everyone wanted to be at the top of the performance category in terms of all phases of branch office performance measured by quality audits, including production of declinable information (Loar 12836-37; CX 783A-F).¹⁰¹ Regions also competed with each other with respect to ranking in the quality audits (CX 1070A, 1146A).

312. Performance on the quality analysis was a factor considered in the awarding of bonuses under the Management Incentive Plan. Branch managers were reminded of this by their Regional Vice Presidents, *e.g.*:

You, no doubt, are wondering how this fine showing will affect your management incentive measurement. It will affect it in a positive way, in most cases, in that I will add to your recorded points on quality because of automobile analysis results . . .

(Regional Vice President to Managers, Western Operating Region on June 6, 1974, CX 1146A; see also CX 1194A and 1269A).

313. Field representative performance on quality audits was one

⁹⁹ The regional and national results in such audits reflect the averages for the year preceding that in which the audit took place (Loar 12856-57).

¹⁰⁰ *E.g.*, "The results can only be termed 'excellent.' We scored in the upper third grouping in both protective and decline . . .

. . . This is what keeps us in business . . ."

(CX 778A.)

¹⁰¹ Sometimes, a Regional Vice President was satisfied with performance in the middle third (*e.g.*, see CX 1309C; Hale 12673-74).

factor among several to be considered in salary recommendations by the branch manager (Eldred 11327). [99]

314. If a particular field representative consistently failed to develop protective/declinable information, he could be subjected to additional training or retraining (Jenkins 5792).

315. To obtain protective/declinable information, field representatives were instructed that they should ask the full range of questions (Baranek 9723; Cooke 9997-98; Landreth 12139, 12150-51; Saltzgaber 11971-72; Brothers 7432-34;¹⁰² Paladino 8732-34; Zack 8230; see also CX 1229A); see logical sources (Cooke 9988, Elmendorf 11574-75, Huntington 12629-30, J. Moss 11048, Saltzgaber 11971-72, C. Smith 8374, Weston 10709); and try to obtain direct interviews with the applicant (Hakey 1715-16, Saltzgaber 11971-72, C. Smith 8374, Elmendorf 11574-75).

316. The applicant is considered one of the best sources of protective and declinable information (Miller 11715-16, Bresnahan 736, Hakey 1716, Eldred 11249). Respondent, for that reason, emphasized the importance of obtaining direct interviews with the subject of reports (C. Smith 8372, Bresnahan 718, Bigham 8600-02; see also CX 1229A).

317. Respondent's branch managers were reminded in connection with the quality audits that there were corporate objectives to be met in connection with the production of protective and declinable information:

The attached will give you a quick picture of the Region's results, as far as this First Analysis is concerned, and you will note that we held our Protective and Declinable levels, but we are falling somewhat short of Corporate objectives. [100]

Several large offices failed to show up well, and, of course, this causes the Regional statistics to suffer.

(Regional Vice President to All Offices—South Central Region on March 22, 1972, CX 1187A).¹⁰³

318. Regional Vice Presidents urged their branch managers to secure sufficient protective and declinable information to qualify for top third ranking in the audits, and branch managers assured their superiors of the desire to achieve that goal. For example:

- (a) I know you and your people are going to be disappointed with the Declinable of 5.4% in the second round analysis, especially in view of the 14.6% Declinable achieved on the first round Auto Analysis; but I also know that the personnel in

¹⁰² "... it has to be talked about to our Field Representatives to make sure that they fully understand that *all questions have to be asked in all instances* in order to extract the fullest amount of information available on any given report." (Brothers 7432, emphasis supplied).

¹⁰³ Declinable and protective results for the region in the analysis referred to were in the middle and lower third, respectively; (CX 1187B).

Albuquerque will immediately set about to make sure the next round analysis will reflect only upper third rankings in all categories!

(Regional Vice President, Dallas, to Manager of Albuquerque branch on October 30, 1973, CX 772).

- (b) The complete results of the Second Round 1972 Quality Analyses are in. Our Region, at 19% Protective and 4.5% Decline, finds itself squarely in the Middle Third. This is disappointing, and I will tell you why. Our people, as a whole, in the Northern Pacific Region are too good to have a record other than in the Upper Third, and I would hope that you agree with me.

(Memorandum to Managers in Northern Pacific Region from Regional Vice President on November 13, 1972, CX 1070A). [101]

- (c) As you know, the L&H Analysis was completed last Fall, and I have written most of you concerning the results.

I thought you would like to have a photocopy of the master page, showing just how the South Central stacked up.

As you can see, some of the larger offices are in the Lower Third, and this pulls our percentages down considerably. Also, some offices that have consistently delivered a high Declinable percentage are shown in the Middle and Lower Third, and I would expect that these offices would normally perform at a much higher level.

This is just informative—you have all received your own record, but I felt you would like to see how others performed.

I can't help but congratulate Dayton and Lexington as they are in the Top Third on both Protective and Declinable. Louisville, a large office, is quite close, and several other points could have a much higher showing with one or two more Declines.

The Automobile Analyses are starting to come in now, and I have seen two of these—both had a substantial Declinable figure (Dayton and Bowling Green), and their figures are going to be hard to beat.

Good luck to both of them, but I hope all the rest of you come up with an even higher showing. As rapidly as I receive the Auto Analyses, I will send them on to you.

(Regional Vice President to Managers, South Central Region on February 13, 1973, CX 1222A; emphasis supplied). [102]

- (d) We were pleased with the improvement in the development of protective and declinable information.

* * * * *

Even though there is improvement in our results, we still have a way to go to

reach the upper third category which we are definitely trying to shoot for. We feel this goal is attainable and are striving hard to further improve our results.

(Manager, Miami branch to Regional Vice President, Jacksonville, Florida on June 27, 1973, CX 837).

- (e) All of us naturally would like to be furnishing customers with a service that ranks above other offices and other regions. All of us would like to be in the top third as we measure an office and region.

We did reach the top third as far as protective information is concerned. We missed the top third on declinable by 0.4%, our regional performance for 1973 being 4.6%.

(Regional Vice President to Managers, Western Operating Region on September 24, 1973, CX 1127A).

319. Field representatives were advised by their superiors that they were expected to develop protective/declinable information and, on occasion, they were instructed to achieve specific percentages in these categories or that the percentages which they had achieved were too low. The following instances are illustrative: [103]

- (a) Jim, I have recently completed an analysis on 55 L&H cases completed by you between the dates of 3-13-73 and 3-22-73.

Out of the 55 reports, you had six Former Resident Address Reports on which you could not obtain a direct interview. You interviewed on 27 for 55% interview. *You had seven protective for 12.7% protective. You had no declines.*

Jim, this is a very poor analysis and certainly after all of the meetings we have had and the literature that has been discussed in regards to protective and declinable and interview percentages, I would have expected this to have been much better. A reaudit will be made shortly and it will be necessary that your figures improve considerably. You should be hitting somewhere in the neighborhood of 70% interview on your L&H cases. Your protective should be exceeding 21% and your declinable should be exceeding 5%.

You are well aware of the fact that the Home Office will be pulling a Quality Analysis shortly and if very many of your cases get into that analysis, based on these reports that I have just reviewed of yours, you would actually pull the office down instead of helping it. I know you don't want to have that burden on your shoulders, and I intend to be working closely with you in this respect. [104]

(Manager, St. Paul, Minnesota to one of his field representatives on April 4, 1973, CX 1199;¹⁰⁴ see also CX 1200, a memorandum by the same author to another field representative to the same effect. Copies of these documents were sent to the Regional Vice President; emphasis supplied).

¹⁰⁴ The figures of 21 percent and 5 percent corresponded to the home office figures breaking down performance into upper, middle and lower thirds. The manager, in this instance, desired to achieve upper third performance (Bigham 8602).

Initial Decision

96 F.T.C.

- (b) Out of 46 Automobile reports you had only 34.8% protective information. The bulk of this was on losses with driving reputation running second. This included information developed through MVR records and can almost be discounted. You only had 2 cases containing protective information concerning neighborhood and environment along with two each of physical impairments and youth or elderly risks. You had one protective on personal reputation.

Your declinable record was very good with 6.5% or 3 cases out of the total 46. These involved losses, two, and one on physical impairment.

(Manager, New Orleans office to field representative on June 21, 1972, with copy to Regional Vice President, CX 1180A).

- (c) Finally during January *they were informed that until such time as each individual met the declinable objective for both the Special Narrative and Special Life areas, there would be no salary increases for any members of the unit.* As a result every single member of the unit is overdue for a salary increase by at least three months and some as long as six months. *I do not intend to recant on this area.* [105]

They have also been informed that should the results not be vastly improved by the end of the first quarter of 1971 that their first quarter bonus is in serious jeopardy and will be cut based upon their qualitative performance. You are well aware of the Frank Wibber situation, and this has had a telling effect upon the Specials Unit.

(Manager, Newark office to Regional Vice President on April 5, 1971, in connection with a special life Recheck Analysis, CX 1283A; emphasis supplied).

- (d) Mr. Phillips, in the past year since I have been in Manchester has been rated a substandard investigator due to quality of his reports. Three recent report appraisals on substandard work led me to outline the terms for his continued employment to be immediate increase in quality and more decline and protective information. To accomplish this he would be transferred to the Keene Sub-office where he would come under strong supervision. Mr. Phillips decided he did not wish to change offices and therefore, resigned. In an appraisal completed two weeks after he was given notice that he must transfer there was improvement in report quality and only because of that would I consider him eligible for reemployment.

("Employee Leaving Company" form, dated September 25, 1972, concerning field representative in Claremont, New Hampshire suboffice, CX 1346A-B). [106]

- e) In the Salt Lake City office, the "manager did put out a sheet to each individual inspector at that time. If he felt you had a low percentage, he would indicate that. He would say, 'You should be paying maybe a little more special attention to your questions and getting your questions answered.' The sheets would contain notations such as 'Your decline ratio is a little low. Work a little harder and try to get it up a little more. That's about right. Good.' " (Getz 12395). Field

representatives in Salt Lake City received such sheets from the manager each month (Getz 12399-400).¹⁰⁵

- (f) On May 9, 1973, a San Mateo field representative was informed that one decline out of 87 cases was not acceptable "and greatly misses the company standard of 4% decline minimum" (CX 1244A; see also CX 1246A to the same effect).

- (g) The manager of the San Mateo branch office expected his unit to meet the organization averages:

I think overall, we will come up with something in these organization averages that I have been furnished, like four per cent [declinable information] (Eldred 11259).

- (h) A supervisor in the San Mateo branch office was put on probation when his unit's production of declinable information was considered too low. The manager taking the action stated: [107]

In connection with my specials quality survey completed in December where the unit dropped to 2% special narrative and 4% special service declinable as outlined in the report quality manual, I placed Mr. Ledum on probation for 60 days as a supervisor, this was in a memo to him on 1-11-74.

(RX 446B.)

- (i) I have received replies to my correspondence of October 18 from all but three managers. From the tone of the replies, *it is obvious, and gratifying, that all managers heard from are very much aware of the need for quality reports and are already taking action with field representatives who are not developing the expected portion of declinable information.*

The replies received tell me that the managers have given this a great deal of thought and are determined to do what is necessary to assure good performance on the part of each field representative.

Being convinced that managers are already taking action where needed, *I will not at this time, make the completion of a street analysis on low performing field representatives mandatory for a salary increase.*

(Regional Vice President to Managers, Western Operating Region, November 15, 1972, CX 1265; emphasis supplied). [108]

320. A field representative in the San Mateo office set for himself (in a consultation with his branch manager) the goal of 6 to 7 percent declinable and 60 percent protective information to be achieved in 12 months (CX 1524C; Elmendorf 11583; see also CX 1504C).¹⁰⁶

321. In the San Mateo and Santa Monica branch offices, supervisors kept charts concerning the production of declinable information

¹⁰⁵ This practice stopped in the summer of 1974 (Getz 12398).

¹⁰⁶ This field representative's goals were recorded on his Personnel Appraisal Report (CX 1524A-E), a form filed for field representatives which were considered candidates for developmental training or advancement into management (Tr. 11582).

by each field representative (Eldred 11244-45; Silar 3932; Milligan 4566, 4589).¹⁰⁷

322. Respondent's Regional Vice Presidents and branch office managers were furnished with a document entitled "Managing Report Quality" (CX 1352A-1352Z-9; Bresnahan 658). It assigned point values for various items of protective or declinable information.¹⁰⁸ [109]The purpose of distributing CX 1352 was to enable local management to determine whether they had a protective or declinable case (Hakey 1638 39). If 10 points were assigned in a report on the basis of one item, the case was considered declinable; if no one item was valued at 10 points, then the combined score for various items had to exceed 10 points for the case to be rated declinable (Hakey 1641).

323. Respondent's Home Office, in reviewing cases in an audit, followed the point system contained in "Managing Report Quality" (Golderer 8689).

324. "[Managing Report Quality] is a training tool. It is an assist. It is a guide. It is an aid. It is a helper in counseling" and "[it] is an integral part of the put-up system" when the field representative tells his supervisor what he has developed (Golderer 8687). [110]

¹⁰⁷ The chart in the San Mateo office was discontinued shortly after Mr. Eldred became manager of that office in early 1972 (Tr. 11245).

¹⁰⁸ E.g., CX 1352 outlines the following point system for personal and family reputation in that section dealing with automobile reports:

FEATURES	INSURED		OD'S—	
	& OD'S—		OWN	
	INSURED		AUTO	
	AUTO			
H. REPUTATION—01				
. . .				
2. <i>Personal</i>				
a. Associates—immoral, gangs, hoodlums, etc.	10	5**		
b. Immorality—present and pronounced	10	5**		
c. Immorality—pres. mild or past severe criticism	5	2**		
d. Domestic difficulty at present (e.g. divorce not final if car purchased prior to separation—not applicable on OD's)	3	-		
e. Arrests or convictions (except Traf. Viol., see point I B 3) (Consider nature, number, recency, ct. action, etc.)				
(1) If serious and/or recent	10	5**		
(2) If minor and/or in past	5	2**		
f. Presently on parole				
(1) If for serious offense	10	5**		
(2) If for a minor offense	5	2**		
g. Dishonorable military discharge	8	3**		
h. Communist	10	5**		
i. Suspicious fire loss (Car or otherwise)	8	3**		
3. <i>Family</i> —Member of family who does not drive generally criticized	2	-		
** May be considered for maximum number of points if information applies to parents of dependent minor insured, or to spouse.				

325. It was Company policy that this manual not be distributed to field representatives (CX 1352A; Hakey 1639). Nevertheless, there were instances where this policy was violated by local management, and copies of the manual were distributed or made available in whole or in part to field representatives (Hakey 1639; Eldred 11323).

326. Protective/declinable information in the form of habits, reputation, and reckless driving information was measured separately under the heading "Major Features" in quality audits and compared to regional and organization-wide statistics on these items. (*E.g.*, see CX 1254B.) And, Regional Vice Presidents brought to the attention of their branch managers, results in this area falling short of the organization averages (CX 1116A).

327. On the basis of quality audits, personnel in the branch offices were pressured to produce protective and declinable information involving habits and reputation. For example:

- (a) When I review the Major Features section I'm pleased to see that you are substantially higher than the organization on habits information. Far too frequently in some of the other audits we are missing that item by a mile. Reputation and reckless driving in Hartford need increased emphasis obviously.

(Regional Vice President to Manager of Hartford office on October 8, 1973, CX 963A; see also CX 1309A, Regional Vice President to Manager, New Orleans office on April 10, 1973).

- (b) It is also disturbing to me to see we had no cases with habits information. As much as we have written and talked about the Indepth Interview and the developing of habits information we still haven't gotten the message across in Miami. You certainly have your work cut out for you in instilling in the minds of the field representatives that we should develop more than 1% habits information. [111]

(Regional Vice President to Manager of Miami office on October 1, 1973, CX 844; see also CX 1298, 1306A-C, 1316).

328. The way in which a report was worded had a great deal to do with how many points it got with respect to protective or declinable information (Golderer 8689).

329. Respondent's local management, in its concern with scoring well in the home office quality audits, was concerned with persuading the field representatives to use phraseology in the reports facilitating a good score. For example:

- (a) . . . We did have cases in the analysis which would have been graded decline, except for a slight change in the terminology the field representative used.
We will continue to work on terminology with our people. We are developing the information. We just seem to have difficulty getting the precise wording, which would put the decline across.

(Manager, Albuquerque branch office to Regional Vice President on February 14, 1973, CX 775).

- (b) We notice a continued tendency to use the phrases, 'it is believed', or 'sources believe.' Try to eliminate this and just give the specific information without these comments, which tend to disturb the confidence of the underwriter in our report.

(Manager, Albuquerque branch office to Gallup suboffice on June 21, 1972, CX 1565A). [112]

- (c) Many of these cases should very well have qualified for decline information but our investigators stopped just short of answering the final question or glossed over very detrimental information with a blanket statement stating that the man was a good driver or had no personal criticism or gave him some other good pat on the back or fine recommendation which overshadowed good decline information . . .

(Manager, Manchester branch office to Regional Vice President on May 26, 1972, CX 1340).¹⁰⁹

330. Similarly, the Regional Vice President wrote the manager of the Manchester, New Hampshire branch office:

Unfortunately, Protective at 7.5 is in the lower third and this combined with your 15.1 in the first round gives you a combined of 10.00 protective all of which are in the lower third. At the time of my visit to your office we discussed quality and you had set up a definite program but obviously this hasn't got the results which are needed. One of the biggest problems was that when your people would develop declinable information it was worded in such a way that its effectiveness was decreased. These were usually such comments as; 'this is the only known instance of driving while intoxicated' or that the subject had stopped drinking completely three months ago and was now reformed. [113]

(Letter, October 13, 1972, CX 1342).¹¹⁰

331. Certain managers and Regional Vice Presidents did not believe that the audits were necessarily representative (Hale 12676;¹¹¹ see also n. 113, 114, *infra*).

332. The same audit results in terms of protective/declinable

¹⁰⁹ The explanation of the author of the document, that it was intended merely to ensure that logical sources be selected (Tr. 8538-41), has been considered. It does not overcome the plain meaning of the document that favorable comments overshadowing good decline information be eliminated.

¹¹⁰ Subsequently, on October 16, 1972, the manager of the Manchester branch office wrote his Regional Vice President, stating in pertinent part:

We have made a number of individual report appraisals and some rehandling on the street for a number of Field Representatives since your meeting and we are taking closer put-ups on all protective cases with an eye toward declines. In addition, I am personally reviewing declines as marked on 930s and sending back coaching points where the information does not qualify.

(CX 1343B.)

¹¹¹ "As I told you earlier, I do not hold a lot of credence in the figures that come out from an audit from Atlanta, and this is one of the big reasons is because when the cases are pulled in Atlanta, it is pulled on a daily basis, and not necessarily pulled by a cross section of every individual that you have in the Branch Office, and not necessarily geographically of the territory in that Branch Office." (Tr. 12676; Regional Vice President, Gulf Region).

information could not be expected for all offices because of differing geographic as well as economic and social factors (Golderer 8668).¹¹²

333. The percentage of protective and declinable information which a field representative is able to develop differs by the area in which he works (Bigham 8603). [114]

334. The home office quality audit procedure, despite such differences, measured each region and each branch office against organization-wide results for the preceding year (see Finding 305).

335. Due to the sample size involved in the quality audit, it is questionable that such analysis constituted a valid survey of the performance of a branch office in the production of protective/declinable information at any one point in time (see Curtis 7279).¹¹³

336. Similarly, because of the sample size utilized in most audits, they did not give a representative measure of the particular items surveyed such as habits information (CX 1130A).¹¹⁴ [115]

337. Despite the view that a particular audit (81 cases) represented only a minute percentage of the reports prepared by a branch office, the Regional Vice President for the Gulf Region, advised one of his managers of the branch on the basis of that audit:

You did an outstanding job under Major Features in developing reputation—just about twice the Company average, but *you dropped the ball on Habits information. This is the area where we definitely need some additional work.*

(CX 1306A-C, memorandum dated October 3, 1973; Hale 12711-12; emphasis supplied).

¹¹² Even within the confines of a particular borough of New York, there is a wide spectrum of people and information (Golderer 8668).

¹¹³ " . . . The reason they quit [making home office quality audits] was because they felt that taking 50 reports, pulling 50 Life reports out of my office this week and then saying that is the results of your office, it is the results only for those 50 cases . . . " (Curtis 7279). Under the circumstances, "An audit was kind of like the luck of the draw. One time you might have an outstanding results, and six months later with the same people the results would be different." (ibid).

¹¹⁴ As noted by one Regional Vice President:

I still do not feel that one analysis gives a fair measurement of information being developed on one feature such as habits, when we measure only 100 to 150 reports, and when our organization average runs only one such report to every 100 cases. Habits cases are not necessarily developed on a regular schedule. An office might go a week without developing a protective habits case. If the cases for the analysis are taken during that week, then the office would show up with zero protective on habits.

The thought that I want to convey boils down to the fact that I do not feel that I can look at one analysis and say that an office is doing a good job or a poor job of investigating. Where I accept region results as being fairly indicative of the type of service being provided from the region, it is more difficult to accept the individual office measurement as an accurate measurement.

(Regional Vice President, Western Region to Vice President Operating on September 27, 1973, CX 1130A-B).

338. On April 10, 1973, the same Regional Vice President wrote the manager of the New Orleans office as follows:

Bob, our Auto Decline since 1971 has retrogressed pretty badly. *I am sure you are going to be upset about the attached audit.*

There were 161 cases involved, and not one habits case among the whole lot. You had only 1.9% impairments, so you can see under these major features that there is a lot of work to do. [116]

Bob, I would like to know what you are going to do as far as Report Appraisals and Field Representative Case Handling Appraisals are concerned. *You need to develop a 'get tough' attitude with your people.*

I would not be as upset if either of the Auto audits in 1972 had been good, but the history in New Orleans for the past 1 1/2 years has not been good. As I said, I would like your specific plans for showing improvement.

(CX 1309A; emphasis supplied.)¹¹⁵

The manager in question was told he needed to develop a "get tough" attitude, although it was not possible to determine on the basis of 161 cases, what would have been satisfactory performance on habits information (Hale 12671-72).¹¹⁶ [117]

339. Up to January 1, 1976, respondent conducted audits of claim reports, measuring performance with respect to significant information and below standard features (Trotochaud 6457-59, Stubbs 9282; CX 849A-E). Significant information, if 40 percent or less, was considered unsatisfactory in 1974 (CX 1498).¹¹⁷ The level of satisfactory performance changed periodically (Stubbs 9279-80).

¹¹⁵ The manager replied:

We have embarked upon a stronger program of Quality Analysis along with Inspector Training & Performance Reviews. All of my people are acutely aware of the need to dig deeper into Automobile reports particularly in those areas involving major features of habits, reputation and impairment information.

All personnel are also fully aware of the fact that our jobs hinge on the ability to produce good quality information of benefit to Automobile insurance company's, if we are going to continue making reports of this type.

(CX 1310, memorandum dated May 22, 1973).

¹¹⁶ "Q With 161 cases involved in the audit, is it possible for you to state what would have been a satisfactory performance on habits' information?

A Absolutely not."

(Tr. 12672).

¹¹⁷ Protective and significant information were considered the same thing (Stubbs 9279). The Claim Audit Profile in effect in 1974 was:

SIGNIFICANT INFORMATION		BELOW STANDARD	
Professional:	60.0% & Above	Professional:	5.0% & Less
Superior:	50.0% to 60.0%	Superior:	10.0% to 5.0%
Good:	40.0% to 50.0%	Good:	18.0% to 10.0%
Unsatisfactory:	40.0% & Below	Unsatisfactory:	18.1% & Below

(Continued)

340. The use of audit results measuring individual branch office performance with respect to production of protective/declinable information and the ranking of individual offices results in relation to organization-wide averages had the potential for inaccurate comparisons because of the disparity of results which can be expected among offices due to differing geographic and economic factors (see Findings 332-34). The system, therefore, had the potential for generating pressure for increased production of adverse information on the basis of invalid comparisons and, therefore, was unreasonable. [118]

341. The audit results with respect to individual branch office performance on production of protective/declinable information were based on small samplings precluding assurance that the survey results were representative for the office measured (see Findings 335-36). Utilization of the system had the potential for generating pressure to increase production of protective/declinable information on the basis of unrepresentative data and was, therefore, unreasonable.

342. The quality audit system with resultant pressure to achieve high scores in the production of protective/declinable information also had the potential for generating pressure to eliminate from reports qualifying statements, pertaining to adverse information on consumers, which could affect the manner in which such reports are construed (see Findings 329-30). The quality audit system was unreasonable on that score.

343. Respondent's system of quality audits which ranked a branch office's performance in the production of protective and declinable information against all other offices in terms of upper, middle and lower thirds computed on the basis of organization-wide figures for the preceding year impliedly set quotas for the production of such information.¹¹⁸

B. The Effect of Factors Such As Production Quotas and Time Pressures on Report Preparation

344. Salaried field representatives, by virtue of the compensation system in effect, had a quota of so many cases to produce in order to cover their salaries and expenses. The required production per field representative varied depending on his reporting standard, salary and expenses (Findings 102-29). [119]Part-time field representatives,

(Assistant Vice President-Claims to Regional Claim Supervisors on February 12, 1974, CX 1498). According to respondent's Vice President for Claims, an office would be considered substandard (Tr. 6458) if both significant information and the below standard item were below a certain level.

¹¹⁸ This finding is corroborated by respondent's use of numerical ratings to define satisfactory performance under claim audits (Finding 339).

however, did not have a production standard or quota (J. Moore 8875).

345. Field representatives, on a daily basis, filled out the "Volume Control: Performance Objectives" section on the Form 930, computing their production quota and comparing actual achievement with their objective (Farra 752; CX 542).

346. Respondent's branch management was concerned with field representative losses, insisting that they be made up: *E.g.*,

We are insisting that those field representatives who have an accumulated loss make every effort to make this loss up in October, even if it means working Saturdays. . . .

(Manager, Miami Branch office to Regional Vice President, October 16, 1973, CX 835B; see also Fuentes 2036).

347. It was the practice of the former manager of the Dearborn office when a field representative fell behind in his performance objectives for the month to "Give him a boost or a kick and possibly assign him an extra case per day or whatever it will take, whatever is necessary to bring him into the black" (Tr. 656). When his office was in financial difficulties, he wrote his Regional Vice President as follows:

Field Rep losses continue to be an extremely costly item and all of my supervisors have been put on notice that I will not tolerate any more Field Representative losses without very good reason.

(Manager, Dearborn branch office to Regional Vice President, November 30, 1973, CX 910).¹¹⁹ [120]

348. Time Service was another factor governing the pace at which field representatives were expected to work. Time Service was essentially the standard whereunder the branch office had a set time after receiving an inquiry or request for a report, to complete the report and mail it to the requesting customer (Hakey 1562; RX 107Z-144).

349. Time Service objectives are determined for each office; these vary from time to time and place to place. The Regional Vice President has discretion to determine the Time Service objectives for each office in his region (W. Matthews 5577). Different objectives may apply within a single office which covers both urban and rural territories. The objectives are based on historical experience and reviewed regularly (W. Matthews 5569-70, 5575; Eldred 11212-13).

350. Time Service objectives for branch office business in larger

¹¹⁹ The office, at the time this memorandum was written, was "obviously under financial stress." The manager in question explained, "If you planned to meet expenses and make your monthly cost and four or five inspectors had a total loss of \$800 or \$1000, it would be virtually impossible to meet your cost objective in a branch office with a sizable inspector loss" (Tr. 643-44).

cities are established in terms of the Time Service index (W. Matthews 5567). For example, the objectives for the Miami branch office in 1972 were as follows: for life and health reports, an index of 1.74 with 96 percent of reports completed within 4 days and 99 percent within 6 days; for employment reports, an index of 1.74 with 96 percent of reports completed within 4 days and 1.99 with 92 percent of reports completed within 4 days and 98 percent within 8 days; for property lines, 90 percent of reports completed within 6 days and 98 percent within 10 days; and, for claim reports, an index of 2.99 and 90 percent of reports completed within 6 days (CX 506D).

351. Time Service objectives in suboffices are lower than those in branch offices because of the lower population density of territories served by such suboffices. Similarly, Time Service for work on certain circuits covering rural areas are lower than for local work (Hakey 1562-63; Jenkins 5788, 5858).

352. Branch managers were told that "fast time service can be maintained through aggressive leadership and daily inspection of the speed of the service. Time is an essential and marketable element of our business." [121](RX 107Z-144). Records were maintained to measure an office's performance in this area (ibid).¹²⁰

353. Branch managers were held responsible for ensuring that Time Service objectives were met.¹²¹ [122](Bresnahan 635-36). Moreover, meeting Time Service standard was one of the criteria

¹²⁰ Objectives for clearing local reports are expressed in terms of:

1. *Time Service Index (TSI)*: A statistical expression of the percentage of reports cleared within an established deadline.

2. *Percentage of Cases Cleared by Deadline*.

Both measurements gauge the flow of cases through a branch office and indicate the acceptability of time service.

A standard maximum deadline has been established for each line of service—for instance, 4 days for Life and Health, 6 days for Claim. Since these are maximum deadlines, the measure of flow (Time Service Index, or "TSI") is more vitally important because the lower the index, the faster the overall service.

TSI is computed by subtracting the accumulative percentage of cases cleared each day within the deadline period from the maximum number of days in the deadline period. For example, if 100 L&H cases are received today (the first day) and 30% are cleared today, 60% by tomorrow, 80% by the third day, and 100% by the fourth day, the TSI would be computed as follows:

$$\begin{array}{r} 4.00 \\ -2.70 \quad (.30 + .60 + .80 + 1.00) \\ \hline 1.30 \quad \text{TSI} \end{array}$$

(RX 107Z-144.)

¹²¹ There were numerous variables which affected whether Time Service objectives were achieved. Among them was the prerequisite that the office be properly organized. It was necessary to have a sufficient full and part-time investigative staff to handle fluctuations in the volume of business (Curtis 7178). In addition, an office had to have adequate supervision of the investigative staff to meet Time Service objectives. Daily controls needed to be set up to ensure that field representatives were dictating out and handling their cases on a daily basis, and the manager had to ensure that the stenographic unit was properly organized to get the dictation out on a daily basis. Measures had to be taken to ensure that reports, after they were typed, were reviewed the same day and mailed out to the customers. It was also necessary, in this connection, to provide that the reports returned to the field representatives for correction or additional work were handled the same day that they were returned (Curtis 7178-79).

considered in computation of the managerial incentive bonus (Bresnahan 575; CX 1353A-H).

354. Branch office personnel were under pressure to meet the Time Service objectives set. For example:

- (a) You have a previous letter from me concerning Time Service, but just in looking at your 1205 for the month of November I hardly see why it was necessary for so many cases to get old.

Jerry, we just cannot jeopardize the service with this sizable volume of business in order to locate people.

I am expecting you to get the service in line promptly. Whatever is necessary must be done.

(Regional Vice President to Manager, Miami office, December 5, 1973, CX 832B).

- (b) We are already in trouble for June as far as the movement of sub-office Life business is concerned. [123]

I am sorry to find it necessary to ask for special attention to the Life business so early in the month. . . but it is *imperative* that we eliminate any over 4-day Life cases for the remainder of the month, if we are to reach our deadline objectives. Unfortunately, we have already released as many over-deadline Life inquiries as the objectives will allow for the entire month.

I know I can count on your assist. If there is anything we need to help you from here, get on the phone and call me.

(Manager, Albuquerque branch office to suboffice, June 5, 1974, CX 819).

- (c) . . . I desperately need your help and assistance, most especially in the area of thoughts and ideas which will enable us to meet our time service objectives in April of 1974. . . .

. . . I can't emphasize with you enough the great importance of meeting our objectives.

(Manager, Dearborn office to Supervisors, March 26, 1974, CX 1515).

355. Field representatives were required to give explanations to management if cases become overage (Zack 8220-21). In the Salt Lake City office, a case became an expedite when it was 3 days old (Vogen 12242-43).

356. The amount of work which field representatives were expected to do on a particular case was governed, to some degree, by the price of the report. Respondent expected field representatives to not "overwork" cases. For example, if the field representative had contacted two sources in a single fee case, he should not go to a third

simply to make sure he was right. In respondent's [124]opinion, this was a question of economics in terms of the price of the report (Lieber 9110-11;¹²² see also Johnson 12283-86). If a field representative had a tendency to dig too deeply, this would make meeting production requirements more difficult (ibid).

357. There are numerous variables determining how many cases a field representative could produce in a normal workday of approximately 8 hours. Illustrative of the practical problems facing field representatives are the following: [125]

There were very many variables and you could get into situations where, let's say, you are getting detrimental information from one source, well, how long are you going to take to resolve that issue? Supposing they give you really bad information, the obligation to your company, to the consumer, to the client, if you really work at it, you might spend 45 minutes working that particular case and there goes your average right away. Or you can go into an area where you can't find a single source you talk to because they work every day and the person might be home as a babysitter or she doesn't know the people. Then that's a different case. Or you go out and you go to Northwest 17th Terrace and the case was supposed to be handled at Northwest 17th Place because the customer made a mistake in writing up the address. Then your average goes out the window. Too many things that do not happen according to the books.

... [I]nformation is not easy to obtain and you have to work at it. If I go meet him for the first time he may not be able to tell me the information on a given person. He will give me all the information he knows which is favorable but you first have to at least establish some sort of a rapport with me in order to confide in me especially if it is personal information and that takes time. Also, you may knock on the house and the lady will say, I'll be right with you, I'm on the phone and you've got to wait until she finishes or if she is giving the baby his milk you've got to wait or someone calls and interrupts you while you are making your interview. Those are the factors that would in this way enter into the case.

(Fuentes 2043-44). [126]

358. It was more difficult for field representatives to produce cases in some geographic areas than in others because of factors such as, the distances to be traveled in order to make the requisite investigations and the greater or lesser willingness of people to give information in different locations (Shaffer 8402, Matthews 12800-01).

¹²² THE COURT: What do you mean by overworking a case?

THE WITNESS: He has the complete information from two logical sources and he sees a third source, because he feels in his own mind, I just want to make damn sure that I have that information correctly.

THE COURT: Would this be primarily when he digs up adverse information?

THE WITNESS: A gut feeling. An indication, with two sources he carries it to a third source, or a fourth source. But, here it comes down to the scope of the investigation. A five dollar report has a certain scope of investigation as compared to a \$100,000 life report which has a broader scope and it would be expected to be carried further, and the man is carrying his investigation actually beyond the scope of that particular report, beyond what could be considered reasonable effort.

THE COURT: As to the amount that is being paid for the report?

THE WITNESS: Yes.

(Tr. 9110-11).

359. The ability of field representatives to produce reports was also affected by the manner in which an office was managed. It was difficult for field representatives to do the job in an office with poor leadership (Beckett 10965). Whether a field representative could meet his production standard in a 40 to 45-hour week depended to a considerable degree on the management of the office and the production climate in that office (Lieber 9019-20, 9071-73).¹²³ The overall quality of the management affected the quality of reports more than any one specific thing (Brown 6977). [127]

360. In addition, the ability of individual field representatives to prepare reports varied (Lieber 9126). Experience was a factor (Pregler 9222-23).

361. In short, the field representative's ability to complete a certain number of cases in a given period of time depended on his own ability, the type of cases assigned,¹²⁴ the characteristics of the area within which he worked and the organization of his office. The need to put in overtime was a function of these variables and the flow of business.

362. Field representatives were told to record the amounts of overtime which they incurred (Lieber 9048). Respondent's field representatives, however, had little economic incentive for recording their overtime.¹²⁵ As overtime increased, the field representatives' compensation on a per-hour basis of effort decreased (see Finding 104). In addition, recording overtime increased the field representative's salary and expenses and thus, increased his required produc-

¹²³ Well, the productive effort of people is dependent upon work-flow in a branch office. Work should be worked up in a manner that will permit the field rep being assigned his work early enough to meet what I consider to be an equitable balance of outside investigation work and inside office work. I look at a framework of five and a half to two and a half; five and a half out, two and a half in, or six hours out and two hours in. There has to be work available, and this entails managing the mix of business and the placing of staff. There must be a balance of organization, staff in balance with the flow of work. This must be tracked, and this is a basic function of management, tracking volume, trends by lines of service, and relating volume trends and mix in terms of dollars relating to determine productive efforts of people.

Those are the basic ingredients of adequate production in a normal day. Given those ingredients, yes. If any of these ingredients vary, then the pressure on the field rep would vary in direct proportion as to how close the office comes to this structure that I just described.

(Tr. 9020-21).

¹²⁴ See Section II, *supra*.

¹²⁵ As one branch manager explained:

Q Are some people interested in working Saturday for overtime pay?

A Heavens no, not with our company.

JUDGE VON BRAND: Why not?

THE WITNESS: Because the overtime is figured for field representative different than that overtime figure for our operating employees and inside clerical employees.

JUDGE VON BRAND: No time and a half?

THE WITNESS: That is right.

(Curtis 7271-72).

tion (Hakey 1734; Chambers 1940, 1945; Clufetos 2291; Ledum 4698; Silar 3905). [128]

363. Records of overtime in excess of 10 hours a week were questioned by management (Jenkins 5723, Fuentes 2089-90). Many field representatives chose not to record overtime because of the economic disincentives involved (e.g., Ledum 4698, Chambers 1954, Monson 3252-53).

364. Respondent's overtime system is inherently, economically unattractive from the field representative's point of view (Finding 362). It is, therefore, in the salaried field representative's interest to produce within a 40-hour week enough cases to cover his salary and expenses as well as to earn a 20 percent bonus. As a result, the less time he spends per case, the greater his per-hour compensation for his efforts. Similarly, in the case of part-time field representatives as well, the less time spent on each case, the greater their per-hour compensation (Hille 4529).

365. The reporting of overtime could also affect a branch office's reporting costs adversely if a field representative had lost on his reporting standard. In short, if a field representative had trouble meeting his expenses and listed his overtime, this could increase his own difficulties and, to that extent, it could adversely affect the finances of the branch office in which he worked (Monarch 8571-72).

366. To complete their reports, field representatives were required to contact the number of sources required for the particular report and to obtain the time coverage prescribed (Section II, *supra*). Respondent has prescribed procedures to be followed if the requisite sources or time coverage cannot be obtained or if Time Service cannot be met.

367. If a report cannot be completed within the Time Service objective, the field representative is to confer with the supervisor. The case may be held over for completion, and if it is, the customer is to be sent a Form 58 notifying him that the case will be delayed (e.g., Vogen 12209-10, Volrath 10991-92). [129]

368. Field representatives unable to obtain the required number of sources of information for a report after consulting with their supervisors, are permitted, under Company policy, to complete the report with less than the required number of sources. They are to state in the report the number of sources obtained and the reasons additional sources could not be obtained. The customer is asked for leads if he desires additional handling (Burge 5020-22; Browning 6064; Saltzgaber 11970, 11993; Tew 13357). In such circumstances, field representatives receive production credit for preparing reports

with less than the required number of sources (Baranek 9696, Eldred 11215-16, Zack 8260-61).

369. If a field representative is unable to obtain the time coverage for a report, he is authorized under Company procedures, after consulting with his supervisors, to write the report with the limited time coverage obtained, stating in the report, why full-time coverage was not available and asking for leads if the customer desires further handling (Baranek 9696, L. Jones 10446-47, Tew 13355-57, Chambers 1923). Under these circumstances, field representatives receive production credit for preparing reports with less than the required time coverage (Baranek 9696, Hilderbrand 12008-09).

370. Successful interviewing by field representatives was not a pro forma matter. To do the job properly, it was necessary to establish rapport with the sources contacted. As respondent's Branch Manager's Manual stated, field representatives, in interviewing during the course of an investigation, needed to be highly sensitive to the more subtle clues and remarks of the source contacted as well as "to the behavior, perceiving their implications and adapting [their] own approach and conversation accordingly. [Field representatives] must know when to talk and when to keep still, how to word [their] questions, and how to listen."¹²⁶ (RX 107Z-3). [130]

371. In addition, respondent's investigators were instructed to be objective in distinguishing facts from opinions (CX 1504G).¹²⁷ This was important in subjective areas such as habits information because "[i]n the field, it would be very difficult to get three or four people that may concur on something anyway." (Hilderbrand 12035).

372. Prerequisite to a meaningful interview was the selection of logical sources to be contacted. "A logical source is one which by reason of position or association with the subject of the report is in a logical position to give the information desired." (Field Representative Manual, RX 102W). Field representatives were admonished, "*It is how well the contact knows the subject of the report that determines the qualifications, not how well the Field Representative knows the contact.*" (ibid; emphasis in original).

373. Respondent's field representatives and branch office management were under pressure to develop protective/declinable information (Findings 317-19, 327).

¹²⁶ Respondent's Branch Manager's Manual also stated that a sense of humor "is a powerful instrument in developing a warm, friendly relationship with sources" and "some of the most pertinent personal information is sandwiched in between homey remarks and other small talk." (RX 107Z-4).

¹²⁷ Respondent's Field Representative Manual instructs, "Rumors, gossip, and scandal must be sifted." (RX 102Z-17).

374. It was necessary, if protective/declinable information was to be developed, that the field representative ask the full range of questions¹²⁸ and see logical sources (Finding 315). An interview took longer if the full range of questions was asked (Paladino 8771). Securing adverse information could also increase the number of sources which a field representative was required to see in order to obtain the necessary confirmation (Fuentes 2043). [131]

375. All other things being equal, it took longer to develop a case with protective or declinable information than a wholly favorable report (Elmendorf 11594-95, Moss 11036, Lindgren 11454, Hilderbrand 12037, Guse 12066, Saltzgaber 11987-90).

376. In the relevant period, the telephone could be used as an adjunct to the field representative's work in the street (Brothers 7406; see also Section X). But it was the field representative's "primary function . . . to work on the street with the goal of getting face to face information from our sources" (Brothers 7406).¹²⁹ The determination of whether resort to the telephone was necessary was to be made by the manager or supervisor (Larson 12515). An attempt to clear the case on the street was to be made first (Johnstun 12286). [132]

377. Field representatives in the local unit of respondent's Boston branch office were unable to complete the number of cases per day necessary to satisfy their production requirements in compliance with Company procedures (Hakey 1597-98, 1604, 1741).¹³⁰ It was not

¹²⁸ To assist the field representative in asking the full range of questions, he was given a note form for each report which contained the questions to be asked for that particular type of report. The note form had blanks for recording the information obtained to be transcribed later. The note form functioned as a reminder or checklist to assure that the field representative did not miss any pertinent questions (Jenkins 5757-58, Brothers 7402-03, Curtis 7127-28, Bender 7665-66).

¹²⁹ See also Larson 12515: "The use of the telephone [in preparing regular life or automobile reports] at that time was not an accepted part of our procedure or normal activity of handling reports. But we did at times use the telephone when we found it necessary in order to contact the individual involved."

A memorandum in the relevant period also indicated that telephone use was to be limited:

In connection with the other cases, Roy, the scope calls for personal interview of a minimum of two sources. As you know, this can be interview on an outside source, two outside sources, etc. The fact that we personally saw only one outside source and then used the telephone reduces the scope. It also does not fill our customer commitment. I was frankly a little surprised at Mr. Bigham's comment that if the telephone sources had not been identified by the "T" that no one would have known. Page 47 of the Inspector Manual instructs that sources be so identified. Further, all of our Marketing studies develop that Habits, Reputation, Hazardous Sports, and Drugs are the usable information features for Life customers. While telephone interviewing can produce Health Information and firm up Identity features, you may agree that in the long run it doesn't do much to secure additional information in those areas most used by customers.

(Assistant Vice President-Operating to Regional Vice President-Operating, July 25, 1973, CX 1217A).

¹³⁰ Mr. Hakey stated, on the basis of his computation, "[t]o break even, an individual would have to do a minimum of 18 reports per day to make full bonus, between 20 and a half and 21 reports a day" (Hakey 1598). Respondent introduced a computation (RX 484Z-18) showing that 14.6 cases a day were needed to meet the production standard; 15.7 cases to make a bonus of 10 percent and 16.9 cases to make full bonus. Respondent contends Mr. Hakey erred in overstating the applicable salary as well as mileage and steno expenses. The Boston branch manager's estimate for the period 1968-1974 falls somewhere between Mr. Hakey's and respondent's computations. He estimated the average field representative "would probably handle about 16 reports a day

(Continued,

possible to see two logical sources on every report, although field representatives might contact many others (Hakey 1604-05). The biggest problem in this unit was taking the time to ask a full range of questions (Hakey 1717). [133]

378. A field representative in the Claremont, New Hampshire suboffice who desired to achieve full bonus "which you needed . . . to survive" produced 23 to 24 cases a day (Crepeau 1754). He varied from Company procedures by using principally central sources and rarely filling out the note form (Tr. 1760). He needed 20 single fee equivalents a day to meet his production standard (Tr. 1778).

379. A field representative in the Baltimore branch office felt it was impossible to do the job as he was required to do it (Wines 388-89). He faked outside sources in the reports he prepared (Tr. 455, 458, 460-61).¹³¹ And, had his cases been rechecked, he would have been fired, because there were many such instances (Tr. 455).¹³²

380. A field representative in the Marietta, Georgia suboffice was assigned 18 to 22 reports a day in order to meet his production requirements (Chambers 1929-30). He normally prepared 19 to 20 reports a day (Tr. 1939). This individual was unable to prepare such reports in accordance with Company instructions in an 8-hour day (Tr. 1938-39). In order to prepare his reports, he had to work a 50 to 55-hour week, but he did not report the overtime because his production quota would have been increased (Tr. 1940). [134]

381. A field representative in the Columbus office in the period mid-April to mid-August 1972, whose goal was 18 to 20 cases a day,

average, sometimes 17" (Tr. 8235). Even accepting respondent's calculations, the difference is not so great as to vitiate Mr. Hakey's testimony based on his experience as a firstline supervisor. Moreover, his testimony regarding the difficulties in producing reports was not confined precisely to the 18 to 21 figure. He stated:

It would be physically impossible for an individual to take out 18 reports or 21 reports *or anywhere in that vicinity*, leave the office between 12 and 1 o'clock in the afternoon and see a minimum of 36 people and drive from one location to another, confirm unfavorable information and see good close logical sources for the prescribed period of time. It is physically impossible.

(Tr. 1604; emphasis supplied).

In weighing computations such as RX 484 against the testimony of the witnesses, it should be further noted that such calculations utilizing devices such as applying national inquiry values to particular offices are approximations. (See Case 5922, 5888-89).

¹³¹ In a nice area, if the property was well kept, this field representative would simply assume the good reputation of the subject (Tr. 388-89).

¹³² There is disparity between the witness' estimate that he prepared 15 to 17 single fee property reports a day in 1972 (Tr. 382, 421) and respondent's calculations in RX 483. According to this computation, he averaged 13.7 reports a day in the period with monthly averages ranging from 12.2 to 15.3 reports a day, and he needed an average of 12.6 reports a day to meet his production requirements, the monthly averages ranging from 9.7 to 13.7 reports a day (RX 483V-Z-2). The differences between the witness' testimony and respondent's computations are not so great that his testimony needs to be disregarded for that reason. There is no dispute that this field representative faked sources (Tr. 458). In this connection, the record also shows that his superiors for some time had been on notice that he had been "consistently sporadic in his work habits" (RX 483A). Management knew or should have known that he needed close supervision.

was unable to complete his assignments in accordance with Company instructions (Pollard 310, 316, 349).¹³³ He falsified sources consistently in order to facilitate production; such faking may have been on the order of one out of 15 cases (Pollard 316-17, 355-56). He faked sources in clean, *i.e.*, favorable cases and never faked derogatory information. He also falsified time coverage¹³⁴ (Tr. 318, 320). He used the telephone to conduct interviews, although use of the telephone was discouraged (Tr. 317, 388).¹³⁵

382. A field representative in the Dearborn office in the period January 1971 to April 1971, was unable to prepare the cases assigned to her in accordance with Company procedures (Woicik 2868-69).¹³⁶ She listed outside sources not seen on reports 40 percent of the time in those instances where she was able to obtain a direct interview with the insured (Woicik 2870). [135] Field representatives in the Dearborn office were warned about excessive telephone use. "They would tell us to stop using it as much as we were." This field representative did not stop using the phone as a result of such warnings, and nothing further was done (Woicik 2872-73).¹³⁷

383. Another field representative in Dearborn was assigned 16 to 18 cases a day and had trouble completing them (Wallace 2993-94). She was unable to prepare her reports in accordance with Company procedures (Tr. 3002). She varied from Company procedures in the use made of the telephone (Tr. 3002-03). On a relief trip to Lansing, Michigan,¹³⁸ she completed cases using unqualified sources (Tr. 3013-14).¹³⁹ And, in the case of one report on that trip, she listed a source not contacted (Tr. 3009-14, 3040).¹⁴⁰ [136]

¹³³ He was given 12 to 13 cases a day toward the end of his employment and with carried-over cases, his assignment was 18 cases (Tr. 350).

¹³⁴ "Well, you would just go ahead and put a number in there. You know, one, or two or three years, enough that it would be credible" (Tr. 318).

¹³⁵ RX 489, one of respondent's computations which calculates that toward the end of his employment, he needed 12.9 cases a day (RX 489I) does not rebut the testimony of the witness that his goal was 18 to 20 cases a day. Respondent's calculation of the actual number of cases done by Mr. Pollard as of August 1972, 11.9 cases a day moreover, is not inconsistent with his testimony that he was given 12 to 13 cases a day toward the end of his employment.

¹³⁶ This field representative became a part-time employee on April 1, 1971 (Tr. 2842). Her testimony for the period January-March 1971, was permitted because of the proximity to the effective date of FCRA (Tr. 2844-45).

¹³⁷ This field representative testified that, on an average, she prepared 18 cases a day (Tr. 2848-49). She may have been in error as to how many cases she needed to break even—20 to 25 cases—and she may have overestimated the number of cases she actually prepared. (Compare Ross testimony that 14 to 17 reports would have been sufficient for 10 percent bonus and 18 would have given her full bonus (Tr. 9337, 9400, 9365-66). However, her testimony that she listed sources not seen on the reports she did do is accepted.

¹³⁸ The relief trip lasted 2 days. On the first day, she received 25 to 30 reports (Tr. 3010). And, on the second day, she received 38-40 cases (Tr. 3013).

¹³⁹ "Well, we took them [the cases] back to Dearborn with us and they were all dictated the following Monday and I used the telephone . . . Except for that one isolated incident where I couldn't get anybody I talked to at least one person and maybe that person wouldn't give me any information but I at least talked to him so I wrote a report but I wrote a favorable report." (Tr. 3013-14; emphasis supplied).

¹⁴⁰ Q. Would you write the report from the Polk Directory?

A. On cases where I wasn't able to talk to anybody, I would write it from the Polk Directory and I'd put down my source "Mr. Polk" (Tr. 3011).

384. A part-time field representative in the Dearborn office, in order to meet Time Service requirements, listed the minimum number of sources required by a report even if such sources had not been seen, in approximately 30 percent of her cases (Hille 4514-16).¹⁴¹ This field representative also wrote pat, favorable reports on the basis of sources who knew nothing about the applicant (Hille 4534-35).¹⁴² Approximately 50 percent of her interviews of sources were over the telephone (Hille 4512).

385. A field representative in the Detroit office had to complete 15 to 16 cases a day to break even when she was making a salary of \$605 a month (Dodson 3043-44, 3077-78).¹⁴³ She was assigned 18 to 19 cases a day and prepared, on the average, 15 cases a day (Tr. 3048).¹⁴⁴ The maximum number of cases prepared by this field representative was 20, produced when she was under pressure for Time Service or to make up losses (Dodson 3050-3056).¹⁴⁵ In her view, she could only do 10 [137]cases in an 8-hour day in accordance with Company procedures (Tr. 3070-71). She did not interview all the sources listed about 75 percent of the time (Tr. 3063) and she conducted 50 percent of her interviews on the phone (Tr. 3062). Sometimes, she would not note telephone use on the file copy "because you didn't want the boss to know how often you were forced to close the report on the phone" (Tr. 3063).

386. A field representative in the Salt Lake City, Utah office, who had to average 17 cases a day to meet salary and expenses, was usually assigned 20 cases (Monson 3240). The volume of this branch office fluctuated, and the lowest number of cases he took out was 12 (Monson 3243). He worked about 9 hours a day (Tr. 3246) and would work at home using the telephone if he had leads to follow up. This field representative rarely recorded overtime because it had to be made up in production (Monson 3247). The maximum number of cases he could do in a normal workday in compliance with Company procedures was 12 (Monson 3252). This field representative, in fact, averaged 17 cases a day, which he accomplished by various shortcut-

¹⁴¹ "Yes, there was a pressure to get the reports done within the allotted time, and it was not generally favored if they were not done within that amount of time, and I did resort to not always interviewing the sources I had in mind." (Tr. 4515).

¹⁴² About 20 percent of her cases, when first received, were on the second, third or fourth day of Time Service. She received cases on the fourth day for the first time infrequently, however (Hille 4511).

¹⁴³ Her testimony on this point is not rebutted by respondent's computations in RX 424. These show that, in a 12-month period, June-August 1973, when her monthly salary was \$605, the required number of cases per day to break even was 14.1, 14.1 and 15.2 (RX 424Z-19, Z-21, Z-23).

¹⁴⁴ Her average production per day, according to respondent's computations for the period June-August 1973, was 13.8, 14 and 16.1 cases (RX 424Z-19, Z-21, Z-23). Again, the divergence is insufficient to rebut her testimony.

¹⁴⁵ There is nothing in RX 424 which precludes a finding that, on some days, her actual production exceeded her average as computed in the exhibit in an attempt to make up for prior losses.

ting techniques, such as the use of the telephone (Monson 3252-53).¹⁴⁶ Sometimes, he would fabricate an informant "when there was pressure to get a case completed, and it was impossible to find a reasonable source of information, and [he] only had one to rely on, [then] the other one would be made up" (Monson 3254). This is a technique he used during a major portion of his time with respondent (*ibid.*).¹⁴⁷ He faked sources two to three times a month (Monson 3299). To implement this technique, he used vague listings of sources which could not be traced (Monson 3300). In addition, this field representative might stretch the time a source had known the subject of the report in order to meet time coverage requirements (Monson 3300-01). [138]

387. A field representative in the Tucson, Arizona branch office needed 15 cases a day to meet his production requirements (Moxham 3497).¹⁴⁸ His actual assignments could vary from 10 to 20 cases per day (Moxham 3499). He was able to prepare 12 cases in an 8-hour day in accordance with Company rules and regulations (*ibid.*, Tr. 3512). However, if he had completed only 11 or 12 cases for the day, his production would have to pick up because he needed 14 to 15 cases on the average (Moxham 3499). On occasion, he would list a source as meeting the time coverage requirements for a report, although the source had not, in fact, known the subject of the report for the required period of time (Moxham 3516-17). This field representative took circuit runs involving 30 cases a day (Moxham 3498).¹⁴⁹ His workday on the circuit averaged 10 to 12 hours (Moxham 3508).¹⁵⁰ Finding the subjects of the report and neighborhood sources in the outlying areas of this circuit was time consuming (Moxham 3508-09). He faked sources about 10 to 20 percent of the time on the circuit (Moxham 3515).

388. A field representative in the San Mateo office had to complete 16 single fee cases a day to cover salary and expenses, excluding dictation expense and bonus (Feriante 4428-29).¹⁵¹ This field representative was unable to do 16 single fee reports on the average while following Company procedures. He varied from Company procedures by his use of the phone (Tr. 4435-36) and failing to ask the full range of questions in all instances (Tr. 4438).

¹⁴⁶ Forty percent of his cases were cleared, although not totally handled, on the telephone. Some cases he would complete solely through the use of the telephone (Tr. 3253).

¹⁴⁷ He fabricated more sources in his last month with the Company when he had two jobs, faking in approximately 40 percent of his cases at that time (Tr. 3254).

¹⁴⁸ With 15 reports, he was "a little bit in the clear," making some bonus; with 14, he would be slightly behind (Moxham 3497).

¹⁴⁹ The cases would be dictated the following day (Tr. 3498).

¹⁵⁰ The run was always more than 8 hours, although 12 hours was an extreme (Tr. 3515).

¹⁵¹ Normally, it was necessary to take out more cases than that to complete 16 cases (Feriante 4429).

On occasion, 80 to 90 percent of his contacts were by phone (Feriante 4443). He also listed neighborhood sources not seen in his reports (Feriante 4440-41, 4444). [139]

389. Another field representative in the San Mateo office attempted to complete 18 full fee cases a day (Silar 3891). He was unable to prepare these cases in accordance with Company procedures (Silar 3911-12). This field representative varied from Company procedures by using inadequate sources, using fewer sources than required and in his use of the telephone (Silar 3912). He also listed sources not seen 75 percent of the time (Silar 3914).

390. A supervisor of a unit in the San Mateo office was unable to interview the required sources for his reports in the time available to him (Ledum 4702). He listed sources not seen (Ledum 4702). This field representative made the effort to interview all sources up to the fourth day that the report was in the office and then faked sources not seen in order to get the report out (Ledum 4701-02).

391. Respondent's officials admitted that, prior to the arrival of a new manager in January 1972, the San Mateo office was disorganized and not adequately supervised (Eldred 11163). And, that such conditions in the office had a negative bearing on field representative productivity (Eldred 11293).

392. The manager under whose direction such conditions arose held this position from 1969 to his termination at the beginning of 1972 (RPF 434; Tr. 13205).¹⁵² The three field representatives from the San Mateo office testifying for the Commission (Findings 388-90) worked there during the entire period that this manager held office.¹⁵³ [140]

393. A part-time field representative in the Santa Monica branch office, in the period after April 1971, listed sources not seen (Milligan 4583-84). The faking of such sources in 1971 was a carryover of habits formed during his employment as a full-time field representative of respondent in 1970, when he was unable to do reports assigned to him in the time available (Milligan 4569-70).¹⁵⁴

¹⁵² The vice president in charge of the region who held this job from April 1970, had become aware on his first visit to the office of poor morale in that office, but did not terminate the manager in question until the beginning of 1972 because, as a matter of fairness, he felt he should be given at least a year (Smith 13178, 13203-05).

¹⁵³ December 1962 to January 16, 1974 (Ledum 4642); June 1966 to March 1972 (Silar 3877-78, 4072); September 1962 to mid-February 1972 (Feriante 4413-14).

¹⁵⁴ He faked sources less frequently as a part-time field representative than as a full-time employee "because my case load was lighter and I could be more selective in the cases in which I would work which was a sore point with the salaried inspectors because they felt that they should be given the gravy and I should be made to go out and dig up the hard stuff." (Tr. 4570).

This witness estimated that, during his full-time employment, his production was "maybe" 12 to 14 cases a day (Tr. 4555-56). His actual production averaged less than eight single fee reports a day (Tr. 4574, 4590).

Field representatives under respondent's production system (not just Commission witnesses) not infrequently tend to overestimate the amount of the reports they do (Zack 8235-36, see also Brown 6969-70). One reason is that, on certain days, field representatives do handle a large number of cases (Zack 8236).

394. A field representative in the Newark office found there was not enough time to do the job in the normal workday (Buckley 1356). He attempted to do 12 to 13 cases a day at the beginning of the month (*id.*). This field representative only secured adverse or protective/declinable information at the beginning of the month when the pressures requiring volume production were less stringent (Buckley 1355). This field representative sometimes would not confirm adverse information as required through a second source (Buckley 1326), although two sources would be shown on his reports (Buckley 1348).¹⁵⁵ [141]

395. Field representatives were assigned circuit runs. The term "circuit run" refers to a trip by a field representative to a rural area where he visits several small towns or cities which are too sparsely populated or too far away from an office to permit the field representative to follow a normal schedule in handling cases. A circuit run is longer than a usual run (Jenkins 5786, Andrews 9420; see also RX 102Z-50).¹⁵⁶ Frequently, the circuit run was what was called a "double run" or two days' work (Crepeau 1756), where the field representative was given a large number of cases to prepare over 2 days. He would "spend the day on the run" investigating the cases and would dictate or type up the reports the following day (Andrews 9421-22, Kain 9460-61, Lieber 9069). As a general rule, field representatives on a circuit run worked more cases than in their regular local areas (Jenkins 5787).¹⁵⁷

396. The number of cases in a circuit run could vary considerably, for example: [142]

Madison, Georgia Suboffice	25-50 cases ¹⁵⁸ (Ivey 1999, 2009, 2011).
Tucson Branch Office	50-55 cases* (Jenckes 74-76, 100-01).
.....	30 cases* (Moxham 3498).

¹⁵⁵ When asked why he did not confirm adverse information, this witness stated that he did not have the time: "[t]here [are] so many reports to do to make the money that you have to make that when you go out in the field, assuming that you go out there and don't use the telephone, you just have enough time to make so many stops and if you have to get 2 sources or even 3 sources on a decline, if you don't get it from the first one, it is impossible to do your job, and there is no way." (Tr. 1347-48).

¹⁵⁶ *E.g.*, the average circuit run from the Appleton, Wisconsin suboffice involved a number of small cities and covered 100 to 200 miles (Pregler 9201-02). However, a circuit run from the Salt Lake office involved nine communities and covered about 350 miles (Huntington 12589-90).

¹⁵⁷ Similar to circuit runs were "relief runs", wherein field representatives from one office were sent to another office (branch or suboffice) with a backlog of cases, to assist in preparing reports (Brothers 7412-13). Field representatives could be given a larger number of cases than usual on relief runs and could work longer hours than usual (Lieber 9070).

¹⁵⁸ Mr. Ivey might work up to 13 or 14 hours a day if the workload on the circuit run was 50 cases (Tr. 2011).

Claremont, New Hampshire	
Suboffice	50-80 cases* (Crepeau 1756).
New Orleans Branch Office	40-70 cases* (Laudumiey 1827-29).
Salt Lake City Branch Office	30-50 cases* (Huntington 12589, 12592).
Alexander City, Alabama Suboffice	40 cases* (Martin 12890-92)
.....	40-60 cases* (Jones 12916, 12919-20, 12935-36). ¹⁵⁹

*These circuit runs were double runs, *i.e.*, the investigation was handled on one day and dictation the next. [143]

397. Field representatives frequently used stock sources in the preparation of reports on circuit runs (Huntington 12591, Jones 12918, Crepeau 1758). A "stock" or "central" source is a person in a small town, typically a businessman or merchant, who can be used by a field representative as a source for numerous reports on a circuit run (Huntington 12591, Crepeau 1759).

398. Field representatives utilizing stock or central sources were cautioned:

A careful selection of good sources is one of the prime requisites of a good report. Do not depend on "stock" or "book" sources just because they know the subject of the report. Such persons may be excellent leads to suggest to you someone who is a logical source. Be sure that each source is in a position to give the necessary facts.
(RX 102Z-50.)

399. On circuit runs, field representatives tried to clear as many cases as possible using central or stock sources.¹⁶⁰ [144]

400. A field representative in the New Orleans branch who worked circuit runs of 40 to 70 cases a day in rural areas used stock sources. He did not ask such stock sources the normal questions since, in his view, such sources knew exactly what he wanted (Laudumiey 1828-29). The procedure of another field representative in obtaining information from stock sources was: "You knew them, and they knew what you want, and I just run the name through to

¹⁵⁹ Mr. Jones pointed out that he seldom completed all cases assigned during a particular circuit run (Tr. 12917; see also Larson 12523).

¹⁶⁰ A field representative in the Tucson office could complete 25 reports on a circuit run through three to four stock sources, if he "had any luck at all" (Jenckes 76). A field representative from the Claremont, New Hampshire office with double runs of 50 to 80 cases a day, generally cleared such cases by using central sources (Crepeau 1756, 1758-59). On a circuit run from the Alexander City, Alabama suboffice, a field representative on the average took 40 cases; on one of his runs, he would clear 20 cases solely through stock sources (Martin 12902).

Respondent emphasized the importance of interviews with applicants because applicants are considered the best sources of protective and declinable information (see Findings 315-16).

them, and if there was anything wrong with him, he would stop me and he would discuss it and clear it up" (Crepeau 1759).

401. Field representatives discussed with each other the prevalence in their office of such practices as faking sources or other shortcuts (Hille 4517-18; Silar 3924; Buckley 1255, 1257; Monson 3254-55, 3260, 3287). Field representatives in their conversations also expressed the view that the job was virtually impossible (Wines 390; Dodson 3069-70, 3067-68). The existence of such conversations demonstrates a state of mind in branch offices likely to lead to infraction of Company policy such as the falsification of sources.¹⁶¹

402. Generally, field representatives did not fake sources in those instances where unfavorable or protective/decline information was developed (e.g., Monson 3302; Moxham 3515; Pollard 316, 356, 361; Feriante 4448-49 cf. Wallace 3014; Hille 4534-35).

403. Field representatives were subjected to conflicting pressures; namely, to produce a certain number of reports in a normal workweek and meet Time Service requirements and, at the same time, to produce protective/declinable information by careful interviewing and by asking a full range of questions (see Findings 315, 344, 354-55, 372-74; see also Findings 370, 371). [145]

404. Many field representatives were able to complete the caseload assigned within a normal workweek in accordance with Company procedures and to earn a full or partial bonus; certain of them put in some overtime in earning the bonus (e.g., Baranek 9703, 9698-99; Bender 7687-88, 7683-84; Getz 12348-49, 12397; Harroun 9512, 9506-07; Hilderbrand 12011-12; L. Jones 10454-55; C. Matthews 12788, 12795, 12803; Rawls 11065-66; Saltzgaber 11972-74, 11983-84).

405. A substantial number of field representatives, however, were unable to complete the work in either the normal workday or workweek in accordance with Company procedures. They compensated for such inability by contacting unqualified sources, faking sources, misstating time coverage, hurrying through interviews failing to ask a full range of questions, using the telephone in a manner not in accord with Company procedures, or working excessive overtime (Findings 377-94, 400).

406. Respondent instructed its field representatives:

Honesty—Fairness

Our business has been built upon integrity and character; nothing in it is more

¹⁶¹ Another field representative felt he could falsify sources when he saw reports prepared by others with vague listings such as "resident" and an address (Pollard 358).

Initial Decision

96 F.T.C.

important. As a service company, the nature of our business makes it essential that we maintain and adhere to strict principles of honesty.

In many businesses, the term 'dishonesty' implies mishandling of money or merchandise. We sell a service—therefore, such actions, for example, as recording hours not worked and miles not driven, or listing sources not contacted, constitute dishonesty in our type of business. For obvious reasons, anyone found lacking in honesty, in our strictest sense of the word, cannot be retained as an employee. [146]

There is no room for prejudice in our work. The person on whom we report is entitled to scrupulous fairness on our part. This obligation is co-equal with our responsibility to our customers as well as to our Company. You are not being fair to them unless you are also fair to the subject.

(RX 102D.)

407. It was respondent's policy to terminate immediately all field representatives falsifying information such as sources during the course of an investigation (RX 102D; Jenkins 5778, Lieber 9015, Browning 6062, Baranek 9703, Dodson 3096-97, Pollard 358, Ledum 4717).¹⁶² This policy was communicated to respondent's field representatives and was generally carried out when such practices were detected (e.g., Tr. 4717, Shaffer 8389, Burk 10380, Getz 12349, Curtis 7152-53).¹⁶³

408. It is not possible for a manager or supervisor to determine whether all information was properly obtained and whether all sources listed were, in fact, interviewed simply by reading a report (A. Brown 7747, J. Curtis 7154, Freeman 10199, Hives 9735-36, J.F. Moore 10043-44, J. Moore 8842). Reading a number of reports prepared by a field representative may lead to a suspicion that there has been falsification. However, it is seldom possible to be certain from a reading of the reports alone. Vague source listings in a series of reports may raise a question as to whether all listed sources were, in fact, interviewed [147](Curtis 7154, Freeman 10199-200, J. Moore 8842, Brothers 7420-21, Lieber 9015-17). Reports consistently containing minimal amounts of information may raise the same question (Lieber 9015-16). And, respondent's management believes that the absence of protective and declinable information on a consistent basis may also indicate that sources have been falsified (Brothers 7420-21, Laugavitz 10328, Jenkins 5779-80). An excessive number of reopened cases (Jenkins 5778, Lieber 9016, Curtis 7153) may raise similar suspicions.

409. Respondent employs various measures such as the put-up system (Curtis 7153, Lieber 9016), the regular review process in the office (Lieber 9015), and analyses of field representatives' cases

¹⁶² Two of the Commission witnesses testifying herein were terminated for that reason.

¹⁶³ There were some exceptions: see CX 1592A-H. In the Denver office, the discipline meted out depended entirely on the degree of fabrication. In that office, falsification of time coverage, according to one of respondent's witnesses, apparently was not considered as serious as other infractions (Hilderbrand 12012-13).

covering such subjects as source listing, source selection and information content, to check the integrity of reports (Brothers 7375-77, J. Curtis 7146-47, Lieber 9034-35, Crawford 12568-69).

410. Performance reviews are conducted on trainees, and, periodically, on other field representatives and on an as-needed basis. They involve going on the street to recheck with the sources listed by field representatives in previously completed reports to determine that the sources were, in fact, contacted, that all the questions were asked, and that the reports accurately reflected the answers (Brothers 7377, Browning 6062-63, Curtis 7148, Jenkins 5701-02, Eldred 11202, Crawford 12568-69, Hilderbrand 12014). Performance reviews may be utilized when there is an indication the reports may have been falsified (Lieber 9016-17, Ross 9343-44). Performance reviews are a cost to the branch office (Bresnahan 567-68).¹⁶⁴ [148]

411. Respondent failed to effectively police falsification of sources by certain of its field representatives.¹⁶⁵ Its supervision must be deemed ineffective.

412. A substantial number of field representatives have falsified information such as sources (Finding 405). The widespread nature of this practice and the fact that such facts were committed by field representatives knowing they risked termination for such infractions compels the inference that a substantial number of field representatives were unable to complete the job assigned to them in a normal workday in accordance with respondent's instructions.

413. Such inability resulted from the fact that particular field representatives were given more cases than they could complete in accordance with Company procedures in the particular areas where they worked or under the conditions prevalent in the offices and areas to which they were assigned. Such inability led to shortcuts such as faking. Thus, respondent's investigative procedures may result and have resulted in inaccurate reporting. Certain field representatives taking shortcuts, such as falsifying sources or utilizing unqualified sources, may have been ill-suited for the job because of lack of competence, disorganization or personal problems. This evidences only that respondent has hired a substantial number of employees unable to cope with the workload and the working conditions generated by respondent's compensation system and other policies. Inaccurate reporting is likely where considerable

¹⁶⁴ Normally, it is computed on an hourly basis at the normal hourly investigative rate (Tr. 567).

¹⁶⁵ *E.g.*, faking sources 10 to 20 percent of the time on a circuit run (Tr. 3515). Faking sources 2 to 3 times a month (Tr. 3298-99); not interviewing sources listed about 75 percent of the time (Tr. 3063); listing sources not seen in 30 percent of the cases (Tr. 4514-15); listing outside sources not seen 40 percent of the time in those instances where a direct interview with the insured was obtained (Tr. 2870); faking sources on the order of one out of 15 cases (Tr. 356); faking by a long-time field representative known to management as "consistently sporadic in his work habits" (Tr. 455, 458, 460-61; RX 483A).

numbers of field representatives are unable to meet the requirements of respondent's system for whatever reason, notwithstanding the fact that others with more ability or more favorably situated are able to cope. [149]

C. Respondent's Computations Pertaining to Reasonableness of Compensation Procedures

(1) Respondent's 1969 and 1973 Product Cost and Effort Studies

414. Respondent has, from time to time, made product cost and effort or time studies to determine the effort required to complete various types of reports in different parts of the country (Burge 5012-13).

415. Analysts in respondent's research department used data from such studies for two major purposes:

1. To compute profitability by type of report, and
2. To develop standard cost estimates for proposed new reports. (RX 566 III-5.)

416. Time studies were conducted in 1967, 1969, and 1973 (Bruns 13912-14; RX 566).¹⁶⁶

417. The 1969 time study had a goal of timing 5,000 reports and, in fact, 3,619 timings were completed in that study (Bruns 13914, Deibig 13614-15). Analysts conducting the study spent approximately 222 man-days in making observations in the field (RX 566 I-1). One hundred seventy field representatives out of a population of 6,031 were timed in the 1969 study (RX 566 II-11).

418. The scope of the 1973 study was more limited than the 1969 study. It included observations of approximately 1,500 individual reports. Analysts conducting the study spent approximately 151 man-days in making observations in the field (RX 566 I-1-I-2). Eighty-eight field representatives out of a total population of 5,145 were timed in the 1973 study (RX 566 II-11). [150]

419. The timers or analysts who conducted the 1969 and 1973 studies observed each field representative selected for inclusion in the studies for one full day. The procedures involved in such observations included the following major steps:

The analyst worked with the manager of the office where he was to conduct observations to determine which field representatives were to be observed . . .

The analyst met the field representative at the beginning of his day's work. He

¹⁶⁶ Since 1973, respondent has conducted timings in 1975 and 1976 (Deibig 13878).

then observed his activities throughout the day and timed each of the field representative's tasks with a stopwatch.

The analyst entered the stopwatch timings and other pertinent information on standard forms

(RX 566 I-5.)

420. For the 1969 study, respondent sought to select a representative group of offices per region, including larger metropolitan branch offices, smaller branch offices in the country and suboffices (Bruns 13938). Some consideration was also given to selecting offices not timed in 1967 (Bruns 13969).

421. In 1973, the branch offices to be timed were selected by respondent's employee James Deibig, who broke down all branch offices then existing into three categories: large, medium and small. Selections were made from the three categories, with an attempt to secure a geographic mix of all three types (Deibig 13623-24).¹⁶⁷ The study, however, was cut short and a number [151] of the branch offices and suboffices originally scheduled for timing were not timed. Respondent's witness responsible for selecting the cross section of offices was unable to state how many were dropped (Deibig 13631, 13866).

422. Field representatives chosen for timing were not chosen on a random sampling basis (RX 566 II-8-II-9).¹⁶⁸ Since random sampling was not used, the data obtained in the study cannot be relied upon on a purely theoretical statistical basis to make predictions about total population (Brown 14172-73, 14214).

423. Respondent described the procedures for selecting field representatives as follows in its exhibit, RX 566:

General guidelines were provided to the study analysts for requesting field representatives to be made available for timing by each branch office visited. The final decision as to which individuals would be timed was left to the analyst and the branch office manager.

. . . The study procedures specified that advance notice was to be given to the offices to be visited regarding the types of reports that should be covered in the timings. The analysts had been instructed to request individuals to be timed who would provide maximum coverage of the basic report types. The procedures specified that they were to avoid timing field representatives whose reporting standards reflected subsidies provided by the Company, and that they [152] should attempt to obtain timings for a cross-section of field representatives by length of service and by level of performance. These guidelines would tend to exclude from the study field representatives working primarily special, nonbasic reports. The guidelines would

¹⁶⁷ To cut down on driving time for the timers, an attempt was made to line up the three to four suboffices that the timers would visit each week within an hour's driving time of each other (Deibig 13878).

¹⁶⁸ For a sample to be random, the procedures used to select the sample from the total population must assure that each element in the population will have an equal chance of being selected for inclusion in the sample (RX 566 II-9).

Initial Decision

96 F.T.C.

also exclude high and low-performing representatives, since only trainees and management-level representatives have subsidized reporting standards.
(RX 566 II-8.)

424. In fact, the field representatives to be timed were selected by the branch office managers (Tr. 13887, 14050).

425. Some of the more prevalent reports timed in 1969 were the regular life report, life NORS written, life NORS non-written, intermediate life, streamlined life, special narrative life, automobile, streamlined automobile, ballpoint pen auto, personnel selection, double rate personnel selection, and triple rate personnel selection (Deibig 13533).

426. In selecting cases to be timed in 1973, respondent's employee, James Deibig, listed 85 services which constituted "almost 90 percent of the total revenues produced by Retail Credit at that time." He excluded from these "target cases" those on which numerous samplings had been obtained in the 1969 study and provided tally sheets to the timers so that a minimum of 30 timings could be completed on each report scheduled for timing. Although regular life and regular auto cases were not targeted, timings of such cases were completed in 1973 due to "the nature of those two reports." (Deibig 13624-25).

427. On the basis of the 1973 study, respondent computed the following average effort in minutes required to complete its basic life and auto reports: [153]

	<i>No. Cases Completed</i>	<i>Average Effort (Minutes)*</i>
Life	188	28.750
Auto	275	31.317
Normal Report Time (weighted average of Life and Auto)		30.275

(RX 566 III-7.)¹⁶⁹

(2) Evaluation of the 1969 and 1973 Time Studies by Arthur Andersen & Co. (The Andersen Study)

428. Arthur Andersen & Co. (Andersen), respondent's outside auditing firm (Woodham 14094), was retained to review the procedures utilized by respondent in its time studies to gain an understanding of those procedures and to prepare a report giving

¹⁶⁹ Arthur Andersen & Co. recomputed the effort necessary to complete those reports and determined that respondent's computation had overstated the average effort per report. Its computation showed an average of 26.64 minutes and 28.75 minutes, respectively for the basic life and auto reports (RX 566 IV-14). The Andersen study (see *Tr.*), after adjustment, relied upon 191 observations of the regular life report and 273 of the regular auto report (RX 566 V-8, IV-15).

Andersen's evaluation of the procedures utilized (Tr. 14095). Andersen was also asked to examine the data from the timing sheets and to relate the findings from the study to the performance standards of the Company for field representatives (Tr. 14096). RX 566 is the study prepared by Andersen at respondent's request.

429. Andersen's stated purpose in making the review was:

- To gain an in-depth understanding of the purpose, scope, procedures, and results of the studies conducted in 1969 and 1973; [154]
- To evaluate the studies and identify any weaknesses in procedures and scope; and
- To perform additional analyses of the data obtained during the studies to determine whether the results support the reasonableness of the Company's field representative reporting standards.

(RX 566 I-13.)

The completed study was transmitted by Andersen's letter, dated May 30, 1975 (RX 566).

(3) Andersen Evaluation of Respondent's 1969 and 1973 Product Cost and Effort Studies

430. Work measurement is a systematic method of recording observations of work activity usually for the purpose of establishing or revising standards for performance in a job. It is generally employed in manufacturing or purely clerical situations where the worker location is fixed, where the task to be performed can be divided into small elements, and the task itself is repetitive and brief in duration (RX 566 II-2).

431. Andersen concluded that completion of investigative reports by field representatives was not a typical application of work measurement technique and that the basic steps followed by respondent would be expected to differ from those that would be followed in a manufacturing or clerical environment. It concluded further that basic work measurement concepts were, nevertheless, applicable (RX 566 II-2).

432. Respondent's product cost and effort studies, utilized for the purpose of determining how long it takes to prepare reports for the purpose of using the data to price the product were innovative at the time they were conducted (Prince 14476, 14478). Work measurement was being extended beyond industrial activities to service industries (Tr. 14477). In this connection, Andersen felt that respondent was on the leading edge of using work measurement techniques for such purposes (Tr. 14477).

433. Andersen concluded that, although the sampling technique used for selection of field representatives could not have resulted in a

random sample, the actual results [155]obtained appear to correspond reasonably well to the Company's total population of field representatives in terms of length of service with the Company (RX 566 II-9).

434. It is difficult to determine whether bias exists in the samples from a visual comparison of the length-of-service percentages in the samples to the total population of field representatives. Andersen, therefore, utilized a statistical test to determine whether the samples were biased. The results of the test did not indicate a biased sample in the 1973 study. The test did show a biased sample for the 1969 study with more field representatives timed in the 1 to 5, 5 to 10, and 10 to 15 years length-of-service groups (RX 566 II-9-II-10).

435. Andersen, in its review of the procedures used by respondent in conducting the product cost and effort studies, concluded that the techniques utilized were reasonable in relation to the studies' purpose and scope, and that they generally conformed to widely used work measurement techniques and that the timing data obtained could, therefore, be expected to be representative (RX 566-10). Andersen, subsequent to the completion of its study, RX 566, suggested that respondent, in future cost and effort studies, make changes in the selection of offices and field representatives to make selection procedures in further studies more objective and more mechanical (Brown 14417-18, Woodham 14110).¹⁷⁰ The revised procedure suggested makes use of random number tables for such selections (Woodham 14122-23). Andersen's recommendations in this respect have been adopted (Deibig 13751).

(4) Andersen's Analysis To Determine the Reasonableness of Reporting Standards (The Bonus Contribution Calculations)

436. Andersen chose monthly bonus contribution as a measure of the reasonableness of the field representative [156]reporting standard (Woodham 14108-09; RX 566 IV-7). Andersen determined that an 8-hour day, 40-hour week was a normal workweek and based its review on that assumption (RX 566 IV-6; Woodham 14108).

437. For the purposes of its study, Andersen defined Monthly Bonus Contribution as "the excess of earnings credit over salary and expenses that would be earned by a field representative with a given set of reporting standards and a workload consisting solely of a given type of report." (RX 566 IV-7).

438. Andersen determined at the outset of its review that the

¹⁷⁰ Andersen's "recommendation was that all subjective types of decisionmaking be eliminated whenever possible respecting [selection of] branch offices and field representatives" (Brown 14418-19).

scope of its analysis of the study results should be limited to the following basic type of reports offered by respondent:

- Regular Life
- Life-NORS Notification
- Auto
- Streamlined Auto
- Health
- Streamlined Life
- Life-NORS Written

439. These seven basic type reports were selected because life and auto reports represent the Company's largest volume of business and on the assumption that the seven basic type reports are those that comprise the typical workload for a field representative with 1 to 5 years of service with respondent (RX 566 I-13-I-14).

440. Andersen concluded that:

The results of the analysis of bonus contribution shown on pages IV-24 and IV-25 [of RX 566] support the reasonableness of Retail Credit Company's field representative reporting standards. For the one to five year length of service and code 4 office reporting standard, the analysis shows a positive contribution to bonus for each of the seven types of reports. For the composite reporting standard, only report codes 27 and 9999 (Streamlined Auto and Life-NORS Written) show a negative bonus contribution. [157] Since these two types of reports are relatively low volume in terms of the Company's overall business, it is likely that any losses against standard resulting from the under-rating of these reports would be offset by gains against standard for the other reports in an actual field representative's mix of work. (RX 566 IV-22-IV-23.)

441. Andersen's Table IV-24, RX 566, is an analysis of bonus contribution on the basis of the 1973 study for the 1 to 5 year length-of-service group in Code 04 offices. According to Andersen's calculations in that table, the following monthly bonus contributions are shown for the reports indicated:

<i>Report</i>	<i>Bonus Contribution</i>
Code 1 (Life)	\$120
Code 20 (Auto)	93
Code 9 (Life-NORS Notification)	136
Code 27 (STRL Auto)	33

Initial Decision

96 F.T.C.

<i>Report</i>	<i>Bonus Contribution</i>
Code 115 (Health)	97
Code 133 (STRL Life)	158
Code 9999 (Life NORS Written)	77 [158]

442. Andersen's Table IV-25, RX 566, is an analysis of bonus contribution derived from the 1973 study calculated on the average for all lengths of service for all offices. According to Andersen's calculation in that table, the following bonus contributions are shown for the reports indicated:

<i>Reports</i>	<i>Bonus Contribution</i>
Code 1 (Life)	\$29
Code 20 (Auto)	1
Code 9 (Life NORS Notification)	40
Code 27 (STRL Auto)	(66)
Code 115 (Health)	6
Code 133 (STRL Life)	63
Code 9999 (Life NORS Written)	(16)

443. The only test performed by Andersen to examine respondent's basic premise that field representatives are adequately compensated in preparing basic life and auto reports was the foregoing monthly bonus contribution analysis (Brown 14301).

444. The tables at IV-24 and IV-25, RX 566, contain the calculations on which Andersen based its original conclusion that field representatives are adequately compensated on the basic life and automobile reports. In reaching this conclusion, Andersen relied equally on both charts (Brown 14302-03). [159]

445. As a result of deficiencies concerning the exhibit brought out

in cross-examination of an Andersen witness, the schedule shown on RX 566 IV-24 was recomputed as RX 566 F, G and H.¹⁷¹ Because of disclosure of the same data, Andersen determined that the chart, RX 566 IV-25, was invalidly computed and could not be relied upon for any meaningful purpose (RPF 623). Andersen did not recalculate RX 566 IV-25 "because upon learning of the different rates and reflecting upon the relationship of the variables involved it looked to us as if we would be drowning in a sea of averages anyway, [160]that the answer is not meaningful." (Brown 14448).¹⁷²

446. RX 566 F, G, and H were substituted by respondent for RX 566 IV-24. Each deals with the computation of "bonus contribution" for the seven basic reports timed during the 1973 study.

447. RX 566 F computes bonus contribution for the 1 to 5-year field representative length-of-service group for field representatives in Code 04 branch offices in 1973, which branch offices had been assigned a Code 04 designation in 1972 (RX 566 F). With correction of one mathematical error, it is identical to RX IV-24 (Brown 14395-96, 14404-05; Deibig 14618).

448. RX 566G computes bonus contribution for the 1 to 5-year field representative length-of-service group for field representatives in suboffice locations of Code 04 branch offices in 1973, which suboffices themselves did not carry a Code 04 designation (RX 566 G; Deibig 14626).

449. RX 566 H computes bonus contribution for the 1 to 5-year field representative length-of-service group for field representatives

¹⁷¹ RX 566 IV-24 was prepared on the assumption "that there was only one rate [price of report] in effect for a Code 04 branch office in 1973." (Brown 14390-91, 14404). Mr. Brown testified that he "[made] a mistake [in] following the assumption that there was one rate in effect in 1973." (Brown 14446).

During the first day of cross-examination of Mr. Brown, it was suggested that a Code 04 office had more than one rate applicable to it in 1973 (Tr. 14296-98, 14301, 14308-10, 14391, 14404). Mr. Brown confirmed that fact in conversation with Mr. Deibig after conclusion of the first day's cross-examination (Brown 14379, 14393; Deibig 14615). Prior to the preparation of RX 566 in May 1975, Mr. Deibig had informed representatives of Arthur Andersen & Co. that there was only one rate in existence for the Code 04 office (Deibig 14615; Brown 14296-98, 14301, 14308-10, 14379-80; Woodham 14650-52). In 1975, Mr. Deibig did not recognize that there was more than one rate (Deibig 14616).

In 1973, respondent reduced the number of standard codes from seven to five and in so doing, respondent took what previously had been designated as Code 02 offices and suboffices and included these offices within the standard Code 04. Former Code 04 and former Code 02 offices were both given the 04 designation (Deibig 14616-17, Brown 14379-81).

¹⁷² The calculation on RX 566 IV-25 was based on the assumption as was the original RX 566 IV-24 that there was only one rate (price per report) for Code 04 offices in effect during 1973. Once it was determined that assumption was erroneous, the calculation on IV-25 was no longer viable. The introduction of a variable in the rate created additional variables with respect to factors such as salaries and expenses making it impossible to come up with "reasonable numbers." It was impossible, furthermore, to recalculate RX 566 IV-25 as was done in the case of IV-24 because it was impossible to compute an average salary for the entire company (Brown 14412-13). And, there was no average rate to correspond to the average salary (Woodham 14671).

in Code 04 branch offices in 1973, which branch offices had been assigned a Code 02 [161] designation in 1971-72 (RX 566 H).¹⁷³

450. Andersen's monthly bonus contribution calculations per type of report were made on the assumption for the purposes of the computation that the field representative does one type of case everyday and completes the same number of cases everyday (RX 566 IV-7-8).

451. The Andersen analysis of bonus contribution, based on the average effort and mileage for all field representative length-of-service groups, rests on the assumption that any differences in the averages among length-of-service groups as to those factors are so small that they can be ignored (RX 566 IV-23; Brown 14253-54).

452. Respondent's branch offices were given different classification codes to reflect differences in the difficulty factor and costs in different areas, as well as differences in prices charged to customers for reports. The number of codes and the classification of given offices within the codes have varied over the years as conditions change (Case 5317, 5326-30). Between 1971 and 1976, the number of codes varied from five to ten (Case 5462-63). The difficulty factor in preparing reports is a primary consideration in designating a branch office's classification code (Case 5329).

453. Andersen's conclusions as to the reasonableness of the reporting standard is based on several factors including the assumption that Code 04 offices are [162] representative of respondent's organization¹⁷⁴ (Woodham 14673). Andersen's conclusion also relies on the assumption that an analysis of field representatives in the 1 to 5-year length-of-service group is appropriate to the evaluation of bonus contribution (Woodham 14673-74).

454. Andersen only wanted to give one example and not one for each code (Deibig 13748).

455. Andersen performed no calculations with respect to monthly

¹⁷³ RX 566 F, G, and H each reflect computations based on a different report rate (Brown 14405-06). The report rates were obtained from RX 715. *E.g.*, the life rates of \$4.85, \$4.95 and \$5.35 are found on RX 715D. Field representative revenue was also obtained from RX 715. For example, the field representative revenue credit of \$4.85, \$4.95 and \$5.35 is found in RX 715M (Brown 14406-07).

¹⁷⁴ Andersen's computations in RX 566 IV-24 and RX 566 F-H were based on the assumption that respondent's Code 04 office was the branch office that most typically represented respondent's corporate averages of branch offices. Andersen consulted Mr. Deibig concerning the conclusion on RX 566 IV-24, which demonstrates a bonus contribution for the 1 to 5-year length-of-service group in a Code 04 office (Deibig 13747). Andersen asked Mr. Deibig to determine, based on his knowledge of respondent or of records of respondent, what the most representative code office would be. "Based on documents already submitted, primarily RX 754, we suggested to him that they use the Code 04 offices that most represented the averages of the company." (Tr. 13478). However, with the inclusion of the old Code 02 office, the 1973 Code 04 office, taken as a separate group, was not as close to being a representative branch as was the former Code 04 office in 1971 and 1972 (Deibig 14617).

bonus contribution in connection with the 1969 study results (Brown 14262).¹⁷⁵ [163]

456. With the repudiation of the chart on RX 566 IV-25, there is no calculation in the record showing bonus contribution for field representatives for all lengths of service for all offices.

(5) The Representativeness and Relevance of Respondent's Product Cost and Effort Studies and the Andersen Bonus Contribution Analysis

457. A representative sample is one that reflects the characteristics of the population being studied (Goldstein 15427).

458. The representativeness of the sample in a study is related to the question of how one can generalize survey results to the particular population under consideration (Goldstein 15341-42). Making a sample representative is a goal, and there are procedures which make it more likely that the goal will be achieved (Goldstein 15343).¹⁷⁶ One of the best procedures for achieving representativeness in the sample studied is to use random sampling procedures (Goldstein 15348, 15352):¹⁷⁷ [164]

459. Respondent did not utilize random sampling procedures in its time studies (Finding 422).

460. There are many variables bearing on the time required to prepare a report.¹⁷⁸ "For example, one variable that may be a factor, more important than age [length of field representative's service] would be the geographic location. Are there differences in geography between big cities, small cities? Are there differences between the scheduling techniques? Some offices have different scheduling techniques than others. And to sort out all of those variables and do an analysis to find out why is a very large undertaking." (Prince 14578).

¹⁷⁵ An Andersen witness testified that, in his opinion, the conclusion would have been the same (Brown 14262). In fact, there are no calculations in this record on which findings on this point can be made.

¹⁷⁶ If it is desired to ensure the inclusion of a particular factor in a study, the variable may be stratified (e.g., a particular type of organization) and a random sample taken within the variable (Goldstein 15348-50).

¹⁷⁷ Complaint counsel request a finding, based on a test for skewness by one of their experts, that the figures in the histogram at RX 566 IV-17 pertaining to effort for the life reports have less than one chance in a million of constituting a random sample from a normally distributed population (CPF 820). The finding is not adopted. To make the skewness test, one must assume that the figures tested are a random sample from a normally distributed population (Tr. 15678). Consideration has been given to Mr. Prince's testimony with respect to the histograms in RX 566 at Tr. 14508-09. This testimony does state the histograms contain a textbook distribution as complaint counsel contend (CPF 1283). However, it is not clear whether this also means that the general population of life reports from which the sample is taken is normally distributed. Dr. Bartlett's comments at Tr. 15707 with respect to Mr. Prince's testimony are too general to permit a finding on this question. The witness was unable to state that life reports constitute a normally distributed population (Tr. 15707, 15717).

¹⁷⁸ "... One of the things that intrigued me is that there are so many variables in this whole task of preparing a report, the characteristics of the report, scheduling techniques that are used, there is a possibility of geographic location affecting it, the time of year, the mix of business, whether it is high volume or low volume, there are just a whole series of things here." (Prince 14548-49).

There was no analysis made of the impact of these variables (Tr. 14578-79).

461. The failure to analyze such factors was one of the primary areas where Andersen suggested improvement in respondent's time study procedures (Prince 14548-49).

462. Respondent's time studies did not follow generally accepted procedures in the sense that they left too much opportunity for bias in the selection of the offices timed and should have been more mechanical (Goldstein 15385).

463. The one manager testifying on this point stated that his selection of field representatives to be timed was based on considerations of volume, availability of the field representative, types of reports desired and field representative ability to do the reports. By availability, he meant selecting field representatives from units in which the work was light (Monarch 8567, 8579-81). This manager also selected one field [165]representative, because the stopwatch might demonstrate to this employee, one of the slower workers, where his time was going (Monarch 8580-81).¹⁷⁹

464. The selection of field representatives from units with a light workload, for the convenience of the office, was not a criterion for selection spelled out in the instructions (see RX 765). Utilizing selection criteria not within the variables set forth in the instructions is contrary to standard procedure, and it is not possible to determine the effect of such a variable on the study results (Goldstein 15475).¹⁸⁰

465. Respondent's selection procedures for choosing field representatives to be timed were not in accord with generally accepted procedures, since choices could be influenced by the manager's individual bias (Goldstein 15387).¹⁸¹ [166]

466. The test by Andersen showing no bias as to selection in terms of length of service would not permit conclusions regarding the existence or lack of bias with respect to other variables such as

¹⁷⁹ Field representatives were selected by this manager from those units which may have been light in volume because that would make it convenient for such persons to work with the timer (Tr. 8567). The record does not show why field representatives from a unit with a heavy volume would have been less available.

¹⁸⁰ Procedures should not be changed because of the study. This is basic to any kind of research. "You just don't do that. You don't want to be measuring the effects of your study. You want to be measuring the organization." (Goldstein 15482).

¹⁸¹ " . . . [S]ince the manager can make the choices, he could make it according to any set of biases he might have. And certainly it is not a random selection procedure and the manager could, for example, select the best employees or the worst employees or a particular employee that he wanted timed for his or her own purposes or whatever." (Goldstein 15387; see also Tr. 15594-96).

This criticism by the Commission's expert, Dr. Goldstein, is confirmed by the testimony of the one manager testifying on this point that he selected one of his slower employees so you could show him where his time was going (Finding 463). In short, the testimony of this witness tends to confirm the position of Dr. Goldstein that the sample may have been influenced by the manager's bias in making the selections (Goldstein 15427).

ability of the workers, speed of workers or representativeness of the tasks timed (Goldstein 15424-25, Bartlett 15650-52).

467. In asking for types of reports, the timers concentrated on lines of reports for which they did not have an adequate number of timings (Bruns 13961). And, near the end of the 1969 study when certain cases were hard to find, the timers emphasized the need for those cases to the branch managers (Tr. 12964).

468. A timer in the 1969 study in three or four offices "just took the normal run of cases that an individual [field representative] had. . . ." When informed by the home office that a sufficient number of certain types of reports had been timed but others were lacking, the timer would "ask the manager [in other offices] to save those cases. . . the type of cases [he] would like to work on when [he] arrived at the office." (Healy 14028-29).

469. As a result, the selection of the cases to be timed in different offices was made on an inconsistent basis (Findings 467-68).

470. The holding of cases for the timing run means that such a run would not be the person's normal work and to that extent, it would be unusual. It is not possible to determine the effect of such practices on performance in the timing runs (Goldstein 15404).

471. Instructions to branch managers in 1969 and 1973 indicated that double runs or long circuits should be avoided (RX 765, 766; Tr. 13613).¹⁸² Circuit runs and double runs constituted an important part of the work of [167] many field representatives (see Findings 395-96). The attempt in the instructions to branch managers (RX 765, 767) to exclude double and circuit runs tended to exclude from the sample variables significantly influencing the conditions under which a field representative works.

472. If normal performance is sought, it is important to ensure that the worker being timed knows that he is not being evaluated (Goldstein 15346, 15355-56).

473. Certain of the managers asked timers questions concerning the performance of field representatives in their office being timed (Bruns 13926, Healy 13998). Managers who asked such questions may have misconstrued the purpose of the study as permitting evaluation of individual field representatives (see Finding 463).

474. A timer in the 1969 study was occasionally asked by field representatives he had timed how they had done. He replied "Nebulously. We would tell them they did well but we have no

¹⁸² The actual practice in 1969 may have been contrary to the instruction (Tr. 13970). To the extent that there was a departure from the instructions, there is a possibility that inconsistent selection procedures may have been applied.

worked up figures so we can't really tell them how they compared to anybody" (Deibig 13880).

475. One field representative, after the timing, asked the timer how she had done:

Q Did Mr. Deibig, or anyone else ask you what your reactions were to the timings after you were completed?

A I was curious to know how I stood insofar as how my time was spent. I did ask him.

Q What was his response to you?

A He said I was very average. I said I'm sorry.

Q Why were you interested in how you stood?

A I just wanted to know how I did.

(Jerome 9684.)

[168]Such testimony indicates that the field representative may have been under the impression that she was being evaluated (Goldstein 15441-43).

476. Use of the production stamp, which indicated which field representative had prepared a report, may have given field representatives the impression that they were being evaluated (Goldstein 15574-75).

477. Debriefing of the subjects being timed is a procedure which may be used to determine whether a normal day's work was performed. It can cover topics such as whether the individual timed felt that he performed differently because of the study (Goldstein 15367-68). Absent a debriefing procedure, it is difficult to make a finding as to whether field representatives' subjective reactions to the fact that they were being timed affected the results.

478. Andersen's bonus contribution calculations are confined to Code 04 offices (Findings 445-49). The recomputation of RX 566 IV-24 set forth in RX 566 F, G and H demonstrates that there is significant disparity among subcategories of respondent's offices in the Code 04 classification with respect to the bonus contribution factor.¹⁸³ Thus (on the basis of Andersen's reasoning), [169]there is variation in ability of field representatives located in different

¹⁸³ For example, in the case of life and auto reports, the Andersen study showed the following variations with respect to bonus contribution:

	<i>Life Reports</i>	<i>Auto Reports</i>
Code 04 Offices which were Code 04 Offices in 1971-1972, RX 566F	120	93
Code 04 Offices Suboffice Rates, RX 566G	59	36
Code 04 Offices which were Code 02 Offices in 1971-1972, RX 566H	40	18

subcategories of the Code 04 offices to meet production requirements with respect to the same reports.

479. Andersen determined that Code 04 offices most typically represented respondent's corporate averages. In this connection, Andersen relied primarily on information received from respondent's employee James Deibig and RX 754 (Finding 453; Deibig 13748, Brown 14311). Andersen took no steps to test respondent's continuing assumption that Code 04 offices represented the Company's average office (Brown 14311).

480. RX 754, entitled "Production and Earnings of U.S. Inspectors," gives for 1971 and 1972 average production, revenue, reporting allowance, earnings (salary, overtime, gain-loss on standards) and expenses for field representatives by class of office. In 1971 and 1972, respondent had offices classified as Code 01, 02, 03, 04, 05, 06 and 07 (RX 754). See the following charts: [170]

Initial Decision

96 F.T.C.

PRODUCTION AND EARNINGS OF U. S. INSPECTORS

JAN-DEC '71	LOCAL INSPECTORS U.S. 1971							Total Local	Sub-Office	Grand Total
	01	02	03	04	05	06	07			
Productions: Reports	428	400	348	373	323	262	362	375	410	374
Revenue	1952	1740	1814	1886	1788	1832	1823	1871	1934	1889
Reporting Allow: Std. Per %	435	416	341	314	274	251	344	330	411	310
Amount	947	949	981	969	954	1009	997	972	950	963
Earnings: Salary	663	665	687	681	685	726	687	684	654	674
Overtime	14	15	14	14	12	13	13	13	15	14
G.I. On Stds.	62	67	65	63	63	71	79	67	64	65
Total	739	747	766	758	760	809	779	764	733	753
Expenses: Confere	121	114	121	120	111	106	127	118	134	122
Steno	87	88	94	91	83	94	92	90	83	88
Other	-	-	-	-	-	-	-	-	-	-
Total	208	202	215	211	194	200	219	208	217	210
Total Earnings and Expenses	947	949	981	969	954	1009	997	972	950	963

1972

PRODUCTION AND EARNINGS OF U. S. INSPECTORS

January - December

JAN-DEC '72	LOCAL INSPECTORS U.S. 1972							Total Local	Sub-Office	Grand Total
	01	02	03	04	05	06	07			
Productions: Reports	437	402	391	374	334	285	366	394	409	393
Revenue	1990	1873	1847	1837	1755	1623	1870	1901	1967	1867
Reporting Allow: Std. Per %	499	469	455	428	388	326	457	434	405	393
Amount	993	970	1002	1019	1001	1026	1053	1017	993	1011
Earnings: Salary	691	602	717	714	717	757	726	711	681	705
Overtime	16	16	14	15	15	15	15	15	17	16
G.I. On Stds.	33	36	33	35	31	32	34	36	35	35
Total	740	754	864	864	863	862	875	862	833	796
Expenses: Confere	125	110	120	122	114	108	120	119	127	126
Steno	55	58	56	55	54	51	54	51	55	59
Other	-	-	-	-	-	-	-	-	-	-
Total	180	168	176	177	168	159	174	170	182	185
Total Earnings and Expenses	920	900	1002	1019	1001	1026	1053	1017	993	1011

RX 754

[171]481. RX 754 demonstrates considerable disparity between the figures for certain classes of offices and both the Company averages and the Code 04 figures, with respect to the foregoing factors; e.g., consider the Code 01 offices.

482. The variations shown on RX 754 with respect to the averages for factors such as production, earnings and expenses among various classes of branch offices also suggests that reliance on RX 566 F-H for generalizing to all of respondent's offices ignores significant differences from corporate averages with respect to such variables in the case of certain offices not in the Code 04 category.¹⁸⁴

483. Andersen's bonus contribution calculations for Code 04 offices utilize an average salary of \$610 and a reporting standard of .505¹⁸⁵ (RX 566 F-H). The reporting standard, however, varies sharply in different branch offices and for field representatives in different length-of-service groups (see RX 754, 715Z-3). The interaction of the per dollar standard or reporting allowance with salary is a critical element in the computation of bonus contribution (RX 566 IV-4, IV-5; [172]see also Tr. 14318-19).¹⁸⁶

484. The Andersen study made no calculations as to the impact on bonus contribution of the interaction of reporting standards and salaries at ranges different from those shown in RX 566 either in connection with the computation for Code 04 offices, RX 566 IV-24, or for the composite of all offices, RX IV-25¹⁸⁷ (RX 566; see Tr. 14318-20).

485. Nor was there any attempt to determine how many field representatives might be required to meet expenses at a higher salary than shown on RX 566 (Tr. 14318).

486. As to these characteristics, therefore, there is insufficient evidence to show that the averages in RX 566 are applicable throughout the Company. [173]

¹⁸⁴ In this connection, see respondent's statement, "With the inclusion of the Old Code 02 office, the 1973 Code 04 office, taken as a separate group, was not as close to being a representative branch as was the former Code 04 office in 1971 and 1972." (RPF 634). Mr. Deibig stated with respect to the consolidation of the Code 02 and Code 04 offices into one group, "it would have been my opinion that it would not have been as close—if at all—to the most representative in 1973, with the inclusion of the old 02 offices." (Tr. 14617; emphasis supplied). Moreover, a prime consideration in assigning a code designation to a branch office is the difficulty factor in preparing reports (Finding 452).

¹⁸⁵ The reporting standard for 1 to 5-year field representatives in Code 04 offices in 1973 (RX 715Z-3).

¹⁸⁶ Earnings credit is computed by multiplying the reporting standard by the field representative's revenue credit. Earnings credit is then matched against salary and other expenses to determine bonus contribution (RX 566 IV-4-IV-5).

¹⁸⁷ For example, if salary goes up and per dollar standard remains constant and assuming the same mix of cases, the field representative would have to complete more cases to achieve a given level of bonus (Tr. 14319). Conversely, if salary remains constant and per dollar standard goes up, the field representative would have to produce fewer cases to maintain constant bonus contribution (Tr. 14319). If both rise, it is clear that the relative rise in each would have an impact on bonus contribution.

(6) Significance of the Andersen Study and the Underlying Product Cost and Effort Study

487. The need to abandon one of the two basic calculations pertaining to monthly bonus contribution on which Andersen rested its conclusion as to the reasonableness of the reporting standard and the need to recompute the other, detracts from the confidence to be placed in RX 566 and the conclusions expressed therein.

488. Andersen's evaluation concerning the reasonableness of the reporting standard and the underlying time studies failed to take into consideration numerous factors bearing on the ability of the field representatives to complete their tasks in a given time (Finding 460). As a result, Andersen's studies fail to take into consideration that different groups of field representatives, because of variables such as geography, scheduling, etc., may differ significantly in their ability to complete a certain number of reports in a normal workday or in their ability to show a gain in any specific period.

489. The failure to analyze the impact of these variables makes it difficult to determine whether the conclusions of RX 566 are attributable to the entire organization or whether there are offices or groupings of offices to which they would not apply.

490. Andersen's conclusion, based on its bonus contribution calculation, that respondent's reporting standard is reasonable rests on the assumption that Code 04 offices are representative of the entire organization. That assumption has not been persuasively documented. For example, see disparity for bonus contribution within the Code 04 category for the various reports as calculated by Andersen for subcategories of the 1973 Code 04 offices as shown on RX 566 F-H (Finding 478). In addition, the Code 04 offices were selected as the most representative because averages for offices in this classification pertaining to such figures as production revenue and reporting standards were closest to companywide averages. [174] However, the pertinent averages for offices in certain other code classifications differ significantly from both the companywide averages and from those of the Code 04 offices (Findings 480-81).

491. Also, the bonus contribution computations failed to analyze the interaction of salaries and reporting standards at levels different from those shown on the computations in RX 566 (Finding 484). There is, therefore, in the case of these characteristics, insufficient evidence to support a finding that respondent's field representatives as a group were sufficiently homogenous so that the averages in RX 566 could be applied generally to them throughout the organization.

492. The purpose of the cost and effort studies was not to

determine the quality of the reports but to determine how much it actually cost to do the reports the way they were being done (Deibig 13764, 13781).¹⁸⁸ They were, accordingly, not designed to evaluate the effect of respondent's compensation system and other policies on the manner in which field representatives conducted their investigations. Since the time studies were not designed to study the quality of the reports, they have little relevance to the issue of whether respondent's procedures were designed to assure maximum possible accuracy of the information concerning the individuals to whom the report relates. [175]

493. The foregoing factors are relevant to weighing the conflict between the conclusions in RX 566 and other evidence. Under the circumstances, the testimony of certain ex-employees that they could not complete their workload in accord with Company procedures in a normal workday or week is entitled to more weight.

D. Production Credit for Reinvestigations

494. Respondent conducts reinvestigations on its reports when the accuracy or the completeness is in question (R. Jones 5177, Curtis 7150). There are three distinct categories of reopen cases: customer reopens, consumer reopens and office reopens (RX 107Z-170).

495. Reinvestigations are usually requested to clarify points of disputed information. As a result, it may not be necessary to rework the entire report (J. Moore 8850, 10038; Ross 9352; Curtis 7149; Zack 8894). Reopens do not deal solely with unfavorable information but they also deal with items such as birthdates and addresses (R. Jones 5176).

496. Respondent's policy in assigning reports for reinvestigation is the following:

Generally, if the point in question is factual, and can be definitely resolved, age, duties, identities, marital status, etc., the original Field Representative should rehandle. *If the point is subjective and/or a difference of opinion is possible as to severity, degree of importance, health habits, reputation, an alternate Field Representative should be used.* In either instance, file copies should be withheld (original sources may be shown on Form 640) to assure objectivity. (RX 107Z-170; emphasis supplied.) [176]

497. When a reopened case is assigned to an alternate field

¹⁸⁸ "We [the timers] were not interested in what he [the field representative being timed] was saying or in the way he was asking his questions, therefore, the only requirement placed on us as timers were that we had continuous line of sight with the man up to the point he might enter a private residence. . . ." (Deibig 13520). Since the timers did not hear the interviews, it would have been difficult for them to determine whether a field representative, in his questioning of sources, was more thorough than field representatives generally (Deibig 13765). And, normally, the timers could not determine whether the field representative being timed had asked a full range of questions (Deibig 13527; see also Healy 14020).

representative, he does not see the original report and he handles it as a new case (A. Brown 7774-75, 7888).

498. Branch managers are given discretion in the assignment of cases for reinvestigation on the ground that it is not possible to cover every contingency that may arise (Jenkins 5702). Exercise of such discretion varied, *e.g.*, in the suboffices, it was not, according to respondent's officials, always possible to assign a reinvestigation to an alternate field representative (Paladino 8738-39). However, if the circumstances were sufficiently serious, the branch manager might send in an alternate field representative from another office (Tilden 11780). And, in the Boston and Hartford offices, 99 percent of the cases were given to the field representative who handled the original report (Hakey 1658, 1730-31).

499. The rules for giving field representatives production credit for reinvestigations vary depending upon whether such reinvestigation is assigned to an alternate field representative or to the original field representative and whether or not the customer is charged for the new report. Respondent's customer is charged for a report when it reopens a case and the original information is confirmed (Hakey 1658-59, Laudumiey 1848-49, Silar 4029-30, Wallace 3014).

500. When the reinvestigation is assigned to a field representative who did the original investigation, he receives production credit for a customer reopen if the customer is charged for the reinvestigation; *i.e.*, if the original report is confirmed as correct (Lieber 9012-13, Curtis 7173, Moore 8850). If the reinvestigation shows an error in the original report so that the customer is not charged, then the manager has discretion as to whether to give production credit to the original field representative for rehandling the case (Lieber 9012-13, Paladino 8754, Moore 8849). [177]

501. The manner in which branch office managers exercise their discretion in compensating the original field representative for a reinvestigation when the first report was in error varies from manager to manager. Certain managers do not give production credit to original field representatives when the first report was in error on the ground that this would reward respondent's employees for improperly doing their job (Curtis 7293-94, Brothers 7439). Other managers give the credit as a matter of course (Larsen 12503-04, 12525-26). Some managers give production credit to such field representative if the error in the original report was not his fault (*e.g.*, J. Moore 8849-50, Paladino 8753-54).

502. In the event that an alternate field representative handles the reinvestigation, then that field representative receives produc-

tion credit whether or not the customer is charged (*e.g.*, Curtis 7173, Case 5414).

503. Normally, when a field representative receives credit for a reinvestigation, he receives the same credit provided for the original report (Zack 8895, Ross 9387-88, Larsen 12527). Where the reinvestigation requires more effort than usually required for the particular type of report, the field representative may, at the discretion of the branch manager, be given additional credit for such work (Zack 8895, Larsen 12506).

504. When field representatives are compensated for a reinvestigation and the customer is not charged, the equivalent revenue is deducted from the branch office revenue (Case 5413-14).

505. Respondent's failure to give production credit if the original report was incorrect, has the following effect in the case of some field representatives:

Oh, in some instances where you would reinvestigate, you may find that the customer is partially right and you are partially right and in writing up this case, you would be inclined to more emphasize, put more emphasis on the [178] information showing you were correct so you could recharge the customer.

(Silar 4030.)

506. Another field representative was influenced as follows by the method of compensation for reinvestigations:

Well, on reinvestigations, I would really—on those cases I would really try to really dig into it and I would try to prove that I was right the first time so I'd get my \$5 but if it turned out that all wasn't true, I wouldn't lie about it. I would still tell the truth, that, well, I was wrong.

(Wallace 3015.)

507. The failure to give production credit for reinvestigations where the original field representative could not substantiate his original report clearly has potential to give field representatives an incentive to try to prove that they were right the first time (Findings 500-05). There is a danger that, in those areas involving subjective judgment on the part of the field representative and where differences of opinion are possible, there would be a tendency to deny the consumer the benefit of the doubt (Findings 496, 505). This point is tacitly recognized by respondent's Branch Manager's Manual (RX 107Z-170). However, no definitive finding can be made on the point. The record does not show the extent to which matters involving subjective points and/or where difference of opinion was possible were assigned to field representatives preparing the original report (see Finding 498). Nor does the record show with any degree of specificity any breakdown on how managerial discretion with

respect to granting production credit was exercised in such cases. The potential for inaccurate reporting is evident where the question in issue is subjective, and the reinvestigation is assigned to the original field representative, and where the manager, as a matter of policy, will not give production credit if the reinvestigation turns up [179]error in the original report. There is insufficient detail, however, in this record to determine that a pattern of inaccurate reporting has taken place by virtue of such compensation policies.¹⁸⁹

E. Health and Arrest Information

(1) Health Information

508. Respondent obtained health information concerning an individual from sources other than licensed physicians, medical practitioners, hospitals, clinics or other facilities. Certain of respondent's reports require that the field representatives obtain such information from lay sources (Stansbury 6751-52, Jenkins 5793, Maust 8289, Hakey 1632, Wines 406, Monson 3274-75, Laudumiey 1838, Wallace 3005; *e.g.*, see CX 422A & B; RX 343A & B; Getz 12387-88).

509. Health information is to be confirmed either by the applicant or by two outside sources (Getz 12388, Hakey 1632-33, Laudumiey 1838, Moxham 3525, Pollard 328). The information in the reports is identified as coming from lay sources or the applicant (Moxham 3526-27, Muth 9954, Monson 3309).

510. Respondent considers the applicant to be a prime source of health information (Coleman 7954, Farra 755-57).

511. Although a neighbor cannot provide the doctor's diagnosis of a specific ailment, a neighbor may provide information which is generally known or derived from his observation of the applicant (Muth 9949). [180]

512. Field representatives were not required to confirm health information secured from lay sources through medical records (Wines 406-09, 411; see also Pollard 328, Buckley 1260, Monson 3275).

513. Underwriters do not take action based solely on health information obtained from lay sources in a report from respondent (Moller 13056, Jenkins 5793-94, Nietzold 13012, Paine 13396-97, Taylor 10841), but use such health information as a lead to request further information from medical sources, the agent or the applicant (Nietzold 13010-11, Moller 13055-56, Paine 13397).

¹⁸⁹ Complaint counsel cites one specific example where this may have occurred (CPF 965). However, that evidence was not allocated to these allegations of the complaint and must, therefore, be rejected on that score.

514. The record does not support a finding that health information secured from lay sources is inherently unreliable (Grossman 4199-4200; see also Elmendorf 4264). The testimony bearing on the issue is equivocal.¹⁹⁰ [181]

(2) Arrest Information

515. Respondent's field representatives, to complete certain reports, obtain information concerning applicants' arrest records (CX 422A & B; Jenkins 5794-95, Hakey 1633).

516. Field representatives are encouraged to check police records where available or where there is reason to believe that an arrest record on an applicant exists (RX 102Z-16-17).

517. Where it is not possible to confirm arrest information through police records, respondent's employees are instructed as follows:

It is also pertinent to mention at this time the reporting of 'unconfirmed adverse information.' Example: If we develop information that there have been arrests, indictments, or convictions, but local police records are not available for confirmation, *WE SHOULD STILL REPORT THE INFORMATION*. But, when reporting the information, put it in the same language as we developed it, such as, 'there is talk in the community that your subject has had police difficulties, but police records are not available locally to verify this information.' It is important, however, that the approximate date of the difficulty be estimated and recorded because of the seven year requirement imposed on reporting adverse information.
(CX 1351I.) [182]

518. In certain jurisdictions, police records are not generally available (Curtis 3279, Jenkins 5795). In such instances, an attempt will be made to confirm the information concerning arrest through newspaper clippings or by interview with the applicant or a member

¹⁹⁰ Dr. Grossman, one of complaint counsel's medical experts, testified that a "yes" or "no" answer could not be given as to whether neighborhood sources are likely to have accurate information as to the existence of certain medical conditions (Tr. 4199-4200). When asked whether it was reasonable for a field representative to obtain information concerning an illness from a lay source, he stated:

A. I don't know how he would ask, but I mean the thing is in some situations the neighbors do discuss with each other conditions that they have and in other situations they do not; and neighbors often imagine things and, in turn, have gotten things in the record sometimes out of malice, so you have a mixed bag there. I mean you can't give one general answer for the whole thing.

In some situations, I mean the neighbor might have, and in others it might suggest things that you may not want, and so you really have a mixed bag there. I don't think you can give one answer to that whole situation. The thing is the investigator can't differentiate what situation he is stepping into.

(Tr. 4199; emphasis supplied.)

Similarly, the testimony of Dr. Elmendorf, who stated there were better ways of getting information than from lay sources (Tr. 4261), did not give conclusive evidence on this point. He also testified that it was conceivable that it may be necessary to get information from neighborhood sources or other sources in connection with an insurance transaction (Tr. 4264).

Even accepting CPF 979-80, the one incident cited would not support a finding that securing medical information from lay sources without further confirmation is inherently unreasonable.

of his family (Curtis 7238-39, Hakey 1633) or through additional outside sources (Hakey 1633, Laudumiey 1840, Monson 3277). If lay sources such as neighbors or the applicant are used as sources for arrest information, the report will so indicate (Laudumiey 1839-40).

519. Some field representatives, if they were unable to confirm arrest information through police records, would not report it (Pollard 330-31).

520. The record contains no evidence pertaining to the use or accuracy of arrest information obtained through lay sources in specific instances. Nor is there other evidence bearing on the question of the reliability of such information. No finding can be made on the state of this record that respondent's practice of securing information of this nature through lay sources is unreasonable. [183]

XIV. RESPONDENT'S DISCLOSURE OF REPORTS UNDER FCRA (PARAGRAPHS 22-23 OF THE COMPLAINT)

A. Training

521. After passage of the FCRA, respondent conducted extensive orientation sessions for its employees to acquaint them with new procedures to be instituted upon the Act's effective date in April 1971.

522. After the Home Office had determined the procedures to be instituted and trained the home office staff, training meetings were held for the Regional Vice Presidents in January 1971 (Jenkins 5656-58; RX 551A-D). Each Regional Vice President then met with the branch managers in his region to train them. Home office personnel attended these meetings (Jenkins 5659-60).

523. Branch office managers subsequently conducted training sessions with the personnel in each branch (Jenkins 5660). Follow-up educational branch meetings were held in April 1971 (Jenkins 5680-81; RX 558A-K). Extensive instructional material was disseminated to the branch office managers to aid them in understanding and teaching the new procedures (Jenkins 5660-61, 5669-70, 5675-78; RX 556B-LL, 564A-YY, 120A-Z102). Additional material was sent to branch managers subsequently to direct them regarding modifications and revisions in respondent's procedures related to FCRA (Jenkins 5669, 5678).

524. A home office staff group—the FCRA unit—was established to provide expertise on FCRA problems. Telephones were manned by this team to handle questions from field personnel when FCRA problems arose (Jenkins 5692-93). [184]

B. Disclosure in Branch Offices

525. In April 1971, branch managers were instructed to "choose those Field Representatives you feel are in the best position to handle Inquiring Consumers" and train them to make consumer disclosures (RX 558C). The importance of having "trained personnel" conduct disclosures was stressed, and the branch offices were provided with training materials (including specimen reports with instructions on how they should be disclosed) to be reviewed by the selected personnel as part of their training (Jenkins 5666-68; RX 556N-Z). Respondent continued to emphasize to branch managers that consumer inquiries "require the best ability in the office." (RX 107Z-187).

526. Respondent's instructions stated that when a consumer visited the office for disclosure regarding a report or investigation on him, he was to be given a brochure explaining the disclosure procedure (RX 547B-E, 303A-F; J. Curtis 7192). A consumer contacting an office in connection with disclosure was to receive disclosure of all reports in his file (other than those respondent felt were not covered by the Act) (RX 556DD). In addition, branch managers were instructed that there should be "trained personnel" in the office *at all times* to give disclosure. "It is *not* satisfactory to refuse to discuss a situation or ask the consumer to come back when the Manager returns, except under the most extreme circumstances." (RX 564T, emphasis in original).

527. Respondent's policy regarding charges for disclosure and reinvestigation paralleled Section 612 of FCRA, with no charge authorized for disclosure if the consumer had, within 30 days, received notice of adverse action in connection with a report filed by Retail Credit (RX 120Z-50). In other instances, where the Act permitted charges, respondent's instructions provided for a \$5.00 disclosure fee and a reasonable fee for reinvestigation (both fees to be refunded if, upon reinvestigation, the original report information were disproved or not verified) (RX 120Z-51). However, respondent's instructions gave discretion as to whether these charges were imposed at all and gave particular instances in which it was suggested that they not be made (RX 120Z-51-52). [185]

528. Contact by inquiring consumers was to be noted on a monthly log maintained by the branch office (CX 1473). In addition, a file memorandum was to be prepared after the disclosure. This document was to set forth a brief description of the consumer contact and information disclosed (RX 556M; Jenkins 5771-72, Jegley 7038).

Copies of the memoranda were sent to the home office (Jenkins 5771-72).

529. Respondent's instructions, however, were not followed in all instances. Consumer Phares visited Retail's Pittsburgh office in 1972, stated to the receptionist his request "to see someone in regards to information on file." He was told that the information "was not given out" (Tr. 773, 783). Only after Mr. Phares had his attorney call the Retail branch office did he receive disclosure (Tr. 774-76).¹⁹¹

530. Consumer Humble visited Retail's Lincoln, Nebraska office in February 1973, after she received a notice from her automobile insurance company rejecting an amendment to her policy to add her husband as an insured (Tr. 3479-82). She was told that the file information was "on" her husband and would not be disclosed to her (Tr. 3484-85). She received no disclosure even though the report was in her name and contained information on her, as well as on her husband (CX 133A-B).¹⁹² [186]

531. Consumer Baker, after having been incorrectly advised by the Wichita branch's assistant manager as to his rights to disclosure (Finding 537, *infra*), took with him to his disclosure appointment Mr. Dickey, a representative of the Consumer Division of his state's Attorney General's Office (Tr. 3113-14). After Mr. Baker indicated that he did not intend to sign a waiver form (CX 337) presented to him (Tr. 3115, 3119), Mr. Smith, the branch manager,¹⁹³ inquired regarding Mr. Dickey's identity. After learning Mr. Dickey's identity, Mr. Smith stated, "I'll tell you this much. If I read this report to Mr. Baker, you are not going to be present when it's read." (Tr. 3119). Mr. Dickey advised Mr. Smith of Mr. Baker's right under the FCRA to have a third person present during disclosure, at which point Mr. Smith terminated the interview without making any disclosure (Tr. 3119-20).

532. In 1972, after learning that his daughter had been visited and questioned regarding his wife, consumer McCune called the Wichita branch office to ascertain whether the interviewer was a Retail employee and if a report was being prepared (Tr. 4361-63). The assistant branch manager told him that he had no record of an

¹⁹¹ In rebuttal of consumer Phares' testimony that he was told his file information could not be revealed, Mr. Peck, the branch manager, testified with regard to the usual procedure when a consumer visited the office for disclosure (Tr. 8360-67). This testimony did not discredit Mr. Phares' testimony based on his clear recollection of what took place at the particular event in question. In addition, the un rebutted fact that Mr. Phares contacted his attorney regarding Retail tends to corroborate his testimony that he had been rebuffed by Retail when he first attempted to obtain disclosure.

¹⁹² Respondent's instructions provided that if information on one spouse was sensitive and likely to be unknown to the other, the discloser might wish to talk with the parties separately regarding information in the file on them as individuals (RX 564V).

¹⁹³ CX 1492 indicates that Mr. Smith was the manager of the Wichita branch.

investigation being conducted on the McCunes (Tr. 4363). Mrs. McCune also called Retail and spoke to the branch manager, who told her they had nothing in their files (Tr. 4384). When the McCunes received a notification that Mrs. McCune's insurance application had been denied on the basis of a Retail Credit report, it became apparent that a Retail report had been prepared (Tr. 4363-64). Mr. McCune again contacted Retail and after asking the branch manager where the information was obtained, was told that all Retail's information was confidential and that "they couldn't tell me a thing, and at that time they didn't tell me whether they even had any record of it." (Tr. 4365). Only after Mr. McCune became aware of the right to disclosure and so informed the branch manager, was he told disclosure could be obtained (Tr. 4366). [187]

533. Respondent violated Section 609 of FCRA by denying disclosure to consumers (Findings 529-32). In addition, the failure of Retail to advise the McCunes upon their first contacts that a report was being prepared or an investigation conducted, discouraged disclosure in a manner tantamount to refusal to disclose (Finding 532).

534. In other instances, respondent's field personnel, while not actually refusing disclosure, imposed certain conditions on or prerequisites to disclosure, which were not permitted by FCRA.

535. It was respondent's practice to request that a consumer seeking disclosure sign a completed Consumer Interview Form (RX 556L). This form had blanks for the consumer's name, address and other identifying information, and for the signature of the consumer to certify that he was who he purported to be (CX 1457). Respondent's stated purpose of this procedure was to provide information adequate to ascertain that disclosure was being made to the proper person (McLaughlin 8346; Dukes 12735, 12741; Jenkins 5689-90; see also CX 675Z-62-63). However, the form, above the signature line, contained the following paragraph:

I hereby certify that I am the above described consumer and request that Retail Credit Company disclose to me the nature and substance of information which it has in its file concerning me. I authorize Retail Credit Company to make necessary investigation of any item which I may dispute and to transmit the results of such investigation to any person to whom it has previously reported such disputed information. I authorize any business, organization, professional person or anyone else to give full information and records about me.

(CX 1457, CX 337.) [188]

Thus, as noted by respondent, the form "when properly signed"

could serve as an authorization for ascertaining medical information (RX 108E).¹⁹⁴

536. Such a waiver was not necessary for identification purposes and was not a proper condition to place on disclosure. Respondent did not impose the condition of this waiver on all disclosures (*e.g.*, telephone disclosure, when given, did not involve the waiver), and did make disclosures when confronted with consumers who refused to sign the waiver (Luster 3172-73, 3180; Bendelow 3459-62). However, its use of the form implied a condition to persons unaware of their right to disclosure without signing a waiver.¹⁹⁵

537. Another condition imposed on disclosure occurred in the case of consumer Baker. Mr. Baker requested disclosure in 1973, after receiving a cancellation of his automobile insurance (Tr. 3108-10). The assistant manager told him there would be a \$5.00 charge for disclosure. Mr. Baker stated that he would not pay a \$5.00 fee and showed the assistant manager his cancellation notice (Tr. 3110¹⁹⁶). The assistant manager then told him, contrary to any corporate policy or instruction, that he would have to have a written authorization from the insurance company involved before he could receive disclosure (Tr. 3110-11). After learning of his rights under FCRA, Mr. Baker again contacted the assistant manager who insisted that a written authorization was prerequisite to disclosure (Tr. 3112-13). Mr. Baker then returned to the branch [139]office with a state consumer representative, well versed on the FCRA. At this meeting, the branch manager gave him the Consumer Interview form to sign for disclosure and the insurance company authorization was not demanded (Tr. 3114-15).¹⁹⁷

538. Respondent imposed conditions on consumer disclosure which were not authorized by the FCRA (Findings 535-37). Imposition of such conditions is another way to avoid the disclosures required by Section 609 of FCRA and is constructive refusal to give disclosure. Such practices violate Section 609 of the Act.

539. Respondent's instructions stated that disclosure of the nature and substance of the information in the file was to be given, "not necessarily verbatim" (RX 556L). Under no circumstances was the discloser to permit the consumer to see, read or handle the report

¹⁹⁴ In 1974 or 1975, respondent redesigned its Consumer Interview Form and omitted the waiver clause (McLaughlin 8347-48; RX 492C).

¹⁹⁵ The field personnel were instructed that if the consumer refused to sign the form, they were to ask for other identification and not to insist that the consumer sign the form (RX 556I).

¹⁹⁶ No finding of violation is based on the attempted imposition of a fee. Mr. Baker's testimony indicates that when the assistant manager mentioned the fee, he had not been advised that Mr. Baker sought disclosure because of an insurance denial (Tr. 3110).

¹⁹⁷ Disclosure in this case did not occur. After the branch manager learned the state representative's identity and that Mr. Baker intended he be present throughout the interview, he terminated the meeting (Finding 531).

himself (RX 556F, 556L). "Nature and substance" was defined to include "ALL file information," favorable and unfavorable. Summarizing and paraphrasing were permitted "so long as we are complete, accurate, and the consumer understands." (RX 564W, emphasis in original). The instructions further provided that, in disclosing a report, the discloser cover all the questions and answers on the report and then take the narrative sections "feature by feature." (RX 564X).¹⁹⁸ [190]

540. "As a matter of established procedure or usual and customary practice, respondent [did] not disclose the recipient of a consumer report on the consumer which it [had] furnished for employment purposes within the two-year period preceding the request, or, for any other purpose within the six-month period preceding the request, unless specifically requested to do so by the consumer." (CX 1445E). Likewise, respondent did not disclose non-investigative sources of information without a specific request (RPF 935).

541. Implementation of respondent's instructions in the field was not uniform. In some branch offices, reports were read verbatim (Burge 5088-89, Jegley 7027). In others, a summary or paraphrase of the report was disclosed (Coulter 8202-03). In still another, only the part of the report which the discloser "assumed was the factor" that had caused the consumer to be rated or denied insurance (Hakey 1664-65) was disclosed.

542. In practice, some field personnel, while purporting to give the nature and substance of reports, failed to give adequate or complete disclosure.

543. In November 1971, a consumer went to the Wichita branch office for disclosure to ascertain what information had been the basis for denial of two insurance applications (Tr. 3377-81). He received disclosure and was told that his life insurance was probably denied because he had had pneumonia and that the basis for his automobile cancellation was probably his six traffic violations in 6 years (Tr. 3383-89). When the consumer asked for the exact reasons he had

¹⁹⁸ Ex-employee Shelley testified at length regarding instructions he allegedly was given by Mr. Browning, the Regional Vice President in Mr. Shelley's area. These alleged instructions were contrary to respondent's written instructions, e.g., in making disclosures, personnel should tone down the reports (Tr. 15115), not disclose the question and answer portions of the reports (Tr. 15116), "highlight" the body of the report (Tr. 15116-17), and if a report contained several adverse items, disclose the item of "least conflict" first because the discloser would often "not have to go the remainder of the report." (Tr. 15117). Mr. Browning specifically denied giving these instructions (Tr. 16098-104). His denial was supported by other Retail employees in Mr. Browning's area who testified regarding instructions he had given them which were inconsistent with those Mr. Shelley allegedly received (Lindsey 16182-85, Beckman 16312, Taylor 16218, Klueh 16274-76). After considering this testimony and the fact that it is highly unlikely that a vice president would issue directives so widely divergent from the instructions he was given by the Home Office (which he knew were given to the branch offices by the Home Office), it is found that Mr. Shelley's testimony was effectively rebutted on this critical issue. His testimony is, therefore, not relied on.

been refused, he was referred to the insurance companies (Tr. 3389). He contacted the insurance companies and was told he would have to receive the information from Retail (Tr. 3390-91). The consumer returned to Retail and had a second disclosure similar to the first (Tr. 3391-92). He again contacted one of the insurance companies about his refusal. The insurance representative finally told him that the Retail report indicated that he had a drinking problem (Tr. 3392-93). Since no information regarding drinking had been disclosed to him by Retail, he returned for a third disclosure, in which the drinking information was again not mentioned (Tr. 3393-94). The consumer asked about any drinking information, and the branch manager stated, " 'I didn't feel that it was important' " (Tr. 3394).¹⁹⁹ Among other items not disclosed to the consumer were that he was "said to be a fast and careless driver;"²⁰⁰ that he was "said to be an unstable type of person, not regarded well;" that his mother had been in a mental institution and was poorly regarded, and that he had a girlfriend who drove his car (Tr. 3397-3401, 3384-85; CX 343H-I). [192]

544. Consumer Grabher contacted the Denver branch office after she received an insurance cancellation (Tr. 3410). She received disclosure but was not told the report's statement of her estimated income and net worth (Tr. 3412-13; CX 113A).²⁰¹

545. In 1972, two consumers, father and son, visited the Dayton branch office for disclosure after an insurance company had refused the addition of the son to the father's automobile insurance policy (Tr. 960-62). Information suggesting the son had been involved with drugs and unfavorable details of his having been terminated from a teaching position were not revealed (Tr. 964, 967). The remaining information, which was disclosed, was basically favorable (Tr. 978, 982-84). Afterwards, the father wrote the insurance company involved, asking whether the denial was based on additional information since the Retail report was favorable. The son thereafter received a telephone call from the Dayton branch manager, who stated that the employee who had conducted the disclosure, had overlooked one page of the report. He then disclosed to the son the

¹⁹⁹ The information which the Retail representative did not consider important was: the consumer had been seen "drunk several times since he was discharged from the military. One source stated that prior to service, the subject was arrested for driving his car with some of the tires on the sidewalk down the middle of the town." (CX 343I).

²⁰⁰ This item appears to have been disclosed in the second disclosure session (Tr. 3400).

²⁰¹ Ms. Grabher's testimony was more persuasive than that of the rebuttal witness who testified regarding the disclosure procedure he generally followed.

drug information and unfavorable details of his dismissal from the teaching position (Tr. 965-67, 979-81; CX 98).²⁰² [193]

546. Consumer Smith twice received disclosure in 1973 from the Manchester branch office of a report which was the basis of his failure to receive an insurance agency appointment (Tr. 927-32; CX 258). These disclosures did not include unfavorable information in the report concerning previous employment (Tr. 930-32). While the information in question was later deleted from the report and a notice of the deletion sent to the company who had received the report (CX 255A-C, 257; Tr. 952-53, 8461-62), this action was taken without Mr. Smith's knowing the information was in the report.²⁰³ [194]

547. Another consumer received disclosure in 1972 from the Oxon Hill, Maryland office after she received an insurance cancellation (Tr. 1792-94). Items from a report dated December 15, 1971 (CX 151) were revealed, but the disclosure did not include information in another report, dated December 27, 1971 (CX 152), that the consumer had run off with a truck driver; that her morals were questioned; and that she was regarded as "trying to take [her husband] for his money." (Tr. 1794-96; CX 151A-B, 152A-B).²⁰⁴

548. Consumer Dayton contacted Retail's Phoenix office in 1973, after her automobile insurance was cancelled (Tr. 3531-32; CX 1469B). She received disclosure of some information, including information that she was living with a man to whom she was not married (Tr. 3533-34). She was not told, however, that the man living with her had caused trouble in the neighborhood (Tr. 3534). Also, her estimated income and worth were not revealed (Tr. 3534-

²⁰² The son's testimony that, following his disclosure, he received a call from Retail and was told that during the disclosure, one page of the file had not been disclosed to him, was un rebutted. This fact, together with the branch manager's testimony that the employee who made the disclosure "was not sure" he had disclosed the items in question (Tr. 14899), gives credence to the consumers' testimony, despite the testimony of rebuttal witnesses.

²⁰³ Consumer Smith's testimony that unfavorable employment information was not disclosed to him is found credible, despite rebuttal testimony of the Retail employee who gave the disclosure. The rebuttal witness testified that the items were disclosed and disputed (Tr. 10890), and that a reinvestigation was conducted (Tr. 10891-92, 10897). However, Mr. Smith appeared to have a clear recollection of what was disclosed to him. His recollection was particularly convincing because he had discussed with Retail in 1968, the subject information and was under the impression the material had, at that time, been deleted from his records (Tr. 918-27). That Mr. Smith would have remembered if this information was mentioned seems certain. Furthermore, the visit of Mr. Yox, the branch manager, to Mr. Smith's office to give another disclosure (Tr. 942-45, 8457-60) tends to corroborate Mr. Smith's testimony that the first disclosures were incomplete. During disclosure by Yox, the then-deleted information was disclosed to Mr. Smith. Mr. Yox told Mr. Smith that the information had been included in the report because the wrong report had been sent to the customer and that during the previous disclosures, the wrong report was read (Tr. 945-46).

²⁰⁴ Respondent's suggestion that there need be evidence that the second report, a prior address report, was actually in respondent's file at the time the consumer received disclosure, is without merit (RPF 817). Respondent had a duty to give disclosure of all reports in a consumer's file. When all reports were not disclosed, it was incumbent upon respondent to show that the reports not disclosed were not in the file. Here, no such showing was attempted.

35; CX 78A-B). Ms. Dayton would have disputed these items if they had been disclosed (Tr. 3534-35).²⁰⁵

549. In 1972, a consumer was given disclosure by Retail's San Francisco office of reports prepared in connection with his application for life insurance made at the request of the bank from which he and his partner in business had a loan (Tr. 3711-13, 3725). [195]One item was withheld. He was not told that his file contained a statement that he used "his hands in an effeminate manner, also talks in an effeminate manner." (Tr. 3720; CX 218).²⁰⁶

550. When consumer Phares (Finding 529) received disclosure of his report, he asked what companies had recently received the information disclosed. He was told this information would not be divulged (Tr. 777, 787-88).²⁰⁷

551. In other instances, while not completely omitting items from the reports, Retail representatives "paraphrased" or "summarized" the items in such a way that the full meaning, and in some cases, the derogatory tone of the report, was not conveyed to the consumer.

552. Another consumer contacted Retail's Canton, Ohio office in 1972, and asked why her policy had been cancelled. She was told that her report indicated she had an unstable marriage (Tr. 3593-94). The report actually stated she had been separated several times from her husband and that two sources "indicated that [her husband] had a desire for other women and they also stated that . . . your insured had a desire for other men and between the two this caused friction in the marriage. Stated were fighting constantly." (CX 169B).²⁰⁸ [196]

553. Another consumer was told that her report indicated she "had recently had a run-in with [her] former husband, a severe one." (Tr. 1794). The report actually stated that she had been assaulted by her husband and incurred 22 stab wounds as a result (CX 151A).

554. When consumer Stanley received disclosure from the Wilmington, North Carolina branch office after having his insurance cancelled (Tr. 220-26), the file information was presented in a far less inflammatory manner than in the report. *E.g.*, Mr. Stanley was told the report indicated he made it a point to be well aware of the

²⁰⁵ Ms. Dayton's testimony was more convincing than that of the rebuttal witness who testified regarding only the usual procedures followed.

²⁰⁶ The consumer's testimony was not rebutted. It is respondent's position that disclosure to the consumer was not required under FCRA because the report prepared was not a consumer report (RPF 818). However, Section 609 of FCRA requires disclosure of all file information on a consumer (except medical information), not just consumer reports (see Finding 559, *infra*, pertaining to claim files).

²⁰⁷ Mr. Phares' testimony that he was told the recent recipients of his report would not be divulged to him was unrebutted. Confusion in peripheral areas of his testimony does not detract from the weight to be given to this unrebutted testimony.

²⁰⁸ This consumer's disclosure was also incomplete in that she was told information only in response to specific questions she asked. After being told the reason for the cancellation, she asked whether the report showed she was married, and where it indicated she worked (Tr. 3594). She was given this information, but only after she asked specifically (Tr. 3594-95). No witness was called to rebut the witness' testimony.

benefits to which he was entitled under insurance policies (Coulter 8198-99), whereas the report actually stated:

. . . Special attention has been given to past losses due to subject being well-known in this area, as being extremely "claim conscious" and has submitted several minor claims with several different insurance companies. We did develop through outside sources that the subject has had his insurance cancelled on several occasions due to excessive claims. Subject is known to be the type person that will submit any claim and usually has a full knowledge of what is covered and what is not. This information was verified through outside sources as well as the local claims adjuster who has worked with the subject in settling several claims.
(CX 271A-B.)

In addition, the report stated:

. . . The subject himself is favorably regarded but his general financial reputation is not good, sources report that he has the ability to pay but general nature is to be slow making payments. We developed a past-due account with the local hardware store over two years past-due and also a past-due account with a local carpet-laying firm over a year past-due with no attempt made to pay.
(CX 271B.) [197]

On this subject, Mr. Stanley was told only of the specific past due accounts and that his reputation for bill paying suffered because of them (Coulter 8200-01).²⁰⁹

555. Respondent's field personnel failed to give the nature and substance of the information in its files in a substantial number of disclosures, by either omitting pertinent information or summarizing and paraphrasing to the extent that the information disclosed did not reflect the full import of the information in the reports (Findings 543-54).

556. In June 1974, respondent instituted "visual disclosure" for consumers visiting an office for disclosure (RX 576A-E). This procedure was developed because "it became apparent over the years that no matter whether or not our manager, or when our manager read a case verbatim across the desk, some of our consumers did not feel that he was doing so." (Jenkins 5763-94). Under the new procedure, the consumer could actually see his report and review it with the Retail representative.

557. In 1976, Retail again revised its disclosure procedure. As of October 1, 1976, a consumer who visits the office for disclosure is to be given a copy of his report after visual disclosure is given (or in the case of telephone disclosure, on a subsequent visit to the office) (R 122A, C-E).

²⁰⁹ Mr. Coulter, who made the disclosure, testified in connection with Mr. Stanley. Mr. Coulter's statements themselves form the basis of this finding.

C. Disclosure of Claim Reports

558. It is respondent's position that claim reports are not consumer reports under the Act and therefore not subject to its disclosure requirements. However, on some occasions, in order to accommodate consumers, claim [198]reports have been disclosed." (RPF 810(a)).²¹⁰ This policy was communicated to the field. As one of respondent's officials explained, he felt no "corporate obligation" to disclose claim reports. "The company policy was that claims versions were not part of the Fair Credit Reporting Act but on each and everyone you had to handle it individually on how you saw—how—if you wanted to disclose part of it. If you saw it feasible to do so then you could do so but it is a matter of convenience to the consumer more so than company policy in that particular aspect." (Piercey 8323).

559. Respondent's position that claim reports need not be disclosed and the ad hoc position with respect to disclosure taken in the field²¹¹ compels the inference that many claim reports were not disclosed. Such failure to disclose claim reports violated Section 609 of FCRA requiring disclosure as to "all information (except medical information)" on the consumer in the files of a consumer reporting agency at the time of the request. [199]

XV. TELEPHONE AND SUBOFFICE DISCLOSURE (PARAGRAPHS 24-25 OF THE COMPLAINT)

A. Telephone Disclosure

560. Respondent's instructions regarding telephone disclosure stated that even though the FCRA authorized Retail to require a written request prior to telephone disclosure, no such requirement was imposed by the Company (Burge 5006-07). Rather, the Retail representative was required to make certain he was speaking with the proper person (CX 675W). Telephone disclosure was encouraged, at least indirectly, by respondent's statement to branch management that as many routine situations as possible should be handled by

²¹⁰ The record indicates that, as of June 18, 1971, respondent did recognize that Section 609 covered not solely consumer reports, but "all of the information about the consumer" (except medical information) in the files (CX Z-21). However, to the extent of any conflict between this document and respondent's proposed finding, respondent's finding is relied on as to the procedure actually followed.

²¹¹ *E.g.*, when consumer McCreary requested disclosure of his claim report from the Miami branch office, he received disclosure only of the portion of the report called the "claimant interview" rather than of the entire report which included information from other sources (Tr. 8317; RX 449B-C). Consumer Beresh received disclosure of information a week after he originally requested it (Tr. 11094). The disclosure occurred only after Mr. Beresh visited the branch office numerous times and Retail's legal department (whom the branch manager had contacted) felt claim reports were not covered by FCRA, told the branch manager to "go ahead and disclose" (man 11086-87, 11092-94).

telephone (RX 564S). In addition, branch managers were urged to "make every effort to make good" with a consumer on the first contact and told that "delay irritates." (RX 107Z-187).

561. Field personnel were instructed that if a consumer telephoned for disclosure, properly identified himself and the pertinent file contained no protective or decline information that was subjective or highly critical, the written request was to be waived (CX 675Z-31). Otherwise, the branch management was to suggest the consumer come by the office for disclosure or send a written request for telephone disclosure (CX 675Z-32). If a consumer wrote to Retail requesting disclosure, he was to be advised by mail that he could telephone for disclosure, but if the report was highly sensitive, it was suggested that the letter "be pitched toward a private, face-to-face disclosure" (CX 675T). It was felt by respondent that while telephone disclosure saved time for all parties involved and even sensitive material could be handled by telephone, there was "no substitute for a face-to-face discussion" (RX 108B). Similarly, Mr. Hakey testified that if the information in a consumer's file were not "minor," he wanted the person to visit the office to ascertain identity (Tr. 1661-62).

562. Respondent's instructions regarding telephone disclosure were not followed in all the branch offices. [200]

563. It was the policy in the Denver branch office for the receptionist, Ms. Dukes,²¹² to advise consumers who telephoned in for disclosure that the information requested was confidential and could not be disclosed by telephone. Callers were advised of their right under FCRA to in-person disclosure, but no mention was made of their right to telephone disclosure if a written request were filed. On the "rare" occasion when a consumer stated he was unable to come to the office, Ms. Dukes referred the call to the branch manager or assistant manager (Tr. 12739). Ms. Dukes received her instructions on what to say to consumers from the branch manager (Tr. 12740, 12739, 12741).²¹³ Consumers Bendelow (Tr. 3452-53), Coons (Tr. 3578), Comerata (Tr. 3218), Goddard (Tr. 3156-57), Moser (Tr. 3561-62) and Van Sickie (Tr. 3823-24) were refused telephone disclosure by the Denver office through implementation of this policy. Consumer Grabher, who asked to and did speak with the manager when she called, was asked by him to come in person in order to obtain

²¹² Ms. Dukes was receptionist in the Denver office from 1970 until January 1976 (Tr. 12733, 12738).

²¹³ Mr. Hendon, the branch manager, testified and did not directly dispute Ms. Dukes' testimony regarding her instructions or the procedure she described. He testified that telephone disclosure was given by the Denver office when a consumer sent a written request (Tr. 11899-900) and that, on occasion, when he felt identification had been properly demonstrated, he gave disclosure when there was no written request (Tr. 11900). In addition, RX 519, 520A-B, 521, 522, 524, 525A-C, 526A-B, 530-543 indicate that some telephone disclosures were made by the Denver office.

disclosure. Only after telling the manager she was at work, could not come in and wanted to know immediately why her insurance was cancelled, was she given disclosure by telephone from the Denver office (Tr. 3410-11). [201]

564. The manager of the Wichita branch office told consumer McCune that the only way disclosure could be given was in person (C. McCune 4366). Consumer Mumford was told by respondent's Rocky Mount, North Carolina office representative that disclosure could not be given by telephone (Tr. 1146).²¹⁴

565. Respondent has told consumers that disclosure could not be given by telephone without mentioning that, with a written request, consumers have a right to telephone disclosure (Findings 563-64). Thus, as to these consumers, respondent eliminated, as a practical matter, the option for telephone disclosure which the FCRA sets forth and have violated Section 610 of FCRA.

566. In the Brockton, Massachusetts and Lincoln, Nebraska branch offices, respondent advised consumers who contacted Retail requesting copies of their reports that, while no copies could be sent to them, they could receive disclosure of their files at the branch offices [202](Humble 3481-82,²¹⁵ Reinhardt; RX 468J; CX 243J²¹⁶). No mention was made of the consumers' rights to have disclosures by telephone.

567. Thus, respondent advised consumers obviously interested in learning what was in their files that disclosure was available in a Retail office without mentioning the possibility of telephone disclosure (Finding 566). Even though telephone disclosure was not specifically requested in these instances, respondent, by undertaking to advise consumers of their rights regarding disclosure and only partially advising them as to their rights has, in a practical sense, made telephone disclosure unavailable to them in violation of Section 610 of FCRA.

B. Suboffice Disclosure

²¹⁴ While Mr. Mumford's testimony on the actual disclosure given him and the subsequent reinvestigation was too confused to ascertain precisely what disclosure was given, his unrebutted testimony was clear that he called the Rocky Mount office and was told that disclosure could not be given by telephone. As respondent pointed out (RPF 949f), Mr. Mumford was told that the reason telephone disclosure couldn't be given related to inadequate identification by telephone (Tr. 1159-60). Nevertheless, he was apparently not told that he could receive disclosure with proper identification or a written request (see Tr. 1146). Mr. Mumford was given some information from his file by telephone regarding marital discord (Tr. 1146, 1160), but he received no disclosure of the specifics of the report until he later visited the Rocky Mount office (Tr. 1147-50) located 40 miles from his home (Tr. 1145).

²¹⁵ Ms. Humble's testimony was not discredited by the rebuttal witnesses' general testimony to the effect that 75 to 85 percent of the disclosures from that office were by telephone (Tr. 8345).

²¹⁶ In the case of consumer Reinhardt, it should be noted that the response she received from Retail was less informative than that given by Retail to a friend of hers in response to a similar request. Her friend had indicated in his request for a copy of his report, that he had some knowledge of the FCRA. (Compare RX 468I and CX 244 with RX 468J and CX 243).

568. When respondent established its disclosure procedures after passage of FCRA, a corporate policy decision was made that there would be no "systematic disclosure" from the suboffices because the suboffices were not adequately staffed for this function (Burge 5008-09).²¹⁷ [203]

569. A suboffice is generally removed from the metropolitan area, located in a small city or town (Case 5362). It is staffed by one or more field representatives, and, in the case of those having more than one field representative, one of them is designated as the supervisor. There may or may not be part-time or full-time clerical personnel (*e.g.*, Jegley 7057-58). In some cases, the suboffice is located in the field representative's home, and the Company pays him for his telephone expense and rent on the space used (Brothers 7358). The number of suboffices also varies from time to time (R. Jones 5218). No files are maintained in suboffices (Burge 5010).

570. The suboffice personnel were instructed that when they were visited by inquiring consumers, they were to secure information on consumer forms and advise the consumers that either the branch manager or the suboffice representative would be in touch with them (RX 564T).

571. After a consumer's visit to a suboffice, a memorandum relating the contact and information obtained was to be sent to the branch manager for his handling (RX 564T). Some suboffice disclosure was apparently anticipated as instructions stated that the branch manager would decide whether to contact the consumer or send the consumer's file to the suboffice with instructions regarding disclosure to the suboffice personnel (RX 564U; CX 675Z-64). If a consumer telephoned a suboffice for disclosure, the Retail employee was to suggest he phone or write the branch office manager and to supply information facilitating such contact (CX 675Z-63, 64). The branch office manager had discretion regarding whether to have disclosures given in the suboffices (Jenkins 5771).

572. In accordance with this policy, respondent admitted that, on occasion, it did not make disclosures at suboffices (Answer, Par 24).²¹⁸ [204]

573. Respondent's failure to provide disclosure at suboffices does not violate Section 610 of FCRA.

²¹⁷ The reason for this decision was stated to be that "there is not personnel present in the sub-office, certain not in the smaller sub-offices, at all times or even in the working hours, because they may well be gone from office during the working hours. More likely, they would be there in off-hours rather than in working hours. So decided at the outset we would not disclose in sub-office points." (Burge 5009).

²¹⁸ When consumer Roberts requested disclosure from the Idaho Falls suboffice, he was referred to the B branch office (Tr. 3358-61, 12661-62).

XVI. REINVESTIGATIONS (PARAGRAPHS 26-27 OF THE COMPLAINT)

574. Field management was instructed that during disclosure, the Retail representative was to note the items the consumer disputed (RX 556L). If the dispute was of a minor point, such as a street address, exact amount of income, dates, or numbers of children, and the item had "no adverse effect on the transaction," the report was to be corrected accordingly, and if the consumer requested, a copy of the correction was to be sent to the recipient company (RX 556F-G). In all other cases of dispute, the Retail representative was to take down the "consumer's side of the situation" on a Consumer's Statement form (CX 675Z-22), and there was to be a reinvestigation (CX 675X). If the consumer disputed information in his file but stated that he did not want a reinvestigation, he was to be told that the law required there be a reinvestigation. If he remained adamant in his position, the Retail representative was to get a written statement of his dispute and a written statement from the consumer that he requested there be no reinvestigation (CX 675Z-36).

575. When a reinvestigation was conducted and the original report information confirmed, the Consumer's Statement was to be sent to the recipient company upon the consumer's request (and the Retail representative was required to advise the consumer of his right to so request). The Consumer's Statement was made a part of the consumer's file (RX 556M).

576. If the reinvestigation did not verify the original report, the information was to be deleted or corrected, and the amendments sent to the recipient company. This procedure was not to be followed, however, if respondent felt that the consumer had exerted pressure on sources and, as a result, they would no longer discuss the matter with Retail, thus precluding verification. [205] In that case, the customer would be advised of the dispute, the circumstances of why the information could not be verified, and a copy of the Consumer's statement would be sent to the consumer (RX 564EE).

577. These explicit instructions, when implemented by respondent's field personnel, resulted in situations where no reinvestigations were conducted though consumers clearly disputed information even then during disclosure.

578. One consumer received disclosure from the Baltimore branch office in 1972, after she was denied automobile insurance (Tr. 16). She disputed much of the information contained in the report, that her house had constant traffic of people and was thought to be a "house of ill repute;" and that her babysitter had taken drugs as

a result of the consumer's influence (CX 280B; Tr. 1530). The consumer's statements of dispute were recorded in a memorandum prepared by Retail after the disclosure (RX 477A-B), and she was told there would be a reinvestigation (Tr. 1505-06). There is no evidence in the record that a reinvestigation was conducted or that the insurance company involved was ever notified that the consumer disputed anything in the report. The fact that the consumer was invited by the insurance company some 3 years later to reapply for insurance is not relevant.²¹⁹

579. Another consumer visited the Boise office and received disclosure of a report prepared on him which was the basis of a health insurance denial (Tr. 4284-87). The report contained many items of an adverse nature, *e.g.*, that his restaurant was closed because he put dog food in his tacos; that he and his wife were arrested in a drug raid and "continued to have illegal drug habits;" that he had been charged with several other crimes; and that he grew marijuana in his backyard [206](CX 1484A-B). During and after the disclosure, the consumer indicated that the report was inaccurate (Tr. 4289-96). He was told that he could dispute specific items and that a reinvestigation of the information he disputed would be conducted (Tr. 4296). While he declined to go over the report stating exactly which items were inaccurate, he stated that everything below his name and address was incorrect (Tr. 4296), and made it known that he strongly disagreed with the report.²²⁰ At one point, he suggested that the discloser ascertain that his restaurant had never been closed on a dog food charge by simply calling the county health department (Tr. 4316-17). In addition, the consumer mentioned suing Retail (Tr. 4310). The next day, the consumer brought his lawyer with him to Retail, received another disclosure (Tr. 4287, 4312) and was again told he could have a reinvestigation conducted if he would specify the items with which he disagreed (Tr. 4313-15). The consumer later wrote a letter to Retail requesting a copy of his report (CX 1485). He received a letter in reply, stating that a copy could not be sent but a reinvestigation would be conducted "[i]f you consider any of the information which has been disclosed to you to be incorrect." (CX 1486). The consumer did not respond to the letter, but turned the matter over to his lawyer (Tr. 4298-99). Mr. Miley, who gave the disclosure, did not order a

²¹⁹ The branch manager of the Baltimore branch office testified in rebuttal to this consumer. However, he did not dispute the evidence relied on in this finding regarding reinvestigation.

²²⁰ Typical of the consumer's statements of dispute during the disclosure were: "I told him it was incorrect" (Tr. 4289); "I told him it was completely wrong" (Tr. 4290); "I told him it was a blatant lie" (Tr. 4291); "I said again those were blatant lies" (Tr. 4293); "I told him it was the most ridiculous thing I had ever heard of" (Tr. 4294). While the discloser stated that Retail would reinvestigate if the consumer would state specifically what he objected to, the consumer felt "he wasn't listening to what I was saying. If I call something a lie, I'm disputing it" (Tr. 4314).

reinvestigation (Tr. 11142). It was his practice that when a consumer simply stated an item was inaccurate and refused to go further, he did not order a reinvestigation (Tr. 11143). Mr. Miley referred the matter to [207]respondent's legal department (RX 807C-D) in compliance with respondent's instructions to do so when a consumer threatened suit (Tr. 11142). Failure to order a reinvestigation after the consumer disputed information in his report violated Section 611 of the Act.²²¹

580. After consumer Kasdorf received disclosure from the Albuquerque branch office, a consumer statement was written showing that he disputed certain items disclosed to him: that he was a slow payer of bills and had left a former residence owing rent (Tr. 12254-55; CX 138A; RX 440E). Mr. Kasdorf assumed the information would be corrected (Tr. 3144). No reinvestigation was conducted (Tr. 11860-62), and there is no evidence that the consumer's statement was sent to the requesting company.

581. Consumer Wisniewski received disclosure from the Cleveland branch office of information in his report prepared for an automobile insurer that he made fast stops and starts, peeled rubber on his tires, and, therefore, his driving reputation was poor (Tr. 1454; CX 332A-C). Mr. Wisniewski denied that he "peeled rubber," although he explained that fast stops were appropriate in some circumstances (Tr. 1454, 1459-60). He filled out a consumer statement denying the peeling of rubber and the fast stops and starts (RX 494C). He provided the names of three people who he said could speak regarding his driving. No reinvestigation was conducted. Retail advised the insurance company involved that Mr. Wisniewski had received disclosure, [208]had "admitted that our report was correct," but had stated that the information regarding his driving did not constitute bad driving (CX 334).²²²

582. After consumer Bitney's automobile insurance was cancelled, she contacted the Seattle office and received disclosure (Tr. 3791). She disputed the accuracy or basis of several adverse items in

²²¹ The record is ambiguous regarding whether a reinvestigation was later conducted and what it included. Respondent does not allege there was a reinvestigation (RPF 969d), but a letter to the insurance company 2 months after the consumer's visits states there was a reinvestigation and mentions two of the items the consumer disputed (CX 1488). Even if a complete reinvestigation was conducted, it was not timely made and did not cover all the items disputed or adequately set forth the extent of the dispute (see CX 1488).

²²² The discloser, Mr. Crawford, testified that the consumer statement and names of references were submitted at a subsequent visit of Mr. Wisniewski after he had consulted with his insurance agent (Tr. 9534). Even if this fact is true, respondent failed to adequately advise the insurance company of Mr. Wisniewski's initial dispute of the peeling rubber item and the obvious dispute of a poor driving reputation. The letter to the insurance company states that Mr. Wisniewski agreed with everything in the report (CX 334). While the existence of a dispute may not have been clear at the first meeting, the consumer statement which Mr. Wisniewski later brought to the office and the bringing of references clearly demonstrated that Mr. Wisniewski disputed his report and desired a reinvestigation. Thus, even if a reinvestigation was not clearly called for after the first meeting, the requirement for one was clear after the second meeting.

the report relating to her children's behavior and reputation and to her reputation and supervision of her children (Tr. 3792-96, 3806; CX 41A-B, 42A-B). She was told that nothing could be deleted from the report (Tr. 3796, 3807), but that she could file a statement adding to the information (Tr. 3796, 3807). She indicated that she felt the report contained assumptions with no verification and that she would follow up researching herself things that were mentioned in the report, *e.g.*, the police's having been called to her apartment, and that she would try to get a statement from the manager of the apartment, the scene of many of the adverse items (Tr. 3806-07).²²³ She was not told that she could [209] have a reinvestigation (Tr. 3796; RX 404A-B).²²⁴ While Retail advised the insurance company of the disclosure and clarified two points in the report (CX 43), no reinvestigation was conducted and no mention was made in the notice to the insurance company that she disputed many more of the items in the report.

583. After another consumer received an automobile insurance cancellation based on a Retail report, she contacted the Fresno branch office (Tr. 4126-27). She was told that "based on the information that was turned over by the investigator that they wouldn't insure us because my daughter had been involved in a bomb threat and I [had been] in a mental institution for a year." (Tr. 4128). The consumer disputed these two items and requested a reinvestigation (Tr. 4128-29). A reinvestigation was conducted and the item involving the daughter was found to be in error (RX 451H-I). The reinvestigation did not verify that the consumer had been in a mental institution; however, the sources interviewed for the reinvestigation indicated that she may have had some medical problems in the past (RX 451H-I). The summary of the reinvestigation states, "Unable to develop further health history on wife, however, if desired maybe should obtain release to obtain her physician's records." (RX 451I). Retail's handling of the reinvestigation regarding the consumer's health was not adequate. Either the reinvestigation summary should have stated that the information was not confirmed and, therefore, should be deleted or Retail should have attempted to obtain a medical authorization from the consumer to

²²³ A letter was later received by Retail from personnel of the apartment (CX 44B).

²²⁴ Mr. Best, the discloser, stated that when a consumer did not really dispute the information, but only added to it, he did not order a reinvestigation (Tr. 11672). While Mr. Best testified that Ms. Bitney did not dispute the information, it is unclear whether he actually refuted Ms. Bitney's recollection of the disclosure or merely had a different definition of "dispute." Mr. Best testified that Ms. Bitney visited Retail after her first disclosure to review the file again and expressed the desire to file a statement. This testimony is consistent with Ms. Bitney's testimony that she disputed the report. Her testimony is given more weight than Mr. Best's memorandum, after Ms. Bitney's first visit, which states that Ms. Bitney indicated that "the report was substantially correct." (RX 404A).

further investigate this matter. Under the circumstances, failure to delete the information violated Section 611 of the Act. [210]

584. Respondent has failed, in certain instances, to provide reinvestigations required by Section 611 of the FCRA when consumers disputed their reports (Findings 578-82). In certain instances, respondent compounded the effects of its failure to reinvestigate by providing notification to the recipient companies which inaccurately or incompletely set forth the disputes by the consumers (Findings 581, 582).

585. When consumer Mattos requested her reinvestigation, she was told by the Fresno office that there was a charge of \$5.25 (Tr. 4129, 4132-33). The request for reinvestigation came within 30 days of the Mattoses' receipt of an insurance denial (RPF 971c). Imposing the condition of a charge on reinvestigation could discourage reinvestigation and is an unlawful condition, even though the money Mrs. Mattos paid was later returned to her (Tr. 4129).²²⁵ By imposing a condition on reinvestigation, which was not authorized by the FCRA, respondent violated the Act.

586. In the case of another consumer, Retail prepared a report on her in January of 1973, in connection with automobile insurance (CX 114A-B), in which it stated that she lived with a man. Later in the month, Retail handled a reopen requested by the insurance company regarding this item. As a result of the reopen, Retail advised the insurance company that "We reinvestigated and confirmed that subject is living with this man . . . Information fully confirmed in both investigations." (CX 146). After the consumer's automobile insurance was cancelled, she received disclosure from Retail's Portland office (Tr. 4479-80). At that time, she disputed the fact that she lived with a man and gave the [211]names of several people who knew she was not living with a man (Tr. 4481). Retail reinvestigated this point and interviewed Mrs. Williams, the wife of the assistant manager of the apartments the consumer lived in, who stated that the consumer was not living with a man (Tr. 4497-98). Retail prepared a new report which eliminated the reference to her living with a man and sent it to the insurance company (CX 148A-B). Accompanying the report, however, was a letter to the insurance company which stated:

[The consumer] disputed the fact that she had a man residing with her, admitted to us

²²⁵ See Finding 527 for respondent's policy regarding reinvestigation charges. Apparently, respondent has interpreted the language of Section 612 of FCRA, which specifically authorizes charges for disclosure and notification, as including reinvestigation charges under the same conditions. Such an interpretation has not been alluded to in this proceeding and is not here decided, as respondent admits that the charge imposed in the case of s. Mattos was a violation of Company procedure established to ensure compliance with the Act.

that he is a frequent visitor at her home, stays quite late in the evening and on occasion will have breakfast there, arriving sometimes as early as 6 a.m. We have rehandled this case in its entirety, contacting original and alternate sources, and at this time we are unable to obtain any source who will even admit knowledge of any friends or acquaintances of [the consumer]. Therefore, would you please use the attached report to replace any previous reports on this individual and make any further evaluation of the risk you feel necessary. (CX 147.)

No mention was made of Mrs. Williams' statement. By sending this letter with the notice of deletion, respondent effectively negated the deletion, particularly in light of the fact that a confirmation had recently been sent to the company on the item in question. In so doing, respondent constructively failed to delete the item in question and violated Section 611 of FCRA, which requires deletion of items which are not verified on reinvestigation.²²⁶ [212]

587. Respondent has failed to delete information that was disputed by consumers and which was not verified on reinvestigation (Findings 583, 586).

XVII. INTERCHANGE OF INFORMATION BETWEEN CLAIM AND CONSUMER
REPORTS (PARAGRAPHS 28-29 OF THE COMPLAINT)

588. Prior to May 1974, respondent's claim reports were filed in the same reference files as its underwriting reports (Burge 5041, Jenkins 5798). When an investigator received a request for a current report, he also received a reference file showing previous reports on the consumer. "He should peruse the file, garnering out of the file what would be pertinent to the thrust of his upcoming investigation." (Bresnahan 601).

589. If an underwriting report was requested on someone on whom a claim report had previously been prepared, the claim report was provided to the field representative along with consumer reports previously prepared on the same person (Trotochaud 6437, Burge 5097-98). It was permissible for the field representative to state in the consumer report that a prior claim report had been prepared (and the customer and date) and to state the doctor, hospital dates of confinement, and the cause (Finding 241). In addition, the field representative could use the medical information in the claim report as a tip or lead in conducting his investigation for the consumer report (Finding 241).

590. Actual use of claim report information went beyond respon-

²²⁶ Respondent stated that the record is unclear as to whether Mrs. Williams was interviewed in connection with this reinvestigation or at the time of the reopen (RPF 971b). In either event, however, notice to the insurance company following contact with Mrs. Williams was inadequate.

dent's instructions. One field representative testified that when he had recently prepared a claim report on someone he was currently preparing a consumer report on, he quoted freely from the claim report (Tr. 4032). Two other field representatives testified that they asked leading questions to confirm medical information obtained from claim reports, *e.g.*, "Has he recovered from his heart attack?" (Tr. 379) or "I understand he had a heart attack last summer." (Tr. 2888). [213]

591. Respondent used information from its claim reports in consumer reports (Findings 588-90). Respondent did not consider claim reports to be subject to FCRA and did not observe certain provisions of FCRA with respect to them (Respondent's Response to Complaint Counsel's Request for Admissions of Fact, dated May 10, 1974, No. 66).

592. Similarly, information in previous consumer reports was referred to in connection with the preparation of current claim reports. Prior to October 12, 1972, it was permissible to use record information from a previously prepared consumer report in a current claim report. Other information from a consumer report was to be reconfirmed before it could be used in a claim report (Trotochaud 6416). After the fall of 1972, field representatives were prohibited from directly quoting in claim reports, information from consumer reports, but the information could be used as a tip (see RX 658, 659; Trotochaud 6415-18).

593. Respondent used consumer report information in its claim reports (Finding 592). Such use violated Section 604 of FCRA, which specifies the permissible purposes for which consumer reports may be furnished.

594. In May 1974, respondent directed all branch offices to change their filing systems and to immediately begin filing claim reports in separate files from those of underwriting reports (see Finding 243). A directive setting forth a program to separate all existing claim files from the underwriting files was sent to the branches in June (RX 660A-H; Trotochaud 6428-29). It was anticipated that completion of the process would take a year (RX 660A, 637A). In fact, by July 30, 1975, all offices had completed the separation process (Tr. 6598).

595. Since separation of the claim and underwriting reports, claim reports have not been available to field representatives preparing consumer reports for tips or any other use (Cooke 10006-07, Baranek 9700-01).

596. With the initiation of the file separation in May 1974, field representatives were instructed that "no use should be made of non-

claim files on current claim reports or vice versa." (RX 637A, see also 637B-C; Trotochaud 6425-28). [214]

DISCUSSION

This is a proceeding brought under the Federal Trade Commission (FTCA) and Fair Credit Reporting Acts (FCRA). The allegations of the complaint have been summarized above and that summary need not be repeated here (see pp. 2-6, *supra*). A discussion of the more significant factual and legal issues follows. It may be noted that there have been numerous court decisions construing FCRA in the course of ruling on disputes between individual members of the public and consumer or credit reporting companies. This case, however, is the first case raising important questions concerning administrative enforcement of compliance of FCRA by the Federal Trade Commission and the interrelation of enforcement between FCRA and the FTCA.

Allegations that Respondent's Employees Have Misrepresented Their Identity (Paragraphs 5-6 of the Complaint)

Paragraphs 5 and 6 of the complaint allege essentially that respondent's investigative personnel have, in certain instances, misrepresented to consumers that they are agents or employees of the companies to which the consumers have applied for benefits such as an insurance company and/or that the information furnished by consumers or others during the course of interviews will be used exclusively by the companies to which the consumers have applied for benefits. It is further alleged that certain consumers interviewed would have chosen to provide the information directly to the company from which benefits were sought rather than to respondent had they known the true identity of respondent's employees or had they known that such data would be added to respondent's files for future reference. [215]

The record shows that certain field representatives, who did not identify themselves as employees of respondent, used introductions such as that they were "from", "with" or calling "for" the company to which the consumer was applying for a benefit. Such introductions had the capacity and tendency to mislead consumers into the belief that the field representatives in question were employees or agents of the company to which application had been made for a benefit or an insurance policy (Findings 162, 163). Such misrepresentations are material to consumers contacted by respondent's investigators (Finding 164).

The record fails to show that respondent affirmatively misrepresented that it did not keep file copies of the reports or that information furnished during an interview would be used exclusively by the company to which the consumer had applied for a benefit such as insurance. However, where the introduction misled consumers into believing that they were talking to an employee or agent of an insurance company, it also had the capacity to mislead consumers to the belief that the information obtained would be used exclusively by the requesting company. In that context, the failure to disclose that a third party would retain files which might be used in connection with other transactions constituted the failure to state a material fact and was misleading (Finding 165).

A simple prohibition against the direct or indirect representation that respondent's investigative personnel are agents or employees of the company to which the consumer has applied for a benefit will adequately prevent recurrence of the violations demonstrated in the record. The evidence in this record permits no findings as to consumer beliefs with respect to the retention and use of information secured by consumer reporting agencies in those instances where proper identification was made. Accordingly, the record will not support the imposition of an order requiring affirmative disclosure that a copy of the information will be retained in respondent's files for future reference. [216]

Complaint counsel propose requiring a written disclosure which the consumer may keep, stating the field representative's name, that he is an employee of respondent, the purpose of the investigation, the person ordering the investigation and that a copy of the information will be retained in respondent's files for future reference (CB App. C, pp. 2-3). The law violations demonstrated by the record with respect to introductions on the part of certain of respondent's employees do not demonstrate so flagrant or engrained a pattern of deception as to justify this provision. It will not be adopted.²²⁷

Respondent argues that the procedures employed by consumer reporting agencies have been sanctioned by FCRA and that, as a result, absent affirmative misrepresentation, no order can issue (RB 10-11). Affirmative misrepresentation is not prerequisite to an order directed to these practices. FCRA does not sanction interview practices which have the capacity to deceive.

In determining the meaning of advertisements or other represen-

²²⁷ To a considerable degree, the failure by respondent's personnel to identify themselves was occasioned by the confusion engendered by the name Retail Credit when the interview was in connection with an insurance investigation not involving credit, e.g., insurance. To avoid the requisite explanations, respondent's field representatives would omit the name of their employer. The incentive to engage in such practices has been reduced by respondent's name change to Equifax (Findings 160-61).

tations, the important criterion is the net impression that is likely to be created on the general populace. *National Bakers Services, Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964). In ascertaining the impression created, the Commission need not look to the technical interpretation of each phrase; it may look to the overall impression likely to be made. *Murray Space Shoe Corporation v. FTC*, 304 F.2d 270, 272 (2nd Cir. 1962). A statement may be deceptive even if the constituent words may be literally or technically [217]construed so as not to constitute a misrepresentation. *FTC v. Sterling Drug Inc.*, 317 F.2d 669, 674-75 (2nd Cir. 1963). And, representations capable of two meanings, one of which is false, are misleading. *Rhodes Pharmacal Co., v. FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *modified on other grounds*, 348 U.S. 940 (1955).

The identification by a field representative such as that he appears "from" or "for" an insurance company may be literally true in the sense that the interview is made at the request of respondent's customers. However, such an identification coupled with the failure of the field representative to identify himself as one of respondent's employees had the capacity to create the misleading impression that he was an agent or employee of the insurer. Under those circumstances, there is no need to find that there has been affirmative misrepresentation concerning respondent's retention and use of the information obtained. The Commission may, where ambiguous introductions have the capacity to mislead, ban such practices. Misleading and confusing interview techniques are not authorized by FCRA.

Requiring respondent to cease using misleading or ambiguous introductions will in no way preclude respondent from engaging in any of the activities permitted by FCRA. Such a prohibition will not preclude respondent from maintaining files as authorized by the Act. Nor will it impede the free flow of commercial information. It will merely ensure that consumers giving information do so with knowledge that they are dealing with a third party consumer reporting agency.

Applicability of the McCarran-Ferguson Act Exemption to the Practices Challenged Under Paragraphs 7-8 and 11-13 of the Complaint

Paragraphs 7 and 8 of the complaint allege essentially that respondent's investigative personnel have misrepresented the purpose of interviews by representations such as that a credit check was being conducted when, in fact, in certain instances, the purpose was to evaluate a consumer's claim for loss [218]or injury under an

insurance policy and the primary object of the interview was to observe the consumer's appearance and his mental or physical capacity in connection with such claim.

Paragraphs 11, 12 and 13 of the complaint allege essentially that respondent, through the use of certain medical authorizations obtained from insurance companies, represented directly or by implication to medical personnel that the data sought pursuant to such authorizations was for the exclusive use of such insurance companies. The complaint also alleges that consumers executed such authorizations on the basis of that belief. The complaint further alleges that, in truth and in fact, the information was not obtained for the exclusive use of the insurance companies to which the authorizations were executed but that it was also retained by respondent and, in certain instances, utilized in the preparation of subsequent reports for different customers of respondent. The complaint alleges that some customers would not have authorized the release of such confidential information had they known it would be utilized by a third party.

Respondent's claim interview procedures and utilization of authorizations to secure medical information violated Section 5, FTCA (Findings 180, 252-55). Respondent's decisions to eliminate the retention of its underwriting medical history reports in November 1973, and to eliminate the retention of claim medical reports in December 1975 (Findings 239, 244, 256) appear to give effective assurance of cessation of the acts charged under paragraphs 11-13 of the complaint. The threshold question, however, is whether the Commission has jurisdiction to challenge such practices.

Respondent asserts the Commission has no jurisdiction to issue an order in the case of these practices because of the provisions of the McCarran-Ferguson Act (15 U.S.C. 102(b)) exempting insurers from regulation under the Federal Trade Commission Act. [219]

For the exemption to become operative, there must be findings (1) that the business is that of insurance, namely, that the industry acts as a risk-bearer for a premium; (2) that the challenged activities relate to the act of risk-bearing; (3) that the states have regulatory authority to govern the challenged activity; and (4) that state regulation is adequate. *American General Insurance Company*, 81 F.T.C. 1052, 1056 (1972). The primary question in determining the applicability of the exemption is whether the particular practice concerns the business of insurance. *Proctor v. State Farm Mutual Auto Insurance Co.*, 406 F. Supp. 27, 29 (D.D.C. 1975), *affirmed*, 5 CCH Trade Reg. Rep. ¶61,481 (D.C. Cir. 1977).

The prime issue in this case is whether respondent's claim

investigations and the introductions made pursuant thereto and its activities in securing medical information for insurance companies are the business of insurance. Complaint counsel strongly contend that these activities are not the business of insurance but apparently do not put in issue respondent's contention that there is state regulatory authority to govern the challenged practices and that such state regulation is adequate. The discussion herein is, therefore, confined to the question of whether respondent's activities are the business of insurance.

It is clear that respondent's claim investigations are part of the business of insurance. The determination of whether a claim under an insurance policy should be paid is central to the insurance business, directly affecting the contractual relationship between the insurance company and its policyholder even in those instances where the claimant is a third party. As a result, respondent's activities are subject to state regulation when it conducts claim investigations. This includes the introduction utilized by respondent in claim investigations; namely, the so-called indirect interview. See *Proctor v. State Farm Mutual Auto Insurance Company*, *supra*, holding that the adjustment and settlement of insurance claims is the business of insurance. Claim investigations are an integral part of that process. [220]

Respondent's acquisition of medical information through the presentation of authorizations secured from insurance companies also constitutes the business of insurance. Obtaining information by insurance companies to investigate the risk of loss prior to deciding whether to accept the risk is a part of the business of insurance. *Schwartz v. Commonwealth Land Title Insurance Company*, 374 F. Supp. 564, 574 (E.D. Pa. 1974).

It is immaterial that respondent itself is not an insurer as long as its activities constitute the business of insurance. The McCarran-Ferguson exemption is "not strictly limited to insurance companies . . . it is the 'business of insurance' with which the Act is concerned." *Royal Drug Co. v. Group Life and Health Ins. Co.*, 415 F. Supp. 343, 350 (W.D. Texas 1976). In performing this service, respondent has become an integral part of the overall scheme of insurance coverage which is regulated by state law. Cf. *Royal Drug Co.*, *supra*. Under the circumstances, it is immaterial that respondent is selling the information under consideration to insurers.

Complaint counsel also argue that respondent's retention of the medical information and use thereof as leads or otherwise in the preparation of other reports cannot be considered the business of insurance. There is no precedent directly in point. However, it is

apparent that securing such information initially is part of the business of insurance. In many instances, insurance companies perform such functions themselves. Respondent's practices in connection with the retention of medical information and the uses thereof which might otherwise violate the Federal Trade Commission Act arise directly out of transactions subject to state regulation as the business of insurance. As best, it may be said that the activities here complained of are abuses by respondent in participating in the business of insurance. Such activities being subject to state regulation are exempt from the jurisdiction of the Federal Trade Commission to the extent regulated by state law. [221]

Allegations as to Misrepresentations of the Manner in Which Reports Were Prepared (Paragraphs 9-10 of the Complaint)

The complaint alleges that respondent has represented that its interviews were conducted in person rather than on the telephone, that direct observation of the consumers' environment was conducted, and that all sources of information listed were seen. The complaint charges that, in certain instances, interviews were conducted on the telephone rather than in person, that consumers' environments were not directly observed, and that the sources listed on the consumer report were not interviewed in person or on the telephone. The complaint alleges that users of respondent's reports would not have given as much weight to the information in such reports had the manner in which they were prepared been truthfully and factually represented.

Respondent, through its brochures, has represented that its reports, as a matter of standard or normal procedure, are compiled through face-to-face interviews of the sources listed and upon the basis of the direct observation of the field representative making the report (Findings 199-200).²²⁸ The record further demonstrates that such representations are also apparent on the face of respondent's reports (Finding 201).

The telephone was used to some extent in the majority of respondent's reports including life and health reports, regular automobile reports and most personnel reports (Finding 185). Normally, use of the telephone was not noted on the copies of underwriting reports going to customers (Finding 194). [222]

In certain instances, reports concerning a consumer's appearance and physical environment or home surroundings were submitted, although no direct observation had been undertaken by the field

²²⁸ Certain of respondent's reports are sold as exclusively a telephone service (Finding 183). No violation is found in connection with such reports.

representative making the report (Finding 211). The record further shows that, in certain instances, reports were submitted listing sources not seen or interviewed by the field representative preparing that report (Finding 405).

Respondent urges that no finding of deception should be made and no order entered in view of the sophistication of the audience to which the representations were directed; namely, the insurance company underwriters. Insurance company underwriters were aware of the fact that sometimes the telephone was utilized in the preparation of such reports (Finding 198; see also Finding 208).

The Commission, in evaluating promotional literature, may draw its own inferences from a reading of the advertisement. In making such findings, it need not depend on testimony or exhibits aside from the advertisements themselves. *Carter Products, Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965); *Royal Oil Corp. v. FTC*, 262 F.2d 741, 745 (4th Cir. 1959). Respondent's brochures present no unusual problems of construction. The meaning of statements such as "You see your applicants even though you aren't able to visit each one yourself" (CX 384B) can be determined solely from the exhibits.

Insurance company underwriters may be a sophisticated audience in terms of understanding the nature of respondent's operation; namely, the telephone is sometimes used in the preparation of reports. They would not know, however, absent a disclosure on the report, whether, in a particular case, a face-to-face interview had been conducted or whether the interview had been conducted by telephone. Whether or not a face-to-face interview had been conducted or direct observation made was a significant factor in the weight to be accorded to the information in such reports, particularly where items such as physical appearance were concerned (Finding 213). [223] In view of the fact that respondent represented that face-to-face interviews and direct observation were the standard or normal procedure, the failure to give notification that they were not used in the case of individual reports, was misleading. Such disclosure will be required.

Cases such as *Waltham Precision Instrument Company, Inc.*, 61 F.T.C. 1027, 1049 (1962, *aff'd.*, 327 F.2d 427 (7th Cir. 1964) and *Sheffield Silver Co. v. FTC*, 98 F.2d 676, 678 (2nd Cir. 1938), indicating that advertisements are to be considered in light of the sophistication of the audience to whom the representations are addressed do not dictate a different result. The issue is not whether insurance companies or other report users have been misled into buying the service. Rather, the question is whether the failure to

note telephone use or lack of direct observation is a material fact which should be disclosed because of its potential for affecting the evaluation of individual reports. As a result, the sophistication of the underwriting industry as to how reports are prepared is not a bar to the entry of an order. In fairness to consumers, the material facts pertaining to how the individual reports were prepared or interviews conducted should be disclosed.

Allegations That Respondent Has Furnished Consumer Reports to Persons Which It Has No Reason to Believe Intend To Use Such Data for One of the Permissible Purposes Set Forth in Section 604, FCRA (Paragraphs 16-17 of the Complaint).

The complaint in paragraphs 16 and 17 alleges that respondent has furnished consumer reports to persons it had no reason to believe intended to use such data for one of the permissible purposes set out in Section 604 of FCRA. The proof pertaining to these allegations is concerned with respondent's Voluntary Follow-up Service and its Monetary Savings Program. [224]

In the case of the Voluntary Follow-up Service respondent transmitted to certain customers to whom a prior consumer report had been furnished, additional adverse information on the individual who was the subject of the report. Voluntary information generally consisted of public information found in newspapers or public records; it could also include information secured by the field representatives in subsequent investigations and during the course of preparing different reports (Findings 258-59, 261).

Under the Monetary Savings Program, respondent also, in certain instances, transmitted to its sales force information about subjects of previously prepared reports. This was done if it was discovered that an event had occurred which would cause an insurance company a loss, if such insurance company had earlier been furnished with one of respondent's reports which would have allowed it to identify such risk and to rate or decline the application of the subject of the report (Finding 264).

The Monetary Savings Program and the Voluntary Follow-up Service differed in that the initial report preceding the voluntary follow-up did not identify a risk or hazard (Finding 264 n. 87). Information under the Monetary Savings Program consisted primarily of information of a public nature such as newspaper clippings as well as police and court records; it could also be derived from subsequent investigations conducted by respondent (Finding 266).

The record further shows that respondent knew or should have known that information furnished under the Voluntary Follow-up

Service and Monetary Savings Program was sometimes furnished to insurance companies who had no insurance policy on the individual involved and who were not at that time considering an insurance application on the individual (Finding 268).

1. The Voluntary Follow-up Service

Respondent contends that the Voluntary Follow-up Service was part of the same package as the original investigation and that it is unrealistic to contend that the follow-up portion of the service served an impermissible purpose (RB 57-58). [225]

Respondent further contends that the Voluntary Follow-up Service has been held valid by judicial precedent citing *Middlebrooks v. Retail Credit Co.*, 416 F. Supp. 1013 (N.D. Georgia 1976). In that decision, the court expressly noted that there was an ongoing relationship between the subject of the Voluntary Follow-up Service and the insurance company to which this information was transmitted. This case is not controlling here.

Respondent contends that there is no violation of the statute in the instance of the Voluntary Follow-up Service, because Section 604 does not require absolute certainty on the part of the consumer reporting agency that the person to whom the information is transmitted has a permissible purpose for such data. The statutory standard is that before such data is transmitted, the person transmitting it must have "reason to believe" that the information will be used in accordance with the criteria set forth therein.

The record shows that insurance companies to whom voluntary information was transmitted sometimes had a policy in force in connection with the individual who was the subject of the service and at other times did not (Finding 263). Under the circumstances, the transmittal of such information without a specific request, therefore, does not meet the requirement that respondent had reason to believe that it would be used for a permissible purpose.

Finally, respondent argues that the Voluntary Follow-up Service was discontinued as of April 29, 1974, and, as a result, no order should issue. The argument is rejected. Discontinuance does not necessarily preclude the issuance of a cease and desist order. An order to desist from an abandoned practice is in the nature of a safeguard for the future. *Clinton Watch Company v. FTC*, 291 F.2d 838, 841 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962). See also *Spencer Gifts, Inc. v. FTC*, 302 F.2d 267 (3rd Cir. 1962). An order prohibiting this practice will issue. [226]

2. Monetary Savings Program

Respondent argues that its Monetary Savings Program is not within the scope of Section 604 since the information furnished to its customers thereunder is transmitted solely as a promotional device to illustrate the value of respondent's services. Respondent contends that the information furnished under the Monetary Savings Program cannot be considered a consumer report because it is not transmitted in connection with a determination of a consumer's eligibility for benefits. It argues that FCRA does not forbid a consumer reporting agency to disseminate information which does not constitute a consumer report.

It should be noted at the outset that the information submitted under the Monetary Savings Program is furnished only on consumers with respect to whom a report has previously been submitted. Where respondent submitted additional information to show that its first consumer report had been of value, the second submittal is necessarily relevant to the first transaction. Accordingly, respondent's promotional purpose in disseminating such material is not inconsistent with the finding that they are consumer reports although submitted for impermissible purposes.²²⁹ In this connection, it is significant that neither the Voluntary Follow-up Service nor the Monetary Savings Program are confined to newsclippings or information from the public records. Information developed in subsequent investigations and consumer reports can also be used for such purposes (Findings 261, 266).

In the case of the Monetary Savings Program, prior to submitting such data, respondent had already submitted an unfavorable report on the individual. As a result, it was on notice that the subject of the report may already have been denied the policy applied for. It was, therefore, also on notice that the insurance companies to which the monetary savings information was submitted may not have had a permissible use for the information volunteered as a promotional device. [227]

Respondent urges that complaint counsel have failed to show both in the case of the Voluntary Follow-up Service and the Monetary Savings Program that harm to the consumer has resulted from operation of the service. The contention is not relevant. The statute unconditionally prohibits the transmission of consumer reports except for the purposes specified in Section 604. There is a presumption of harm if the statute is violated.

Respondent also urges that the information transmitted under the Monetary Savings Program is commercial speech protected by the

²²⁹ Dissemination of consumer report information for promotional purposes is not one of the purposes sanctioned by Section 604.

First Amendment and that an order may not be issued for that reason. The First Amendment argument, to a considerable degree, rests on the assertion that respondent, under the Monetary Savings Program, does no more than transmit public record information. This is not necessarily the case. As already noted, information secured during subsequent investigations on the subject of the original report and set forth in additional consumer reports are also within the scope of the program. The argument that respondent does no more than transmit information in the public domain is, therefore, not dispositive of the issue.

The Act's Statement of Finding and Purpose expressly notes that there is a need to ensure a respect by consumer reporting agencies for the consumer's right to privacy (Section 602(a)(4)).²³⁰ Clearly, Section 604's limitations on the dissemination of consumer report information are designed to protect that right. [228]

As respondent states, commercial speech, like other speech, is protected by the First Amendment. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-72 (1976). However, this does not mean that commercial speech can never be regulated (*ibid.*).²³¹ "[B]ecause of the 'commonsense differences' between commercial speech and other varieties, even commercial speech subject to First Amendment protections may nonetheless enjoy a 'different degree of protection' than that normally accorded under the First Amendment." *Warner-Lambert Co. v. FTC*, Slip Op. p. 2 (D.C. Cir. Sept. 14, 1977) [11 C.D. 601; 562 F.2d 749 (1977); *cert. denied*, Apr. 3, 1978].

FCRA "supports and protects a significant personal right, the right to privacy." *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976). In enacting Section 604's requirement that consumer reports be furnished for a permissible purpose, Congress struck a balance between the individual's right to privacy and the consumer reporting agency's freedom to disseminate information. Congress had the power to strike that balance. As the 8th Circuit noted, "consumer credit reports are not protected speech for which under the First Amendment 'Congress shall make no law.' " The First Amendment does not bar the issuance of an order in connection with respondent's challenged practices under the Monetary Saving Program.

The Order will prohibit respondent from submitting consume

²³⁰ See also Senate Report No. 91-517 (91st Cong. 1969, p. 1), stating "[t]he bill also seeks to prevent an und invasion of the individual's right of privacy in the collection and dissemination of credit information."

²³¹ The court, in *Virginia State Board of Pharmacy*, noted that the attributes of commercial speech, including such characteristics as greater hardness and objectivity may also make inapplicable the prohibition against pr restraints (425 U.S. *supra* at 771 n. 24).

reports to persons who it has no reason to believe intend to use the information for a permissible purpose as set forth in Section 604 of the Act. The Order will further prohibit respondent from disseminating consumer report information unless there is a specific request therefor. [229]

Allegations That Respondent Has Reported the Existence of Adverse Information in Violation of Section 605, FCRA (Paragraphs 18-19 of the Complaint)

The allegations that respondent has reported obsolete information violative of Section 605 pertain to respondent's employment and motor vehicle reports.

In connection with the employment reports, the parties have stipulated as follows:

When respondent is requested to prepare employment reports covering employment experience for more than seven years and when respondent obtains adverse information more than seven years old from a former employer, as a matter of established procedure or usual and customary practice, respondent states in the reports "In compliance with the FCRA, no additional information can be reported from this former employer covering employment experience prior to seven years ago" or otherwise indicates that the Fair Credit Reporting Act does not permit the reporting of such information.

(CX 1445D.)

The sentence "In compliance with the FCRA, no additional information can be reported from this former employer covering employment experience prior to seven years ago" is used *only* in connection with reports containing adverse information. This comports the inference that it is used to signal the existence of adverse information in violation of Section 605, FCRA (Finding 272).

Respondent attempts to justify the use of the stock sentence in question. It asserts that "[r]espondent cannot be expected to lie by advising the customer that all the information developed was favorable, nor to write artfully ambiguous reports that seek to conceal the existence of unfavorable data", in the case of those [230] reports where employers have requested a report exceeding 7 years (B 68). A prohibition on this practice, however, would not, as respondent asserts, require it to issue deceptive or misleading reports. To prevent misunderstanding, respondent could simply notify the users of such reports of the limitations imposed by the Act on the reporting of obsolete information. The record demonstrates no need to disclose those limitations only in the case of those reports where adverse information over 7 years old has been developed.

The use of the stock sentence does disclose an item of adverse

information although the details are not set forth. The subject of a report where such a stock sentence is included, moreover, might well be in a worse position than a consumer with respect to whom a report spells out the details of the adverse information reported. In that case, at least the consumer is in a position to take advantage of the disclosure requirements of the Act and to dispute the items in question where appropriate. Such remedies are not available to the consumer when boilerplate language is used to signal the existence of adverse information, but the details are not disclosed.

The fact that complaint counsel has failed to introduce evidence of injury to consumers in specific instances is irrelevant. The practices under consideration violate the statute. Congress, in enacting Section 605, determined that reporting of obsolete information is harmful to the consumer. There is no need to duplicate the legislative finding on that score in an adjudicative proceeding.

Respondent objects that there has been a failure of proof. It asserts complaint counsel failed to show that any single employment report forwarded by respondent containing the stock sentence in question was transmitted in connection with an individual considered for a job at [231]an annual salary below \$20,000.²³²

The argument is without merit. The parties have stipulated that the stock sentence in question is used as a matter of established procedure. It would have made no sense for respondent to establish the procedure; namely, to issue such warnings to users of reports, in connection with employment reports for jobs involving salaries at or greater than the \$20,000 level. In the case of those reports, respondent is at liberty to report adverse information more than

²³² Employment reports concerning prospects for jobs for \$20,000 or more a year are exempt from the requirements of Section 605(b) prohibiting the reporting of certain items of obsolete information. The section provides in relevant part:

(a) Except as authorized under subsection (b), no consumer reporting agency may make any consumer report containing any of the following items of information.

(1) Bankruptcies which, from date of adjudication of the most recent bankruptcy, antedate the report by more than fourteen years.

(2) Suits and judgments which, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.

(3) Paid tax liens which, from date of payment, antedate the report by more than seven years.

(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

(5) Records of arrest, indictment, or conviction of crime which, from date of disposition, release, or parole, antedate the report by more than seven years.

(6) Any other adverse item of information which antedates the report by more than seven years.

(b) The provisions of subsection (a) are not applicable in the case of any consumer credit report to be used in connection with—

(3) The employment of any individual at an annual salary which equals, or which may reasonably be expected to equal \$20,000, or more.

seven years old. Under the circumstances, the inference is inescapable that the procedure was intended to apply in the case of employment reports not within the exemption of Section 605(b)3. Complaint counsel were not required to prove such occurrences in specific instances. It is the function of stipulations between the parties to eliminate the need for such proof.

The Order will prohibit the practice. [232]

Complaint counsel's allegations that by masking out obsolete information on motor vehicle reports, respondent has reported obsolete information contrary to the provisions of Section 605 has not been sustained. The evidence indicates that to the extent that this practice occurred, it was because certain State Motor Vehicle Departments continued to report such information despite the provisions of FCRA. The evidence further indicates that respondent attempted to persuade the state authorities to modify their practices in this respect (Findings 274-79).

The record demonstrates that with respect to the motor vehicle reports, there was no reasonable alternative to the practices followed by respondent in masking out the old information (Finding 279). Under the circumstances, respondent's practices in connection with motor vehicle reports are not considered violations of the statute justifying the issuance of an order. [233]

The Reasonable Procedures Allegations (Paragraphs 20-21 of the Complaint)

The allegations that respondent has failed to conform to the requirements of Section 607(b) of FCRA, providing that a consumer agency, whenever it prepares a report, shall follow reasonable procedures to assure maximum possible accuracy are central to this proceeding. A major part of the effort of litigating the case has been devoted to those charges.²³³

Complaint counsel has attempted to prove these allegations by showing that the interaction of production requirements, compensation system, time pressures on field representatives, the requirements for production of adverse (protective/declinable) information and financial pressures on branch offices may result in the production of inaccurate reports. This phase of the Commission's case relies primarily on the testimony of a number of ex-employees and internal Company documents. The proof on the reasonable procedures issue relies essentially on evidence pertaining to respondent's

²³³ Section 607(b) provides "[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual out whom the report relates."

general procedures. It is, therefore, necessary to look at respondent's system as a whole.

The record shows that a substantial number of respondent's employees were unable to meet their production requirements of completed cases within a normal day or workweek in compliance with Company procedures. As a result, some resorted to shortcutting techniques with the result that inaccurate reports were produced. Such practices were principally the listing in reports of sources not actually contacted by respondent's field representatives, falsification of the time coverage,²³⁴ the failure to see logical sources, that is, sources that are in a logical position to give the information desired, and failing to ask a full range [234]of questions. Other field representatives have found it necessary to put in large amounts of overtime.

The record also shows that many and perhaps the majority of respondent's field representatives are able to produce the number of cases required in accord with Company procedures. That, however, does not demonstrate the reasonableness of the system where it is apparent that a substantial minority cannot cope.

In some instances, respondent has attempted to demonstrate that the field representatives testifying in the Commission's case were too disorganized or for other reasons were unsuitable to do the work. Even if this were the case, that would constitute no defense to the charges. If such persons are employed, then the system is simply not designed to produce maximum possible accuracy. If, as the record indicates, respondent employs substantial numbers of field representatives who cannot cope with the system as it exists, then such procedures are unreasonable for that reason alone.

The second major aspect of the Commission's case on reasonable procedures is the allegation that respondent imposed quotas for the production of adverse or protective/declinable information.²³⁵

Respondent urges that its system of home office audits measuring the development of adverse information by branch offices was an educational or training tool to improve report quality and was not used for policing purposes (RRB 69). The quality audits were used as a departure point for determining whether field representatives in a particular unit were employing proper investigative techniques such as asking the proper range of questions, getting a sufficient number of direct interviews with the subjects of reports, and seeing appropriate sources. It is also true that if a field representative consistently failed to develop any adverse information, [235]there could be a

²³⁴ The time that a source has known the subject of the report.

²³⁵ For definition of protective/declinable information, see Findings 281-82.

legitimate question as to his performance on the job. Nevertheless, in practice, the system of home office audits was not a reasonable procedure designed to assure maximum possible accuracy. Scoring well in the audits became an end, in and of itself, as is made evident by respondent's internal memoranda.

Respondent's employees have been told, in connection with such audits, that it is the production of protective/declinable data which keeps respondent in business (Finding 309) and respondent's employees in the field are extremely sensitive to the analysis results, good or bad, which "have a definite effect on the Manager's morale, the Manager's individual bonus, and the morale of the [employees]." (CX 766; Finding 310). And officials sought the right wording to get the decline across when such audits were made (CX 775). Moreover, offices and regions competed with each other with respect to the ranking in such audits (Finding 311).

The fact that review of branch office performance with respect to production of adverse information was not quality control unalloyed is evidenced by the following:

... the service is quite marketable that you are producing although *we want to consistently look for ways and means of getting more and more declinable information into our reports* and you are well aware of this. (Regional Vice President to manager, Miami office, February 17, 1972, subsequent to review of cases in an office visit, CX 494A).

The record shows that in the relevant period, respondent's branch offices were under systematic scrutiny concerning their performance in the production of adverse, *i.e.*, protective/declinable information through the home office audit procedure. The record shows that branch offices were ranked in thirds against companywide averages for the preceding year relating to the production of such information and that branch management was under considerable pressure to score well in [236]those rankings. Field representatives were also pressured to produce protective/declinable information so that their offices would score well.²³⁶

The quality audit system ranking a branch office's performance in the production of protective/declinable information against all other offices in terms of upper, middle and lower thirds computed on the basis of organizationwide figures for the preceding year, impliedly set quotas for the production of such information (Finding 343).

Pressure on field representatives to produce protective/declinable

²³⁶ *E.g.*, a field representative with a poor showing in producing adverse information was told that with such a performance in the next audit, he "would actually pull the office down instead of helping it." (CX 1199, Finding 319). And, branch offices with a lower third ranking have been told that they were pulling the region's percentages down considerably (CX 1222A; Finding 318).

information took diverse forms, respondent's branch managers having considerable discretion in running their offices. For example, one branch manager threatened to withhold raises; in two offices, charts of individual field representatives' production of protective/declinable information were kept. In another office, field representatives received monthly sheets from the branch manager indicating whether their production of protective/declinable information was at an appropriate level (Findings 319, 321).

There is persuasive evidence of significant pressure on field representatives to meet certain minimums in the production of protective/declinable information (see generally, Finding 319). Consider the following communications: [237]

DECLINES: Some of our folks were on the lower 'rung' and are improving. We have no one below 6.6% in Decline in Life or 6.7% in Auto. Congratulations to Coble, Cundey, Landwehr, and Ursish for over 10% decline Life and to the majority of our people for over 10% decline in Auto. Attached are the statistics for your review.

(Manager, Dayton branch office in Monthly Newsletter to suboffices, February 1974, CX 742B).

* * *

Phil, our objective on protective is 21% and our objective on declinable is 5% . . .

(Manager, St. Paul office to field representative, April 4, 1973, CX 1200).

* * *

. . . It is very gratifying to see the increase of your declinable cases and I am extremely pleased with the Special Life feature of 9% declinable. The Narrative declinable of 4% has just met company objectives and I would like to see this increased, if at all possible in the coming months.

(Supervisor, San Mateo office to field representative, May 9, 1973, CX 1246A).

Communications of this nature make clear the percentage constituting acceptable objectives or levels of performance. Moreover, such memoranda within a year of each other from separate and geographically dispersed offices compel the inference that the practice was substantial.

Such evidence is not vitiated by general testimony that no quotas were in effect. It may be that some field representatives were or told they should obtain "some", and not specific percentages, of such information. However, the contemporaneous documents show that instances did occur where specific percentages were directly

impliedly set. The fact that such pressure may not have [238] been put on all field representatives does not insulate the practice from remedial action.

The record does not demonstrate an overall pattern of overt sanctions such as firings or the withholding of salary increases or promotions as penalties for the failure to achieve specific levels of protective/declinable information.²³⁷ The pressures as far as can be determined from this record, were generally more subtle: for example, achievement in production of protective/declinable information as measured by the audits was one factor considered in connection with managerial incentive bonuses and field representatives put down the objective of achieving particular percentages of protective/declinable information on their personal appraisal forms (Findings 310, 320, n. 106). And, field representatives' performance on the quality audits was one factor among several to be considered in salary recommendations by the branch manager (Finding 313).

The following statement by one of respondent's ex-employees appears to give a fair summary of what frequently occurred: [239]

At the end of every month, I was reminded that I didn't have the office objective of percentage of protective information by the supervisor and that I really ought to try a little harder to get it. There was always implication that there would be some consequences, but there were never any consequences. I have no idea what the consequences would have been.

(Farra 754).²³⁸

Although the pressure on many individual field representatives may have been informal, such procedures are not reasonably designed to achieve maximum possible accuracy.

Branch offices were scored on audit samplings too small to be a fair test of their performance, and they were competitively ranked against companywide averages for the preceding year with no showing that such yardsticks could be validly applied to all the offices measured, and praise and blame accurately apportioned on the basis of such audits. Such practices have the potential for inaccurate reporting (Findings 340-41).

The potential of the quality audit system to adversely influence

²³⁷ The record is mixed. There is evidence that one supervisor was demoted when his unit did not pass an audit (Bureau 1765-66), that another was put on probation for similar reasons (RX 446) and that in the Newark office, field representatives were told that salary increases would be withheld until declinable objectives were met (CX 13A). On the other hand, the supervisor who was put on probation, RX 446, *supra*, was given a bonus to which he was not mathematically entitled although his unit did not meet the corporate average of 4 percent of such information on a consistent basis (Eldred 11261-62, 11327). And, managers whose offices were ranked in the lower end on home office quality audits have, nevertheless, been promoted (e.g., Foley 11510).

²³⁸ This field representative testified that such pressure had no effect on the manner in which he prepared reports (Tr. 755).

report writing is perhaps best set forth in some of respondent's internal memoranda:

We did have cases in the analysis which would have been graded decline, except for a slight change in the terminology the field representative used.

(CX 775.) [240]

Another memorandum noted, "We notice a continued tendency to use the phrases, 'it is believed', or 'sources believe.' Try to eliminate this and just give the specific information without these comments, which tend to disturb the confidence of the underwriter in our report." (CX 1565A). In another memorandum, a branch manager was disturbed because field representatives stopped short of answering the final question or glossed over detrimental information with comments such as that a "man was a good driver or had no personal criticism" or "some good pat on the back or fine recommendation which overshadowed good decline information." (CX 1340).

The pressure to withhold information from reports which could put into perspective detrimental information because of the desire to score well in audits has the clear potential for harm to the consumer. Similarly, the injunction to eliminate phrases such as "it is believed" has the potential to increase the impact of adverse information to the detriment of the consumer. There is a distinction between knowledge and belief. If phrases such as "it is believed" or "sources believe" affect the confidence which underwriters place in reports, they should be kept in the reports for precisely that reason.

It makes no difference that the elimination of such phraseology might not lead to literal misstatements. It must be recognized in this connection that much of the information which respondent reports is not purely factual in the sense that it can be definitely resolved as, for example, age, duty, identity, marital status, etc. (RX 107Z-170). Rather, a great deal of the information reported by respondent in areas such as health, habits, and reputation is subjective where judgment must be exercised and which may be matters of opinion (RX 107Z-170, 102Z-17; see also Tilden 11854). In fact, respondent expressly recognizes that differences of opinion are possible in these areas (RX 107Z-170). The degree of a source's confidence in such information is clearly a crucial consideration as are any factors which may mitigate unfavorable information. The potential harm to consumers from injunctions to delete qualifying phrases such as "it is believed" or statements like "a man was a good driver or had no personal criticism" is patent in areas such as habits or reputation where subjective judgment must be exercised. [241]

Respondent contends that complaint counsel have not made the threshold showing necessary to demonstrate a violation under Section 607(b). They assert that complaint counsel have not introduced one report with respect to which there has been shown any inaccuracy caused in whole or in part by respondent's salary and production system. In short, respondent urges that the question of reasonable procedures is not reached unless there is a showing of specific inaccurate reports resulting from the procedures under consideration. Respondent, in this connection, relies upon a number of judicial precedents refusing to strike down a procedure as unreasonable under Section 607(b) if the reports under consideration were not found to be inaccurate, *e.g.*, *Peller v. Retail Credit Co.*, 359 F.Supp. 1235 (N.D. Ga. 1973), *aff'd. mem.*, 505 F.2d 733 (5th Cir. 1974). Those cases are not controlling here. They involve attempts to vindicate private rights in suits for damages under the Act. Clearly, there can be no damages to an individual if no inaccuracy has been shown in the particular report.

The Federal Trade Commission, in its role of administratively enforcing the Act, has a broader function. It need not rely on inaccuracy in specific reports. It may scrutinize respondent's procedures generally to determine whether they are reasonably designed to assure the maximum possible accuracy of information concerning the individuals with respect to whom the agency's reports relate. Here, the record shows that production requirements, time pressures and respondent's quality audit system have the potential for resulting in inaccurate reporting.

To the extent that reports are prepared listing sources not seen with unqualified sources contacted, time coverage misstated, or insufficient time taken to ask the applicable questions, such methods are likely to result in inaccurate reporting. Pressure as to report wording to facilitate good audit scores may have similar results. As already noted, respondent's quality audit system, when it was in effect, implicitly set quotas for the production of adverse information. The Commission may evaluate respondent's procedures as a whole to determine whether a consumer agency is following reasonable procedures to assure maximum possible accuracy without a case-by-case analysis of a myriad of reports. [242]

Respondent, in urging that the key test is reasonableness, seems to equate that concept with the Rule of Reason. Moreover, the

argument apparently implies that the required showing must be one of actual adverse effect on consumers (RB 72-73).²³⁹ There is, however, no requirement in Section 607(b) that the Commission must permit procedures to continue until, in fact, adverse results have occurred. In this connection, Section 621 of the Act defines the Commission's enforcement role. It states, "[f]or the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this title [FCRA] shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act." The term "reasonable procedures" under Section 607(b) is one that requires interpretation in light of the surrounding circumstances. In Section 621, Congress accordingly linked such interpretation with the concept "of an unfair or deceptive act or practice" as set forth in Section 5 of FTCA. The Commission, in determining practices to be unfair or deceptive, need not make a finding that actual deception or injury has occurred, e.g., *United States Retail Credit Association, Inc. v. FTC*, 300 F.2d 212, 221 (4th Cir. 1962); *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 311 (7th Cir. 1919). The Federal Trade Commission, moreover, is to [243]stop unfair acts and practices in their incipency. See *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966).²⁴⁰ Under the circumstances, the Commission has the power to prohibit practices under Section 607(b) of FCRA applying the same standards as are applied under Section 5 of FTCA in declaring certain methods of competition unfair. The Commission, in this case, need find no more than that the procedures, in effect, have the potential and capacity to result in inaccurate reporting.

As a general rule, when field representatives resorted to shortcuts such as the listing of sources not seen, they did not falsify adverse information, and there is no evidence in the record of a report where adverse information has been falsified. In fact, the record shows that where sources were faked, reports were generally favorable to the consumer. This, however, does not preclude a finding that such practices violate the requirements of Section 607(b).

²³⁹ Respondent links the assertion that judicial precedent requires a showing of inaccuracy in specific cases with the contention that the Supreme Court, while construing Section 5 of the FTC Act, in *FTC v. Sperry Hutchinson Co.*, 405 U.S. 233 (1972), "stressed once again the need to show the effect of a practice on consumers before the Commission could prescribe the practice as being unreasonable under Section 5." (RB 73).

²⁴⁰ In *Brown Shoe*, it may be noted, that the court held that, in a case dealing with restrictive franchising, the Commission was not required to show the element in Section 3 of the Clayton Act that the effect of the franchise program "may be to substantially lessen competition or tend to create a monopoly." The court held rather that the Commission had the power under Section 5 to arrest trade restraints in their incipency without proof that they amount to an outright violation of Section 3 or other provisions of the antitrust laws. In this connection, it may be noted that Section 3 itself did not require proof of actual injury to competition and is itself a statute designed to stop certain practices in their incipency.

Respondent contends that the benefits of FCRA extend only to the consumer and not the report user. The primary emphasis in the statute is on the protection of consumers with respect to whom reports are prepared. Nevertheless, the statement of findings and purpose in Section 602, makes it clear that inaccurate credit reports impair the efficiency of the banking system. In short, the Act recognizes that the public as a whole has a stake in accurate consumer reporting. Section 607(b) requiring procedures to assure maximum possible accuracy, draws no distinction between adverse and favorable reports. [244]

Finally, there is the question of remedy for the Section 607(b) violations. Complaint counsel seek essentially an order prohibiting respondents from requiring its employees to complete or prepare an unreasonable number of consumer reports,²⁴¹ or to prepare a certain proportion of consumer reports containing adverse information about the subjects of the reports (CB App. C, p. 8, par. 4(a)-(b)). Complaint counsel also request a prohibition on various sanctions with respect to compensation, promotions, or job status to compel respondent's employees to prepare an unreasonable number of reports or a certain proportion of reports containing adverse information (CB App. C, p. 10, par. 5). [245] Complaint counsel further recommend the adoption of a prohibition against emphasizing the development of adverse information in the preparation of consumer reports and failing to train its personnel to complete consumer reports "in a manner which is fair and equitable to the consumer with equal emphasis on the development of and reporting of favorable and adverse information." (CB App. C, p. 11, par. 6).

The recommended provisions will not be adopted in the form proposed. They would be difficult, if not impossible, to enforce. The prohibition against requiring production of an unreasonable number of reports would compel the Commission and its compliance staff to become involved with the details of supervising several thousand field representatives, a task for which it does not have the resources.

The variables determining what is a reasonable workload for one

²⁴¹ Complaint counsel's order defines an unreasonable number of reports as follows:

For purposes of subparagraph 4(a) above, an unreasonable number of consumer reports shall be that number of reports which an investigator cannot, with due diligence, complete or prepare accurately while conforming to the following procedures:

- (1) interviewing all the sources or other third parties listed on said reports;
- (2) conducting all interviews directly and in person, unless it is clearly indicated on the report that the telephone was used;
- (3) making all observations of the homes, neighborhoods, or other physical surroundings of the consumers who are the subjects of the reports directly and in person;
- (4) confirming all adverse information through interviews with independent sources, unless it is clearly indicated on the report that the information was obtained from one source only.

of respondent's field representatives are numerous. They include the requirements of the preparation of particular reports, the mix of such reports assigned to the individual representative, the areas where the investigations are to be made, the ability of the individual field representative, and the production climate in a particular branch office. In addition, new types of reports placing different demands on field representatives may be instituted by respondent either on its own initiative or at the request of its customers. Accepting the definition of an unreasonable number of reports in complaint counsel's proposed order would not simplify the task. The Commission would still be required in each compliance proceeding essentially to relitigate the instant case.

The requirement of Section 607(b) mandating reasonable procedures would be more effectively enforced by requiring respondent to institute performance reviews of its field representatives on a systematic basis. The Order will require respondent, on a random sampling basis acceptable to the Federal Trade Commission, to semi-annually conduct unannounced performance reviews of its field representatives to determine whether the sources listed have been interviewed, whether the sources contacted were logical sources and whether the information was accurately recorded. The Order will further require that the results of such performance checks be submitted to the Federal Trade Commission. [246]

The results of such performance checks should disclose a pattern from which a determination can be made as to whether respondent is imposing a reasonable workload on its field representatives and where corrections may be needed. Such a provision would be essentially self-enforcing. Inaccurate reporting is in the interest of neither respondent nor its customers. Accordingly, if the required performance reviews were to show a pattern of inaccurate reporting, such as the faking of sources, respondent would have a strong incentive to change its procedures to achieve more accurate results.²⁴²

Complaint counsel propose that respondent be required to complete a "Source Information Analysis" for each source of adverse information contained in an investigative consumer report (CB App. C., pp. 5-6). Under this provision, respondent would be required to disclose whether the source in question gained his information through personal knowledge, personal observation or hearsay, and whether the investigator obtained such information through personal interview, telephone interview, direct personal observation or file

²⁴² In the event that necessary remedial action is not taken, and if the need therefor is demonstrated by the required performance reviews, then the Commission may seek modification of the Order.

information. This provision will be entered; it is related to shortcuts such as listing sources not seen and contacting unqualified sources. It is also designed to prevent deception as to whether information has been obtained by the investigator's personal observation. The disclosure required by this provision concerning the provenance of the data will facilitate the evaluation of the report by respondent's customers. Complaint counsel has, however, not made a persuasive showing that such disclosure should be coupled with further information about the number of other reports prepared that day by the field representative in question. As already noted, there are a multiplicity of variables involved in determining a reasonable workload for a particular field representative. It is unlikely that such information would facilitate customer evaluation of the report. This part of the proposed order will not be adopted. [247]

Complaint counsel's provisions with respect to the imposition of adverse information quotas will not be adopted in their entirety. The record shows that, through the home office quality audits, respondent, in the relevant period, in effect, set up a quota system for the production of adverse (protective/declinable) information, and that practice should be banned. The unreasonable pressure on branch offices and field representatives for the production of adverse information was rooted in respondent's system of home office quality audits. The prohibitions in the Order should, therefore, focus on that procedure. It was the institutionalized competition for high ranking in the quality audits which gave rise to unreasonable pressures on respondent's personnel in the field to produce certain percentages of adverse information. Prohibiting these practices should adequately bar the violations documented here.

That portion of complaint counsel's proposed order defining a prohibited system, plan or procedure will not be adopted. The provision is unduly prolix. The record does not support the inclusion of all the elements of complaint counsel's definition in the order. For example, there is insufficient evidence in the record supporting a specific prohibition against sanctions related to a field representative's compensation, job status, promotions, etc. to compel the production of such information (see CB App. C, pp. 9-11 and n. 237).

Respondent will be prohibited from compelling or inducing its investigative personnel to complete or prepare a certain proportion of consumer or consumer investigative reports containing adverse information with respect to the subject of the report by utilizing the quality audits or any similar plan or procedure.

Respondent's practice of measuring the audit results of individual branch offices against companywide averages for ranking by lower,

upper or middle thirds in the production of protective/declinable information had the potential for inaccurate comparisons because of the disparity of results to be expected among different offices because of differing economic and geographic factors. The system, therefore, had the potential for generating pressure for increased production of adverse [248]information on the basis of invalid comparisons and, therefore, was unreasonable on that score (Finding 340). In addition, the audit results for individual branch offices with respect to the production of such information were based on small samples precluding the assurance that such results were representative for the office measured. The system, therefore, had the potential for generating pressure to increase protective/declinable information on the basis of unrepresentative data and was unreasonable for that reason (Finding 341).

The Order will prohibit the utilization of any system of quality audits or any similar system, plan or procedure ranking the performance of branch offices or other organizational units with respect to the production of adverse information against company-wide or regional averages (1) unless respondent can demonstrate such averages provide a valid standard of comparison for all the branch offices or units measured, and (2) unless respondent can demonstrate that the particular audit or survey utilized includes a representative or statistically valid sample of the branch office or other unit surveyed.

Complaint counsel also seek a prohibition against emphasizing the development of adverse information in the preparation of consumer reports and failing in training, supervisory, and review procedures to inform its personnel to complete or prepare consumer reports in a manner fair and equitable to consumers with equal emphasis on the development and reporting of favorable and adverse information (CB App. C, p. 11, par. 6).

This provision will not be adopted. The proposed injunction that respondent's employees be instructed to prepare reports in a "fair and equitable manner" with "equal emphasis" on favorable and unfavorable information is too general and vague for practical enforcement. Respondent's manuals already enjoin field representatives from using words emphasizing unfavorable information out of proportion and instruct that "Rumors, gossip, and scandal must be sifted." (RX 102Z-17). Inevitably, if this provision were entered, the Commission would have to engage in the time-consuming task of analyzing numerous [249]informal contacts between respondent's management and employees involving verbal exchanges. The FTC in the past has refused to enter broad prohibitions against practices

capable of only imprecise definition (e.g., excessive or unfair pressure) for similar reasons. See *Arthur Murray Studio of Washington, Inc.*, 78 F.T.C. 401, 441 (1971), *aff'd* 458 F.2d 622 (5th Cir. 1972). The Order provisions directed to respondent's quality audit procedures should remedy the violations found without the disadvantages inherent in the proposed provision.

Respondent states that regulatory action making continuation of the regular life and health reports impossible would have adverse effects on the consumer (RB 78). It states in this connection:

if an agency were required to prepare every report using the standard of care that is appropriate to the most detailed service it furnishes, the result would be to preclude agencies from selling more than one kind of report, a result not contemplated by the FCRA.
(RB 78.)

Apparently, respondent contends that, in the case of the lower-priced reports, a lesser standard of care is permissible. There is, however, nothing in the Act which supports an argument that those consumers only able to afford or purchasing insurance with lower limits should have less protection than those buying higher-priced policies. Certainly, the harm to the consumer is the same if erroneous information is reported concerning, for example, his habits and reputation regardless of the benefit applied for or the type of report made. Reports may differ in the depth of their coverage and the amount of detail reported depending on the price of the report. And procedures may vary to get the requisite detail depending on the depth of coverage desired. However, the standard of care with respect to the accuracy of the information actually reported should be the same for all reports. It would be anomalous to interpret this statute which expresses broad concern for all consumers as permitting a lesser standard of care for those consumers who are the subjects of lower-priced reports. [250]

In any event, the provisions to be entered here impose no burdens jeopardizing the continuation of respondent's regular reports.

Respondent's Product Cost and Effort Studies

Respondent relies on the Arthur Andersen & Co. evaluation of its product cost and effort studies and the bonus contribution computations (RX 566) to demonstrate that the field representatives' compensation and the related production requirements are reasonable. That study has been considered in weighing the conflicts in the evidence on this issue.

Andersen, to test the reasonableness of respondent's reporting

standards, reviewed the data from respondent's product cost and effort study to determine whether a field representative could work enough cases in an 8-hour workday and correspondingly in a period of three 21-day months to make his standard or quota (RX 566 IV-6).

In this connection, it further determined the evaluation should be made by applying a measure of reporting standard reasonableness that could be applied to each of the seven basic reports it had selected for this purpose on an individual basis. It selected as the criterion, "Monthly Bonus Contribution, defined as the excess of earnings credit over salary and expenses that would be earned by a field representative with a given set of reporting standards and a workload consisting solely of a given type of report." (RX 566 IV-7).

Andersen's conclusions that respondent's reporting standard is reasonable is based on its calculations of a positive bonus contribution for seven basic reports in 1973 for Code 04 offices (RX 566 F-H). In this connection, Andersen's conclusion that respondent's reporting standard is reasonable is based on the assumption that Code 04 offices are representative of respondent's entire organization (Findings 453, 490). The Code 04 offices were selected as the most representative for the organization because their averages for figures such as reporting standard, expenses, production, and earnings were closest to the Company averages (Finding 453, n. 174). Presumably, homogeneity on these points was considered essential to the determination that Code 04 offices were representative of the entire organization. [251]

There is a question, however, whether the conclusions to be drawn from the Andersen bonus contribution calculations confined to Code 04 offices validly apply to respondent's organization as a whole. The record shows that, while the Code 04 offices may be closest to the companywide averages in categories such as report production, revenue, etc., there are substantial variations in branch offices in other code classifications in this respect from both the Code 04 office averages and the organizational averages (see RX 754; Findings 480-81).

Significantly, respondent's branch offices were given different classification codes to reflect differences in cost and the difficulties of preparing reports in different areas as well as differences in prices charged to customers for the reports (Finding 452). And, respondent states, "[i]t has long been recognized, for example, that it requires more time to prepare reports in certain areas (such as a large metropolitan area) than in others (such as a small city). The number of codes, and the classification of given offices within these codes, have varied over the years as conditions change." (RPF 327). It is

evident from the very nature of respondent's code classification system for its offices that there are significant differences in the level of effort required in preparing reports among groups of branch offices in the different code classifications.

The record (in particular, RX 566 F-H) shows that there is considerable disparity among the monthly bonus contribution for reports in the three different categories of 1973 Code 04 offices for whom Andersen made computations. Although the bonus contribution for all three is positive, the differences are substantial (Finding 478, n. 183).²⁴³ [252]

The Andersen bonus contribution calculations for the Code 04 offices utilize an average monthly salary of \$610 and a reporting standard of .505 as two of the elements in the computation (RX 566 F-H; Finding 483). The interaction of those two elements is a critical factor in the computation of bonus contribution (Finding 483). The record shows no calculations as to the impact on bonus contribution of reporting standards and salaries at ranges other than those shown in RX 566 (Finding 484). On the basis of these characteristics, there is insufficient evidence to support a finding that respondent's field representatives were sufficiently homogenous so that the averages in RX 566 could be applied generally to them throughout the organization.

The Andersen evaluation concerning the reasonableness of the reporting standard and the underlying product cost and effort studies failed to take into consideration significant factors bearing on the ability of field representatives to complete their tasks in the given time. For example, no consideration was taken of the fact that different groups of field representatives, because of variables such as geography, scheduling, mix of business and the volume of business, may differ significantly in ability to accomplish their tasks (Findings 460, 488).

If averaging is employed in studies of this nature and conclusions drawn therefrom as to units in different classifications, then a showing is required that there is sufficient resemblance between the groups to whom the conclusions are applied on the essential points (in this case, level of difficulty, reporting standards, etc.). This is prerequisite to a showing that the Code 04 averages on bonus

²⁴³ Respondent states that the salary on RX 566 G and H was overstated and that the actual salaries applicable to each group of offices with respect to which such computations pertain were less (RPF 640). Respondent contends further that had such lower salary been utilized, the bonus contribution on RX 566 G and H would have been greater and the differences between RX 566 G and H and RX 566 F, less. The fact remains respondent was unable to provide the information necessary to substantiate this point (see Deibig testimony quoted in RPF 640). This decision must draw its conclusions from the computations actually in the record. There is no way of determining from the evidence, the extent to which the computations were affected by respondent's inability to retrieve the appropriate figures.

contributions are meaningful for all of respondent's branch offices, including those offices not within the Code 04 category. [253]

Respondent's code classification system for putting different branch offices in specific codes presupposes that there are significant differences with respect to the level of effort required to prepare reports in offices in different categories. As a result, respondent had the burden of demonstrating that despite these differences, all offices were sufficiently homogenous with respect to these critical characteristics so that the Code 04 offices could be considered as representative of the organization as a whole. That burden has not been met. The mere fact that the Code 04 offices were closest to the Company averages in certain respects permits no conclusions as to the effects on the computation of the *differences* from the average in the case of branch offices in other classification codes.

The reasoning of the Supreme Court in *United States v. Borden Co.*, 370 U.S. 460, 468-69 (1962), a decision rejecting a cost justification study, is applicable here.

But this is not to say that price differentials can be justified on the basis of arbitrary classifications or even classifications which are representative of a numerical majority of the individual members. At some point practical considerations shade into a circumvention of the proviso. A balance is struck by the use of classes for cost justification which are composed of members of such self-sameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member. High on the list of "musts" in the use of the average cost of customer groupings under the proviso of § 2(a) is a close resemblance of the individual members of each group on the essential point or points which determine the costs considered. (emphasis supplied).

No convincing showing on this point has been made. [254]

Also significantly detracting from the confidence to be placed in the study is the fact that, of the two basic calculations pertaining to monthly bonus contribution on which Andersen based its conclusion as to the reasonableness of the reporting standard, one, after cross-examination, had to be retracted and the other recomputed.

The product cost and effort studies on which the Andersen evaluation rests were designed to study simply how much it cost to do the reports the way they were being done as a prerequisite to setting prices. There was no attempt in the study to evaluate the quality of the work (Finding 492). The analysis has little relevance therefore, to the question of whether the procedures are such as to assure maximum possible accuracy.

In view of the foregoing considerations, RX 566 does not outweigh the testimony of respondent's ex-employees in the Commission's case to the effect that they were unable to comply with respondent

production requirements in accordance with Company policy within a normal workweek.

Allegations of Failure to Disclose Nature and Substance of Reports (Paragraphs 22-23 of the Complaint)

The complaint alleges in paragraphs 22 and 23 that respondent, in certain instances, has failed to clearly and accurately disclose the nature and substance of all its file information (except medical information) on consumers who have properly identified themselves and requested disclosure.

The record shows that, in anticipation of the FCRA's effective date, respondent promulgated extensive new procedures to implement compliance with those provisions of the Act requiring disclosure to consumers (Findings 524-28). Training sessions at all levels of the corporate structure were conducted to acquaint pertinent employees with the new policies and procedures (Findings 521-23). [255] Respondent's disclosure procedures, as set forth in its manuals and other instructional materials, in most instances, provided for compliance with the FCRA provisions.²⁴⁴ However, the record also shows that respondent's employees did not follow the stated procedures in all instances. Departures at the local level from respondent's official procedures and, more important, from the FCRA requirements, justify the imposition of an order to prohibit such violations.

In respondent's Pittsburgh, Lincoln and Wichita branch offices, inquiring consumers were told they could not receive disclosure of their reports (Findings 529-32). One consumer received disclosure only after his lawyer contacted the Retail office (Finding 529); consumers should not have to retain an attorney as a prerequisite to disclosure. Consumer Humble was denied disclosure of a report prepared in her name because the information was "on" her husband (Finding 530).²⁴⁵ In the instance of consumer Baker, after being told on two occasions that an insurance company authorization was necessary for disclosure, he was bluntly denied disclosure in the Wichita office when he indicated his desire that a third party be present during the disclosure (Finding 531). The same office advised the McCunes, after an investigation had been conducted on Mrs. McCune, that there was no record of an investigation and, later, that

²⁴⁴ The procedures found to violate FCRA are discussed individually, *infra*.

²⁴⁵ Respondent's procedures, however well intended, permitting denial of disclosure to one spouse when there is adverse information on the other (Finding 530 n. 192) violated the FCRA to the extent that it was used to deny consumer information which was prepared and reported in connection with that consumer.

In the case of consumer Humble, it should be noted, that she was denied disclosure, not only of the information regarding her husband, but also information about herself (Finding 530).

all file information was confidential (Finding 532). [256]The Wichita occurrences, particularly when viewed in light of other FCRA violations in that office (Findings 543, 564) indicate that this particular office (from which no rebuttal witness was presented) had little or no regard for the corporate procedures or compliance with FCRA.

Respondent's instructions pertaining to the disclosure of "nature and substance" of file information as specified by the Act appear to provide for compliance with the statute (Finding 539). However, actual implementation in the field resulted in instances of inadequate disclosure. The record shows that in the Wichita, Denver, Dayton, Manchester, Oxon Hill, Phoenix and San Francisco offices, disclosures were made which omitted certain portions of reports altogether (Findings 543-49). In several instances, highly inflammatory information was withheld. There were omissions of adverse drinking information (Finding 543), drug information (Finding 545), adverse employment information (Finding 546), information that a consumer had run off with a truck driver and was regarded as "trying to take" her husband for his money (Finding 547), and the statement that a consumer used his hands in an effeminate manner (Finding 549). Similarly, respondent appears to have paraphrased particular items disclosed to consumers in such a way as to reduce their impact on a listener (Findings 552-54). In the Canton office, a consumer was told her report indicated she had an unstable marriage. In fact, the information reported was that two sources indicated she had a desire for other men and her husband had a desire for other women (Finding 552). In Wilmington, North Carolina, a consumer was told by respondent that his report showed he made it a point to know the benefits to which he was entitled under insurance policies. The report stated the consumer was well-known in the area as being "claims conscious" and had had his insurance cancelled on several occasions due to excessive claims (Finding 554). Disclosure of this nature changed the tenor of the report and gave an entirely different impression from that given respondent's customer which had received the report. [257]The term "nature and substance" is one which inherently invites imprecise and varying definitions. However, it cannot be interpreted so as to permit respondent's field management to pick and choose among items in a report or, through summarization or paraphrasing, to dilute the thrust of a report during disclosure.

Respondent urges that "at most, complaint counsel have shown an insignificant number of isolated violations" where consumers did not receive full disclosure. (RRB 97). However, the violations found cover

a broad geographic area, and show that some of respondent's employees do not regard compliance with the Act or with the corporate procedures as a high priority. The occurrence of such violations of the Company procedures, without remedial action by respondent, demonstrates a lack of adequate supervision by respondent. Since the institution of visual disclosure in 1974, and the further liberalization of respondent's disclosure policies in 1976 (Findings 556-57), it appears that respondent has made changes to further ensure compliance with FCRA's disclosure provisions. However, in light of the past violations, an order prohibiting respondent from failing to comply with Section 609 is needed to assure future compliance with the Act.

In addition to direct refusals of disclosure and inadequate disclosures, respondent discouraged disclosure by imposing conditions. The procedure established by respondent whereby an inquiring consumer signed a consumer interview form which included a waiver clause regarding reinvestigation (Finding 535), violated Section 609 of the FCRA by putting a condition on disclosure not sanctioned by the Act. While the signing of the form was not an absolute prerequisite for disclosure, consumers would not have been aware that it was not mandatory unless they protested signing. The procedure, in effect, functioned as a condition. Consumers not acquainted with the specifics of the Act were, thus, required to meet more than the conditions specified by Section 610 of FCRA in order to obtain disclosure. Utilization of the waiver provision was a companywide procedure, not a local departure from the corporate instructions. Although discontinued in 1974 or 1975, this procedure was widespread, [258] and a prohibition on such practices is warranted.²⁴⁶

Complaint counsel contend, as alleged in the complaint, that respondent's practice of revealing the recipients of reports and non-investigative sources to consumers only on specific request (Finding 540), violates FCRA (CB, pp. 64-65). Respondent's implementation of Section 609, which provides that "upon request", various items are to be disclosed, does not clearly violate the statute. The statutory words "upon request" should not be used as a means to justify requiring words of art to warrant disclosure, but there is no evidence that respondent has so interpreted them. Absent evidence of bad faith on the part of respondent, the procedures relating to disclosure of

²⁴⁶ By contrast, the imposition by the Wichita branch office of the condition that an insurance authorization be obtained prior to disclosure in connection with one consumer (Finding 537), is not sufficient to warrant a prohibition directed at this particular practice.

recipients and non-investigative sources on request is not found to violate Section 609.²⁴⁷

Respondent has stated its position that claim reports and other reports such as business and some property reports are not subject to the disclosure requirements of FCRA (Finding 558; RB 100-105, 111-113).²⁴⁸ Respondent relies on the fact that such reports are not consumer reports as defined by the Act. However, the Act does not require disclosure of only consumer reports. Section 609 provides in pertinent part that: [259]

Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

(1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

Respondent asserts that Section 609 of the statute must be read in connection with other provisions of the statute. Respondent states that Section 603(a) states that the definitions contained in that section are applicable for the purposes of the title and the "title" is Consumer Credit Reporting. It contends that, accordingly, the Act does not concern itself with business reports. Respondent further asserts that when the definition of "files" contained in Section 603(g) is read in the context of the above, it is apparent that business reports are not included. The argument is not persuasive. Section 603(g) defines "file, when used in connection with information on any consumer" as meaning "all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored." The language of Section 609 and Section 603 is clear. It does not limit the disclosure section to consumer reports. Had Congress so intended, it could easily have provided for such limitations. Thus, all information, including information in the reports other than consumer reports, in a consumer reporting agency's files (except medical information) is subject to the disclosure provisions.²⁴⁹ Respondent's failure to comply

²⁴⁷ The record does show that a consumer was denied disclosure regarding recipients of his report after he so requested (Finding 550). This instance shows again departure at the local level from respondent's procedures.

²⁴⁸ It should be noted that, while there are examples in the record of respondent's not disclosing claim reports (see Finding 559 n. 211), evidence of specific instances is not necessary or relied upon in light of respondent's stated position and policy, which is that such reports need not be disclosed. This clearly demonstrates the violation.

²⁴⁹ This decision does not reach the situation not presently in issue, of whether claim reports or other non-consumer reports would be subject to the disclosure provisions if a consumer reporting agency were to establish a completely separate organization to prepare and handle these reports. There is evidence that, as of May 1977, respondent's claims operation was established as an "autonomous profit center" (Tr. 16121). However, the record does not contain sufficient evidence to define that term. *E.g.*, it is not clear whether claim and consumer reports are still handled in some instances by the same people or whether the claim operation is entirely separate from the consumer reporting conducted by respondent.

with such provisions in connection with non-consumer reports violates the Act. [260]

Allegations of Failure To Disclose by Telephone and at Suboffices (Paragraphs 24-25 of the Complaint)

Paragraphs 24 and 25 of the complaint allege, essentially that respondent violated Section 610 of FCRA by failing to give disclosure when requested to do so by telephone and by discouraging telephone disclosure.

Section 610 of FCRA states that a consumer reporting agency is required to give telephone disclosure if a consumer has made a written request, with proper identification and the telephone costs are covered by the consumer. Respondent's procedures regarding telephone disclosure, however, did not require, as permitted by FCRA, that a written request be received before telephone disclosure was given. The corporate policy required only that prior to telephone disclosure, the consumer should be properly identified (Finding 560). The instructions, while clearly permitting telephone disclosure, did imply that, in sensitive cases, in-person disclosure was to be encouraged (Finding 561). There is no indication in the instructions that respondent encouraged or condoned its employees telling consumers that telephone disclosure was not available. As in the case of other corporate policies, however, there were departures from such instructions violative of the FCRA. [261]

The record shows that the Denver office, in particular, had the practice of telling consumers who telephoned for disclosure, that disclosure was available only in respondent's office (Finding 563).²⁵⁰ In addition, in the Rocky Mount, North Carolina and Wichita offices consumers were told to come to the office for disclosure (Finding 564). Also, respondent, through its Brockton, Massachusetts and Lincoln, Nebraska branch offices, advised consumers who requested copies of their reports that copies were not available but that disclosure could be obtained if the consumers came to the office (Finding 566).

Respondent notes that none of the consumer witnesses presented by complaint counsel had filed a written request for telephone disclosure (RPF 945). Respondent further asserts that the FCRA does not place on respondent the obligation to affirmatively advise consumers of their rights under the FCRA (RB, pp. 100, 109). Respondent is under no obligation to affirmatively advise consumers of their rights in order to comply with the Act. However, once

²⁵⁰ This finding is not vitiated by evidence in the record which shows that some telephone disclosure was given by the Denver office.

respondent undertook to explain the availability of disclosure, there was an obligation to advise correctly and completely. Similarly, when respondent stated to consumers that disclosure could only be obtained by coming to the office, it implied that telephone disclosure was not available and effectively denied consumers the option of seeking and receiving telephone disclosure. The fact that such consumers had not filed a written request does not affect the determination that these practices violated the Act. Respondent could have stated to such consumers that they could not obtain telephone disclosure because they had not filed a written request or until they filed such a request, leaving with the consumer the option of seeking telephone disclosure. [262] It did not choose to do so. Rather, respondent foreclosed the option of telephone disclosure by stating or implying that telephone disclosure was unavailable. To so foreclose telephone disclosure is tantamount to refusing it and violates Section 610 of FCRA.

The complaint alleges that respondent's failure to provide disclosure from suboffices (Finding 568) violates FCRA's disclosure provisions. However, as respondent argues, the suboffices are not staffed to the same extent as branch offices, do not retain file copies of the reports, and are not equipped to handle disclosure. Respondent's decision to provide disclosure primarily from the branch offices appears reasonable in light of the manpower available in suboffices and the filing system maintained. Respondent established procedures to assure that consumers inquiring at suboffices were properly directed to the appropriate branch offices. There is no evidence that respondent, by establishing these procedures, in any way attempted to escape its disclosure responsibilities. If respondent were required to make disclosure from suboffices, either the branch office files would have to be divided with some files dispersed among the suboffices, or duplicate filing systems would have to be established. Additional manpower in the suboffices would also be needed. The FCRA does not put such a burden on consumer reporting agencies. Complaint counsel asserts that respondent should provide disclosure at some seven suboffices which appear to be better staffed than others (CB 68). To require respondent to establish different procedures for different suboffices would impose a burden not contemplated by the FCRA. Moreover, with telephone disclosure available, consumers will be in a position to avoid traveling great distances for disclosure. [263]

Allegations of Failure To Comply with Section 611 of FCRA
(Paragraphs 26-27 of the Complaint)

Paragraphs 26 and 27 of the complaint allege essentially that respondent has violated Section 611 of FCRA by failing to reinvestigate disputed information, failing to record the current status of disputed information and to promptly delete information which can no longer be verified, failing to disclose to the consumer his right to request that respondent furnish notification that a previously reported item has been deleted or that respondent furnish a statement prepared by the consumer to recipients of previous reports, and failing to provide notification to recipients of previous reports when specifically requested to do so by the consumer.

Section 611 of FCRA provides basically that, if a consumer disputes the completeness or accuracy of his report, the consumer reporting agency must conduct a reinvestigation of the disputed information. If the reinvestigation does not confirm the original report, a deletion is to be made in the report. If the original information is confirmed by the reinvestigation, the consumer is entitled to submit a statement setting forth his position, which is to be included with the information in question in any subsequent reports. Notification of any deletions made or consumer statements submitted is to be sent at the consumer's request to parties who have received the report in question (within 2 years for employment reports and 6 months for other consumer reports). The consumer reporting agency has the duty to clearly and conspicuously disclose to the consumer his right to make such a request.

Respondent devised extensive procedures in connection with Section 611 and in good faith attempted to provide for compliance with that section of FCRA (see Findings 574-76). However, Section 611 has been violated at the local level. [264]

The record shows instances in respondent's Baltimore, Boise, Albuquerque, Cleveland and Seattle offices where reinvestigations were not conducted after consumers disputed their reports (Findings 578-82). One consumer disputed highly inflammatory information in her report, yet no reinvestigation was conducted (Finding 578). Respondent offered testimony from the branch office showing the usual procedure followed. However, no attempt to specifically rebut or explain this consumer's testimony was made (see RPF 971i)

In the case of another consumer, respondent implies that because the consumer would not go over his report item by item noting his disputes as to particular items, no reinvestigation was required (see RPF 969d; RB 109). However, the record shows clearly that the consumer disputed the report (Finding 579). The Act requires a reinvestigation when such a dispute is conveyed to the agency. In the case of this consumer, no item-by-item discussion was necessary to

make known the dispute. While it might have been helpful to respondent to know the consumer's exact position on each and every item in the report, his statements throughout the disclosure were adequate to convey a dispute to trigger the statute's requirement that there be a reinvestigation.

With regard to consumer Kasdorf (Finding 580), respondent contends that the consumer did not dispute any significant information in the report (RPF 969c). However, the branch manager of the office testified that dispute as to one's being a "slow payer" was significant but that in this case, the consumer agreed with information in the file (Tr. 11861).²⁵¹ The [265]statute requires a reinvestigation when a consumer disputes the "completeness or accuracy" of any item of information. The consumer need not assert there is no truth in an item as reported, but merely that it is incomplete in order to warrant a reinvestigation.

In the case of two consumers (Findings 581-82), respondent contends that there was statutory compliance though no reinvestigation was conducted (RPF 970). These consumers disputed information disclosed to them and indicated they desired further handling of their reports.²⁵² However, no reinvestigations were conducted. Respondent asserts that, by communicating the disputes to the recipient insurance companies, statutory compliance was obtained. This contention fails for two reasons: the communications sent to the insurance companies in both instances did not set forth completely and accurately the extent of the disputes (see Findings 581-82). More important, however, is the fact that the statute does not give a consumer reporting agency a choice of *either* reinvestigating, *or* sending a statement of dispute to the insurance company, even if such statement accurately describes the consumer's position. The statute clearly calls for a reinvestigation when items are disputed. This requirement could be carried to its logical, yet unworkable conclusion; *e.g.*, requiring a company to conduct a reinvestigation when a consumer disputes his birthdate by a few days. Respondent's procedures permit acceptance of a consumer's version on certain matters without a reinvestigation (Finding 574). In such cases, the statute is not violated; there is no longer any dispute between the consumer and the report. However, if such a procedure is followed, it is essential that the communication to the insurance company (or

²⁵¹ The consumer report had stated that Mr. Kasdorf was considered slow in paying bills in Peoria, that he left owing rent and was delinquent in paying an oil company bill (CX 138A). Mr. Kasdorf disputed that he was a slow payer, and that he had left owing rent. He did not dispute the oil company delinquency, but explained that it was paid after being owed for 1 1/2 months (RX 440E).

²⁵² One consumer gave respondent the names of three people to contact (Finding 581) and the other who was not told that reinvestigation was possible, told respondent she would follow up researching the information herself (Finding 582).

other recipient) set forth clearly that the new information [266] is accepted as true. Otherwise, the recipient company is left with the original information and a denial from the consumer. As a practical matter, the dispute is left unresolved.²⁵³ Absent a full endorsement of the consumer's statement, a reinvestigation is warranted. If respondent chooses not to reinvestigate, and to accept the consumer's statement, then the consumer should be in at least as good a position as if a reinvestigation had confirmed his position.²⁵⁴

The record shows also that the Fresno office advised a consumer wrongfully that there was a \$5.00 charge for a reinvestigation to be made (Finding 585). The consumer had disputed the report within 30 days of an insurance denial based on the report. Such charge was not authorized by FCRA. The record does not contain evidence sufficient to find that respondent had a practice of imposing unlawful charges as a prerequisite to reinvestigation. Therefore, no specific provision is included in the Order directed to this practice. However, this is another example of failure at the local level to adhere to the Company policies necessary to implement compliance with the Act.

There is evidence in the record showing that, in two instances, respondent failed or constructively failed to promptly delete the information which was not verified in a reinvestigation (Findings 583, 586). In the case of one consumer, the recipient company received from Retail a report stating that the consumer lived with a man, a confirmation of that information, and a letter stating [267] that the consumer disputed the statement and no one would "even admit knowledge of any friends or acquaintances of" the consumer (Finding 586). In fact, at least one person with whom respondent talked, had confirmed the consumer's denial. The communication from Retail, in effect, nullified the deletion of the information from the report. It was constructive failure to comply with Section 611. In the case of the other consumer, respondent's failure to delete health information which the consumer disputed after a reinvestigation in which respondent was "[u]nable to develop further health history" violated the Act (Finding 583). However, the two instances, without more, are insufficient to support an order on this point.

In addition, there is not sufficient evidence in the record to support the complaint allegations that respondent failed to disclose to consumers their right to have notifications sent to recipient compa-

²⁵³ *E.g.*, if Retail chose to accept Mr. Wisniewski's consumer statement that he did not peel rubber, it should have advised the insurance company that it had been learned that Mr. Wisniewski did not peel rubber.

²⁵⁴ In the case of consumer Van Sickle, respondent followed its procedure of sending a consumer statement rather than reinvestigating. While respondent did not expressly adopt the consumer's statement in the manner set forth above, considering the attendant circumstances, there is no indication that the recipient company would question the correction. All that was involved in the consumer's statement was an explanation and elaboration of the consumer's wife's prior statement regarding the date of an accident.

nies, or failed to provide notifications when requested by consumers to do so.

It should be noted in connection with consumer Spillane, whose experience does not form the basis for a finding of violation (pp. 297-98), that complaint counsel contend that consumers cannot waive their reinvestigation rights under the statute (CB, pp. 127-132).²⁵⁵ [268] This contention is based on a line of cases dealing with the unavailability of waiver of private rights granted in the public interest. It appears, however, that while the FCRA generally seeks accuracy in reports in the public interest, Section 611 is designed particularly for the protection of individual consumers. Since the right to reinvestigation is designed to protect individuals, it appears to be one which the individuals intended to be so protected can waive. Section 602(a)4 states that there is a need for consumer reporting agencies to respect the consumer's right to privacy. To categorically state that a consumer cannot say to a consumer reporting agency, "I don't want further investigation" would completely negate the right to privacy. Congressional intent to do so is not present in the Act.

Complaint counsel further contend that were waivers found permissible, consumer reporting agencies would be allowed to adopt scare tactics to induce waivers, there would be a substantial number of uninformed waivers by consumers confused about their rights, and the issue of waiver would become an issue in every action to enforce Section 611 (CRB 130). However, these dire results do not appear inevitable. Respondent's instructions which contemplated waivers do not appear to be designed to even encourage waivers, much less to coerce them (Finding 574). Apparently, a waiver can only be exercised under respondent's procedures when a consumer states that he wants no reinvestigation and signs a statement to that effect after being told that the Act requires reinvestigation. The possibility of waivers arising out of confusion seems remote. Also, it is unlikely that waivers will become an issue in every proceeding to enforce Section 611; the exercise of a waiver requires affirmative action by the consumer to be effective. [269]

Allegations Concerning Interchange of Information between Claim and Consumer Reports (Paragraphs 28-29 of the Complaint)

Complaint counsel contend that respondent's claim reports should

²⁵⁵ It should be noted that, in Mr. Spillane's case, even if waiver were not permitted, there would be no violation. Respondent had already reinvestigated Mr. Spillane's report at the time of the "waiver." Since the Act only requires one reinvestigation, respondent's failure to reinvestigate a second time, particularly when the consumer indicated he desired there be no further reinvestigation, would not have violated the Act.

be considered consumer reports for purposes of FCRA, and that respondent has violated FCRA by failing to adhere to its procedures applicable to consumer reports in the case of claim reports (CB 76-77). Complaint counsel bases this contention, not on an assertion that claim reports are consumer reports *per se*, but rather on respondent's use of its reports. The record shows that respondent has used information from its claim reports in subsequent preparation of consumer reports (Finding 591). In addition, the record demonstrates similar use of consumer reports in subsequent claim reports (Finding 593). Complaint counsel contend that such use transformed claim reports into consumer reports for two reasons: first, claim information could be, and was expected to be, later used in consumer reports. Complaint counsel contend that claim reports, therefore, were "used or expected to be used or collected in whole or in part" for the same purposes as the subsequent consumer reports. The second reason advanced by complaint counsel is that claim reports containing information derived from consumer reports are, in essence, consumer reports. Complaint counsel's argument is not persuasive.

Claim reports from which information is taken for use in consumer reports do not have to be transformed into consumer reports before the protection of the Act applies. Complaint counsel apparently concede, the Act does not regulate the preparation and use of claim reports as such. However, when respondent uses information from a claim report in a later consumer report, respondent must meet the requirements of FCRA in connection with that consumer report, as in the case of all other consumer reports. Information in a consumer report, including that acquired from a claim report, is subject to the disclosure and reinvestigation provisions. The prior status of such information as part of a claim report does not shield it from disclosure and reinvestigation when it [270] has been incorporated in a consumer report. Nor does its later status as consumer report information impose the FCRA requirements on the claim report from which it was taken. Subjects of consumer reports containing claim information should be afforded no less and no more protection than that given in the case of other consumer reports. Thus, no order prohibiting respondent from using claim information in consumer reports is appropriate.²⁵⁶

The statute does impose restrictions on respondent's use of consumer report information. Section 604 delineates the purposes for which consumer reports may be used. The statute does not list

²⁵⁶ If complaint counsel's position were accepted, Section 604 of the statute would become meaningless. As respondent points out (RRB 117), if claim reports were considered consumer reports, respondent would violate Section 604 by furnishing these reports to its customers for use in connection with claims, since this is not a permissible purpose for furnishing consumer reports.

among the permissible uses, utilization of such information in claim reports. Respondent's use of consumer report information in subsequent claim reports violated the statute.

This practice was extensive and did not cease until the recent separation of files. An order prohibiting such use of consumer report information in claim reports is warranted and will issue.

Remedy (Paragraphs 22-29 of the Complaint)

The provisions of the proposed order pertaining to the allegations under paragraphs 22-29 have been modified. Certain provisions of the proposed order have been combined and consolidated to avoid confusion and repetition. The Order issued prohibits respondent from misrepresenting to consumers their rights to disclosure under the FCRA and requires that when a consumer makes an inquiry in connection with disclosure, respondent must advise the [271]consumer of his options regarding disclosure. The Act does not require affirmative disclosure. However, a requirement for affirmative disclosure to consumers is needed in light of respondent's past record of inaccurately and incompletely advising consumers regarding their rights. The Order further prohibits respondent from failing to give disclosure, in person or by telephone, when consumers meet the conditions under FCRA and from failing, while purporting to give disclosure, to disclose the nature and substance of the pertinent file. The words "including claims information" have been deleted from complaint counsel's proposed order. This deletion was made because specifying claim reports without mentioning all types of non-consumer reports could be confusing. The provision as written covers all file information other than medical information. No provision of the Order is specifically directed to the disclosure of recipients or sources of the reports because the record did not show a pattern of withholding such information.

In addition, no provision is included to prohibit respondent from "discouraging" telephone disclosure. The record shows that it is respondent's position that disclosure of certain reports can be handled more effectively by in-person contact (Finding 561). The record also shows that respondent has failed to advise consumers properly of the option of telephone disclosure. The Order requires that respondent advise consumers of their right to telephone disclosure. If respondent properly advises a consumer of the alternative of the telephone disclosure, respondent should be permitted to advise the consumer that respondent feels in-person disclosure is more effective.

Complaint counsel propose in its order, a requirement that

respondent provide inquiring consumers with copies of their reports. The Act does not make such a requirement. Further, respondent has voluntarily changed its disclosure procedures and now provides copies of reports to consumers. The requested provision is unnecessary. [272]

Provisions from the proposed order requiring suboffice disclosure have been deleted as have provisions requiring respondent to advise consumers of the location of their files. Failing to provide disclosure at suboffices does not violate the Act, and the record does not contain sufficient evidence to warrant a provision requiring notification of file location to consumers.

The provision of the proposed order requiring respondent to advise its customers of the address of the branch office preparing reports for the customer has been deleted. Complaint counsel offer no justification for this provision and there is not sufficient evidence demonstrating its necessity.

The provisions of the proposed order relevant to reinvestigation,²⁵⁷ have also been modified. The time limitation for reinvestigations has been changed from "five working days" to "a reasonable period of time" in accordance with the statute's requirements. The record does not show a pattern on respondent's part of delaying reinvestigations. In addition, the Order does not contain complaint counsel's suggested provision requiring respondent to notify consumers that their reinvestigations have been completed. The provisions of the Order dealing with consumer disclosure apply to disclosure of reinvestigation results. The record does not contain evidence showing a pattern by respondent of singling out and withholding reinvestigation results, or indicating to consumers that disclosure of reinvestigation results cannot be obtained. To require respondent to contact each consumer after a reinvestigation would constitute a burden not warranted in light of the evidence and the assumption that consumers interested in the results of a reinvestigation will contact respondent to obtain this information. [273]

Other provisions in the proposed order pertaining to reinvestigation have been deleted. These relate to the alleged failure to delete information, note the consumer's dispute in subsequent reports, and advise consumers of their right to have report recipients notified of amendments in the reports. There is insufficient evidence to justify such provisions.

Scope of Order

²⁵⁷ Paragraphs 26 and 27 of the complaint.

Respondent, objecting to introductory language in the proposed order at CB App. C, p. 1, urges the proposed order is too broad. The order, as recommended by complaint counsel, would cover "consumer reports, investigative consumer reports, claims reports or other reports containing information about consumers." Respondent contends that, if any order issues, its coverage should be limited to the type of reporting services formerly performed by Retail Credit Company and now performed by Equifax Services Inc. Respondent states there is no evidence in this record concerning its credit bureaus and no justification for including them in the order (RRB 10).

Commission orders need not be limited to the products involved in the violations demonstrated by the record. The Commission is not confined to prohibiting the identical practices which demonstrated a law violation. It has authority to prohibit acts of the same type or class as committed in the past. *Maryland Baking Co. v. FTC*, 243 F.2d 716, 718 (4th Cir. 1957); *Moog Industries, Inc. v. FTC*, 238 F.2d 43, 52 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958); *Niresk Industries, Inc. v. FTC*, 278 F.2d 337, 342-43 (7th Cir. 1960); *Hershey Chocolate Corp. v. FTC*, 121 F.2d 968, 971 (3rd Cir. 1941). To be of value, the order must prescribe the method of unfair competition as well as the specific acts by which it has been manifested. *Hershey Chocolate Corp. v. FTC*, *supra*. The Commission, moreover, has wide discretion in determining the type of order necessary to eliminate the unfair or deceptive trade practices found to exist provided that the remedy selected is reasonably related to the violations of law shown. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946); *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957). [274]

The propriety of the product coverage in an order, however, depends on the facts and circumstances of the particular case. *Carter Products Inc. v. FTC*, 323 F.2d 523, 532 (5th Cir. 1963); *The Quaker Oats Co.*, 60 F.T.C. 798, 807-08 (1962); *Royal Crown Cola Co.*, 63 F.T.C. 1950, 1963 (1963); *United Biscuit Co. of America*, 64 F.T.C. 586, 625-26 (1964), *aff'd*, 350 F.2d 615 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966). As previously noted by this agency:

The reason for the Commission's reference to the facts in each case is simple. The purpose of an order is to prevent statutory violations, the occurrence of which in the future appears likely on the basis of reasonable inference from events that have already taken place

Transogram Co. Inc., 61 F.T.C. 629, 701 (1962).

In this case, the violations demonstrated by the record must be considered in the context of such factors as respondent's organiza-

Initial Decision

96 F.T.C.

tion, structure, compensation system, the nature of the services offered, job demands on employees, etc. On points such as these, the record includes no evidence pertaining to respondent's credit bureaus. Accordingly, no finding can be made on the basis of this record that an order covering the practices of respondent's credit bureaus would be reasonably related to the law violations found herein. The introductory paragraph of the Order will be modified by excluding from coverage those credit reports prepared by Credit Bureau, Inc. of Georgia, Credit Bureau of Montreal and Credit Marketing Services (see RPF 6). [275]

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter in this proceeding and of the respondent Equifax Inc.
2. This proceeding is in the public interest.
3. The aforesaid acts and practices of respondent as herein found under Count I of the complaint, were and are to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.
4. The aforesaid acts and practices of respondent, as herein found under Count II of the complaint, were and are to the prejudice and injury of the public and constituted, and now constitute, violations of the Fair Credit Reporting Act. [276]

ORDER

I

It is ordered, That respondent, Equifax Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the preparation, offering for sale, sale or distribution of consumer reports, investigative consumer reports, claims reports, or other reports containing information about consumers (except credit reports prepared by Credit Bureau, Inc. of Georgia, Credit Bureau of Montreal and Credit Marketing Services), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

- A. Representing, directly or by implication, during the preparation of any report that its investigative personnel are agents or

employees of the company to which the consumer who is the subject of the report has applied for a benefit. [277]

B. Misrepresenting, directly or by implication, that its reports are compiled from information obtained through:

1. in-person interviews with the consumer who is the subject of the report, or the subject's friends, neighbors, or associates;
2. direct observation of the home, neighborhood or other physical surroundings of the consumer who is the subject of the report;

C. Failing to indicate on the copy of the consumer report or consumer investigative report going to respondent's customer that an interview has been conducted on the telephone if that is the fact, unless the service provided is sold exclusively as a telephone service. [278]

II

It is ordered. That respondent Equifax Inc., a corporation, its successor and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the preparation, offering for sale, sale or distribution of "consumer reports" or "investigative consumer reports," as defined in Section 603(d) and (e) of the Fair Credit Reporting Act, Pub. Law 91-508, 15 U.S.C. 1601, *et seq.*, ("the Act") (except credit reports prepared by Credit Bureau, Inc. of Georgia, Credit Bureau of Montreal and Credit Marketing Services) do forthwith cease and desist from:

A. Submitting consumer report information to persons who it has no reason to believe intend to use the information for a permissible purpose as set out in Section 604 of the Act.

B. Furnishing consumer report information to any person who has not specifically requested such information from respondent with respect to each consumer reported upon. [279]

C. Using consumer report information in any manner, including as reference information or as a lead, in the preparation of any report other than a consumer report.

D. Including any notice or other statement in a consumer report indicating directly or indirectly the existence of items of adverse information which antedate the report by more than the applicable period of time specified in Section 605 of the Act; or otherwise reporting, directly or indirectly, adverse consumer report information or the existence of such information which antedates the report

by more than the applicable period of time specified in Section 605 of the Act.

E. Compelling or inducing its investigative personnel to complete or prepare a certain proportion of consumer reports or investigative consumer reports containing adverse information about or relating to the consumers who are subjects of such reports by utilizing [280] quality audits or any similar system, plan, or procedures.

F. Utilizing any system of quality audits or any similar plan or procedure whereby the performance of branch offices, regions, or other organizational units, with respect to the production of adverse (protective/declinable) information is ranked against companywide or regional averages:

1. unless respondent can demonstrate that such averages constitute a valid standard of comparison for all of the units to which they are to be applied; and
2. unless respondent can demonstrate that the particular survey utilized includes a representative or statistically valid sampling of the branch office or other unit audited or surveyed. [281]

It is further ordered, That respondent shall:

G. Semi-annually conduct unannounced performance reviews of its field representatives, on a random sampling basis acceptable to the Federal Trade Commission, to check the accuracy of their reports, to determine whether the sources listed have been interviewed, whether the sources contacted are logical sources, and whether the information received has been accurately recorded.

H. Submit to the Federal Trade Commission, the results of such performance reviews.

I. Complete the following form for each source of adverse (protective/declinable) information contained in an investigative consumer report. The forms shall be initialed by the investigator preparing the report and forwarded with the report to the recipient. A copy of each form shall be retained in and become part of the consumer's file, as "file" is defined in Section 603(g) of the Fair Credit Reporting Act. [282]

SOURCE INFORMATION ANALYSIS

Adverse (protective/declinable) Information

Covering _____
[Identify adverse information]
was obtained from _____

[Identify source: Employer, neighbor, friend, observation of environment, etc.]

The source gained his [her] information from:

- ☐ Personal knowledge;
- ☐ Personal observation;
- ☐ Hearsay.

The investigator obtained this information through:

- ☐ Direct, personal interview;
- ☐ Telephone interview;
- ☐ Direct, personal observation;
- ☐ File information.

It is further ordered, That respondent shall cease and desist from:

J. Misrepresenting to any consumer who requests information concerning himself in respondent's files, the consumer's rights under §609 and §610 of the Act. [283]

K. Failing to inform a consumer who makes a request within the scope of the preceding paragraph:

1. that such consumer has the right to disclosure of such information upon proper identification, by telephone if he pays any toll charge, or in person, at his option; and
2. what constitutes proper identification and to supply or mail, at the consumer's option, all forms which he must execute in connection with the requirements of Section 610 of the Act, to receive disclosure to which he is entitled under the Act and this Order.

L. Failing to give disclosure required by §609 of the Act to any consumer who has contacted respondent and has provided proper identification as required by respondent under §610 of the Act, and [284]has paid or accepted any charges which may be imposed upon him under §612 of the Act.

M. Failing, when giving consumers disclosure, to disclose the nature and substance of all information (excluding medical information) in its files on the consumer at the time of the request.

N. Requiring a consumer as a prerequisite to disclosing information from the consumer's file pursuant to §609 of the Act to fill out or sign a form which authorizes respondent to conduct a reinvestigation of any item the consumer may dispute or to transmit the results of

such reinvestigation to persons to whom it has previously reported the disputed information or which authorizes any business, organization, professional person or anyone else to give full information and records about said consumer to respondent; or interposing [285] any other similar condition or requirement which exceeds those specified in §610 of the Act.

O. Failing within a reasonable period of time to reinvestigate any item of information, the completeness or accuracy of which is disputed by the consumer unless it has reasonable grounds to believe the dispute is frivolous or irrelevant, as required by §611(a) of the Act.

It is further ordered, That respondent herein shall deliver a copy of this Order to cease and desist to all present and future personnel, including employees and representatives, engaged in the preparation of reports, including consumer reports, investigative consumer reports, and claims reports and engaged in the disclosure and reinvestigation of all information in said reports.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this Order to each of its operating divisions. [286]

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of which may affect compliance obligations arising out of the Order.

It is further ordered, That respondent herein shall within sixty (60) days after service upon it of this Order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this Order. [287]

APPENDIX A

Evidentiary Conflicts, Credibility and Related Problems

1. Ex-employee Witnesses

The parties' contentions as to the credibility of the Government's ex-employee witnesses have been reviewed. The testimony that certain ex-employees could not complete the workload assigned within a normal workday or workweek is found credible. The testimony of these witnesses with respect to the shortcuts they took to complete cases is persuasive. It is unlikely that they would give such testimony unless it were true. It is improbable that witnesses,

who did take shortcuts such as falsifying sources, would do so unless they could not cope with the workload, since such practices were a firing offense. Moreover, this testimony pertaining to a cross section of respondent's offices, located from coast to coast, is generally consistent on these points.

The testimony of these witnesses has also been weighed against the opinion testimony of rebuttal witnesses that such ex-employees should have been able to do the job without difficulty. The testimony of the Commission witnesses is accepted on this point. The ability to complete a certain number of reports in a given period of time is governed by many variables. These witnesses were in the best position to testify with respect to the specifics of their own situations and they best knew their own limitations.

Respondent contends that the testimony of three ex-employee witnesses is inherently incredible and that no findings whatsoever should be made on the basis of these witnesses. In the case of one witness, no findings will be made in view of his hostility to respondent expressed while testifying (Tr. 1124). In the case of a field representative who worked in the Newark office, respondent's contentions in RPF 97(d) have been considered. It is unlikely his testimony as to the shortcuts he took would be untrue, and findings are based thereon. Respondent adduced considerable evidence to cast doubt on the reliability of a third witness, a former supervisor [288] in the Wayne-Dearborn office. The most damaging appear to be those findings proposed implying he falsified mileage on his expense statements (RPF, pp. 105-106). Such conduct, if proven, is a firing offense (RX 102D). In fact, the witness was not fired but promoted to another office²⁵⁸ (Tr. 10215-16). Under the circumstances, there are no grounds for ignoring his testimony in its entirety as respondent contends.

2. Documentary Evidence

Findings have been made on the basis of contemporaneous documents from respondent's files. There has been considerable testimony explaining such documents. In some instances, after weighing the inferences to be drawn from the documents against such testimony, findings at variance with the explanations have been made. The finder of fact is entitled to weigh such inferences from contemporaneous documents against subsequent explanations. Cf. *U.S. v. Gypsum*, 333 U.S. 364, 395-96 (1948).

²⁵⁸ Respondent's rebuttal witness testifying on this point concurred with the Regional Vice President on the promotion (Tr. 10215-16).

3. Consumer Witnesses

Complaint counsel presented approximately 60 consumer witnesses who testified regarding alleged violations by Retail. In most cases, respondent offered rebuttal witnesses to the consumers' testimony; and, in many instances, the testimony of the rebuttal witnesses directly conflicted with that of the consumers as to what actually occurred in the various transactions. Thus, the issue of credibility was pervasive in considering the evidence presented by the consumer witnesses. The testimony of some witnesses was accepted as accurately portraying the events related, when rebutted by witnesses who could not recall the incidents in question and testified only [289] regarding the usual procedures in such instances. The recollections of other witnesses were accepted as accurate, even after direct rebuttal or despite inconsistencies not bearing on the particular violation under consideration. Explanation of such credibility findings accompany the findings of fact made in connection with these witnesses. In some instances, despite rebuttal testimony, the essential points involving the violation were not in dispute. Some consumers' testimony was found to be persuasively rebutted by testimony or documents, or not sufficiently clear to support a finding of violation. In other cases, the testimony did not set forth facts which would establish a violation or was offered under paragraphs of the complaint to which it did not relate. Below is set forth, by complaint paragraphs, explanation of the determinations made in connection with certain of these witnesses.

(a) Paragraphs 5-6 of the Complaint

The testimony of consumers Frazzano,²⁵⁹ Stanley,²⁶⁰ [290] Moss,²⁶¹ Harris,²⁶² and Baldwin²⁶³ did not set forth facts showing a violation.

The testimony of consumers Pierce,²⁶⁴ Van Sickle,²⁶⁵ [291] and J.

²⁵⁹ L. Frazzano's testimony makes it clear that there was no misrepresentation of identity when he was contacted by a Retail employee. Mr. Frazzano testified that the field representative who called him refused to give the identity of her employer and, therefore, he refused to answer her questions (Tr. 3605).

²⁶⁰ Mr. Stanley testified that the field representative, Mr. Nelson, who interviewed him, did not state that he worked for Retail Credit. However, he also testified that he had known Mr. Nelson for 15 years and knew where he worked (Tr. 217-18). Mr. Stanley had recently acquired an automobile insurance policy (Tr. 216-17). When Mr. Nelson visited him and asked questions regarding his automobiles and their usage, Mr. Stanley "assumed the possibility" that Mr. Nelson was preparing a report (Tr. 258).

²⁶¹ There was insufficient evidence to connect Retail to Mr. Moss' experiences with an investigator who visited him. Thus, his testimony does not support a finding of violation (see RPF 135a).

²⁶² Mrs. Harris testified that the Retail representative who contacted her stated that he represented Retail Credit (Tr. 1137).

²⁶³ Ms. Baldwin testified that a field representative who interviewed her "flipped a card at [her] and he fired off his name," and then proceeded to ask her questions (Tr. 4730). This testimony is insufficient to show the field representative misrepresented his identity. The fact that his introduction was given quickly and Ms. Baldwin failed to comprehend it, is not necessarily tantamount to a misrepresentation.

²⁶⁴ Mr. Pierce's testimony contained several statements which tend to cast doubt on his recollections. He stated

(Continued)

Sattler²⁶⁶ also do not support findings of violation. Considering the direct rebuttal testimony, their testimony is not persuasive.

(b) Paragraphs 22–23 of the Complaint

The testimony of several of complaint counsel's witnesses did not make out a violation under paragraphs 22 and 23 (Parnell,²⁶⁷ [292] Ptacek,²⁶⁸ Vail,²⁶⁹ Roberts,²⁷⁰ Raber,²⁷¹ [293] and Van Sickle.²⁷²

that the Retail field representative who visited him in connection with a property report stated that "the sidewalk wouldn't meet his approval" (Tr. 3568). This inherently unlikely statement was denied by the field representative (Tr. 12118–19). In addition, Mr. Pierce stated in connection with a later contact with Retail for disclosure, that Retail told him the computer had made a mistake and he had a bad credit rating (Tr. 3573). Since Retail did not use computers to store information in the pertinent office (Tr. 11898) and the report did not involve credit (CX 222A–B), Mr. Pierce's testimony under this paragraph is not persuasive.

²⁶³ Mrs. Van Sickle's testimony that a Retail field representative who represented she was there in connection with a high school project she was doing (Tr. 3815–16), was effectively rebutted by the credible testimony of the field representative who, at the time of the occurrence would have been 22 years old, that she had never represented herself as a high school student while conducting investigations (Tr. 12277).

²⁶⁶ Mrs. Sattler's testimony that a Retail field representative visited her after contacting her husband (see Findings 162, 164), and introduced himself as "an insurance inspector" (Tr. 4277) is not persuasive in light of the credible testimony of the rebuttal witness, the field representative. He testified that, after the "first incident" with Mr. Sattler, he made "exceptionally sure" that when he contacted Mrs. Sattler, he introduced himself as Mr. Newman with Retail Credit (Tr. 11745).

²⁶⁷ Consumer Parnell contacted Retail after hearing from a neighbor that someone had called pursuant to an investigation of him and had made some "inappropriate" comments, e.g. had asked the neighbor if it wasn't a little strange that Dr. Parnell lived with a single man named John. (John was Dr. Parnell's 5-year old son)(Tr. 4323–26). Dr. Parnell's testimony indicates, however, that when he contacted Retail, he was not interested in disclosure and did not request it. He called to advise Retail he would be sending a letter to register his displeasure regarding the manner in which the investigation was conducted, and to find out questions asked (Tr. 4325–27, 4345–46). Dr. Parnell followed up his telephone call with a letter to Retail in which he requested a copy of the questions asked and information obtained (CX 1489A–B). He did not recall having requested a copy in his telephone contact (Tr. 4327), and though he received a written apology from Retail which advised him of the procedure for in-person or telephone disclosure (CX 213), he did not follow up by requesting disclosure (Tr. 4328).

²⁶⁸ Retail had reported on consumer Ptacek in CX 226A–B, dated January 25, 1972, a motor vehicle report showing traffic violations and in CX 225A–B, dated February 2, 1972, an automobile report which contained more personal information. When consumer Ptacek was told by his insurance agent that the cancellation of his automobile insurance was based on particular items of a personal nature reported by Retail Credit, he contacted Retail for disclosure (Tr. 3546–47). CX 226 was disclosed to him, but CX 225 (which contained the information mentioned by the insurance agent, was not)(Tr. 3547). However, Mr. Green, who conducted the disclosure credibly testified that the reason he did not disclose CX 225 was that it was not in Mr. Ptacek's file (Tr. 12163–64). In fact, CX 225 was never located in the office (Tr. 12173). He explained that about 1 to 2 percent of files are lost or misplaced due to human error (Tr. 12161–62, 12165). Since Mr. Ptacek did not advise Mr. Green that he expected other information, Mr. Green did not suspect the file was incomplete and thus, did not take the steps he would ordinarily take to locate a missing file (Tr. 3550, 3553, 12161–62, 12166–67). Under the circumstances, no violation is found.

²⁶⁹ In the case of consumer Vail, there was no evidence supporting complaint counsel's allegation of failure to disclose (Tr. 2708–09). According to Mr. Vail himself, the disclosure was complete (Tr. 2695–97).

²⁷⁰ Mr. Roberts' testimony that his disclosure was incomplete (Tr. 3362–64) was considered in conjunction with his testimony that when the disclosure began, he was read information on a "questionnaire basis" (Tr. 3362) which he said was "trivia" in his mind (Tr. 3372). Therefore, he hurried the disclosure, by such tactics as "butting in during his conversation." (Tr. 3372). According to Mr. Roberts, "I was trying to get him to hurry . . . I was still coming on pretty strong over the phone. So, I did get him to hurry." (Tr. 3362). Under these circumstances, no violation is found.

²⁷¹ While consumer B. Raber's testimony was offered under paragraphs 22 and 23, it did not set forth any allegations relating to failure to disclose (Tr. 1002–06).

²⁷² Mr. Van Sickle received a letter from his insurance company denying renewal of his automobile insurance (Tr. 3821). He contacted his agent and the company was advised that the action had been taken because a Retail report indicated he had had an automobile accident "a couple of weeks prior." Mr. Van Sickle contacted Retail to correct this inaccurate information (he had had an accident, but it had occurred 9 months prior (Tr. 3821–22)). The appropriate correction was made (CX 305, 306). Mr. Van Sickle testified that his "prime purpose" in contacting

(Continued)

In the case of consumers Reinhardt and Robinson, the allegations under paragraphs 22 and 23 seem inextricably related to and dominated by those under paragraphs 24 and 25, relating to telephone disclosure. Their testimony did not pertain to allegations of failure to disclose separate from the allegations of failure to give telephone disclosure. Consideration of this testimony regarding disclosure is confined to the allegations under paragraphs 24 and 25.

Several of complaint counsel's witnesses were effectively rebutted by respondent's evidence. In the case of consumers Bitney, Spillane, Kasdorf and Suerth, the alleged omissions during disclosure concerned items of much less importance and of a far more neutral nature than other items in the reports which were disclosed.²⁷³ [294] Considering together the absence of any motive on the part of Retail to withhold the more innocuous items, and the direct rebuttal of the testimony of these witnesses, it seems probable that the items in question were disclosed, and that such disclosure was forgotten by these witnesses. Thus, no findings of violation have been based on the testimony of these witnesses with respect to disclosure.

The testimony of several other witnesses was directly rebutted by contemporaneous documents tending to show that complaint counsel's witnesses were mistaken in their testimony (L. Raber,²⁷⁴ Carreathers,²⁷⁵ Drezek,²⁷⁶ Hillman,²⁷⁷ [295] Moss,²⁷⁸ McKeown,²⁷⁹ and

Retail was to correct the error. He did not recall whether he asked what other information was in the report (Tr. 3823-25, 3835). In fact, the report, a Streamlined Auto Report, contained little additional information (CX 303). Under these circumstances, the fact that Mr. Van Sickle's birthdate was not disclosed, is not found to be a violation of the Act.

²⁷³ In the case of consumer Suerth, while the alleged omissions were not completely innocuous items (Tr. 1500-02; CX 280A-C), they were far more neutral than the items which were disclosed (see Finding 578). In addition, Ms. Suerth's memory was shown to be hazy on details surrounding the disclosure, *e.g.*, whether disclosure was given by telephone or in person (Tr. 1497, 1520-21, 1526; CX 300A-B).

²⁷⁴ Consumer L. Raber's testimony that he called Retail's Baltimore office and was denied disclosure until he made clear he knew his rights under FCRA (Tr. 990-94) and that disclosure, when it was given, was incomplete (Tr. 995-96) was not persuasive. Direct rebuttal by the discloser, Mr. Keilbar, and contemporaneous documents indicated that Mr. Raber's memory was hazy, *e.g.*, Mr. Keilbar actually called Mr. Raber (after Mrs. Raber had requested he do so), advised him he could not receive a copy of the report and gave him telephone disclosure (RX 467A; Tr. 7640-42).

²⁷⁵ Ms. Carreathers' testimony that she received no disclosure and, thus, gave no corrections during disclosure (Tr. 3327-28, 3339) was effectively rebutted by the testimony of Mr. Tilden (the discloser), supported by RX 412A-C. RX 412A-C showed that disclosure was given, and corrections made at the request of Ms. Carreathers (Tr. 11783-86).

²⁷⁶ Mr. Drezek's testimony that he did not receive disclosure that his report showed (accurately) that his wife had epilepsy (Tr. 4103) was rebutted by RX 498A, showing this fact was disclosed and confirmed.

²⁷⁷ Consumer Hillman's testimony that she was refused, or received incomplete disclosure (Tr. 2717-19) was effectively rebutted by testimony of two rebuttal witnesses, Mr. Dewing (Tr. 9309) and Mr. Eaton (Tr. 9322-23), supported by RX 493D and E, which showed Ms. Hillman's recollections were inaccurate.

²⁷⁸ Mr. Moss' recollection of his disclosure (Tr. 3961-64) was found to be inaccurate when rebutted by the testimony of the discloser, Mr. Pettit (Tr. 11650-52) and RX 455F, which contained Mr. Pettit's handwritten notes from the disclosure and showed additional information given by Mr. Moss which related to the items he claimed were not disclosed.

²⁷⁹ Mrs. McKeown's recollections were shown to be inaccurate, *e.g.*, she testified that certain things were disclosed to her (Tr. 505-06) which were not even in her report (CX 176A-B).

Notaro²⁸⁰).

Several of complaint counsel's witnesses, some of whom were rebutted, appeared to be confused and were unable to clearly state the events which occurred in connection with them. It is impossible to ascertain with confidence what actually transpired in these instances and, in some instances, even what was alleged to have transpired. No findings have been based on their testimony (Mumford 1142-75; J. Crouch, R. Crouch,²⁸¹ Conger 3769-89; Comerata,²⁸² [296]Harrington²⁸³).

(c) Paragraphs 24-25 of the Complaint

Consumer Lowe's testimony (Tr. 2091-103) does not support a finding of violation. She was unable to remember the events in question and did not testify with clarity regarding these matters. Similarly, no findings of violation were based on the testimony of consumer Conger (Tr. 3769-69).

In the instance of consumer Robinson, there was insufficient evidence to link the allegations to which he testified to Retail.²⁸⁴ Thus, no findings are based on his testimony.

The testimony of consumers Parnell, L. Raber, Hillman, Moss and Phares contained allegations of failure to disclose. While the contacts in these cases took place by telephone, there was no evidence that telephone disclosure was singled out or that the treatment of these consumers was a result of their calling by telephone rather than going to the offices. Thus, the evidence pertaining to these witnesses was considered under paragraphs 22 and 23 under which it was also offered.

Consumers Luster (Tr. 3164-84), B. Raber (Tr. 1002-06) and M. McCune (Tr. 4378-412) were also offered under these paragraphs,

²⁸⁰ Mr. Notaro's memory was found to be inaccurate. He appeared to be confused with regard to which of Retail's offices he contacted at various times (see Tr. 4460-61, 10545-47; RX 457A-B). The contemporaneous documents were found to be persuasive.

²⁸¹ The testimony of Mr. and Mrs. Crouch conflicted on major issues, *e.g.*, whether disclosure was given (Tr. 3186-88, 3207). The rebuttal witness, the discloser, testified as to yet another recollection (RX 421D, pp. 34-35). Under the circumstances, no findings of violation can be based on their testimony.

²⁸² In the case of consumer Comerata, her testimony on cross-examination indicated that the most significant item in her report—that Retail was unable to locate anyone in Aspen who knew her—was disclosed (Tr. 3227; CX 63, 64, 65). The testimony was unclear regarding whether anything else was disclosed (Tr. 3219-20).

²⁸³ The introduction of CX 1570A, a consumer log from the Chicago office (Tr. 14841-42), corroborated Mr. Harrington's testimony that he contacted the Chicago office in March of 1973 (Tr. 2515-16) and impeached the testimony of respondent's witness, Mr. Brenner (Tr. 9621). However, the record in connection with Mr. Harrington is confused and he appeared generally unsure of what actually took place. No finding of violation is based on this testimony.

²⁸⁴ Mr. Robinson testified that he called Retail and was refused disclosure by telephone (Tr. 2175). However, rebuttal testimony indicated that Mr. Robinson may have called a local credit bureau rather than Retail (Tr. 7021-61).

but their testimony contained no facts relevant to telephone disclosure. Thus, no findings are based on their testimony. [297]

The testimony of consumer Drezek regarding telephone disclosure (Tr. 4102) does not support a finding of violation when read in light of the rebuttal testimony and contemporaneous documents which showed that Mr. Drezek did not recall accurately with whom he spoke at Retail and what was told to him (see p. 294 n. 276).

(d) Paragraphs 26-27 of the Complaint

The testimony of Mr. and Mrs. Crouch does not support a finding of violation in connection with reinvestigation as their testimony indicated that they were unable to clearly remember the events in question (see p. 295 n. 281).²⁸⁵ Similarly, no violation was found in the case of consumer McKeown.²⁸⁶ In addition, consumer Moss' recollections were found to be confused, and a finding of violation is not based on his testimony (see also p. 295 n. 278).

Consumer Mumford's testimony was too confused to permit a finding of whether disclosure was complete (see p. 295) or the reinvestigation complete. The record does show a reinvestigation was conducted (CX 201, 202A-B, 197, 198A-B). Under the circumstances, no violation is found.

The testimony of consumers Spillane,²⁸⁷ [298]T. Smith,²⁸⁸ Van

²⁸⁵ The item that both Mr. and Mrs. Crouch alleged was disputed, namely, that Mr. Crouch was disabled and incapable of driving (Tr. 3210, 3187-88) was not even in the report in question (CX 74A-C).

²⁸⁶ Mrs. McKeown testified that she disputed facts disclosed to her (Tr. 505-06, 511-12). However, the alleged dispute concerned information not in the report (CX 176A-B; see also p. 295 n. 279).

²⁸⁷ Consumer Spillane disputed his report during disclosure (Tr. 3844-47) and supplied Retail with the names of references to be contacted (Tr. 3848). A reinvestigation was conducted, but the references Mr. Spillane provided were apparently not contacted (CX 267; Tr. 3848). Mr. Spillane received disclosure of the results of the reinvestigation (Tr. 3849), and disputed them (CX 265). When it was suggested to Mr. Spillane that he write out his dispute in detail, he responded that he did not want inaccurate information and a denial in the file; he wanted the inaccurate information deleted (Tr. 3851). The discloser also suggested that yet another reinvestigation could be conducted, but Mr. Spillane rejected that alternative, stating he "didn't feel that [his] reputation could stand another one of [their] investigations" (Tr. 3852). Under the circumstances, no violation is found. FCRA imposes no duty to contact a consumer's references in a reinvestigation, nor is there a duty to continue reinvestigating after one reinvestigation has been completed and the consumer declines an offer of further reinvestigation.

²⁸⁸ As noted earlier (Finding 546), the information which Mr. Smith disputed was deleted from his report and a corrected copy sent to the requesting company. Thus, no failure to reinvestigate is found.

Sickle,²⁸⁹ Vail,²⁹⁰ Stanley,²⁹¹ [299]Roberts,²⁹² and Dealy²⁹³ does not set forth facts which show any violation. [300]

APPENDIX B

Abbreviations used throughout this Initial Decision are as follows:

- CX - Complaint counsel's exhibit
- RX - Respondent's exhibit
- Tr. - Transcript page
- CB - Complaint counsel's brief
- CPF - Complaint counsel's proposed finding (reply findings of fact)
- CRB - Complaint counsel's reply brief
- RB - Respondent's brief
- RPF - Respondent's proposed finding
- RRB - Respondent's reply brief

OPINION OF THE COMMISSION

By PERTSCHUK, *Commissioner*:

I. BACKGROUND

A. The Law

Congress enacted the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681, *et seq.* (1976), in order to ensure that "consumer

²⁸⁹ In the case of Mr. Van Sickle, the record shows that a notice was sent to the insurance company correcting the item Mr. Van Sickle disputed (CX 305, 306; Tr. 3824-25). There is no evidence in the record to support complaint counsel's speculation that the recipient insurance company regarded this correction notice as self-serving (CPF 1061; see also p. 266, n. 254).

²⁹⁰ The record shows that a reinvestigation was conducted after Mr. Vail disputed his report and that the results were transmitted to the requesting company with corrections (CX 292, 293, 294A-B, 295, 297A-B, 299A-B).

²⁹¹ The record evidence surrounding Mr. Stanley's contact with Retail does not support complaint counsel's position that reinvestigation in this instance was not conducted within a reasonable time (CCB, p. 70; CPF 1006). Mr. Stanley received disclosure on either January 24 or 25, 1972, (RX 495D, G). Retail notified the recipient company of its intention to reinvestigate on January 28, 1972 (RX 495F). On January 31, 1972, the reinvestigation was ordered (RX 495B; CX 271C). This brief delay was explained in a memorandum to the Home Office as being due to the branch office's attempt to locate the report on Mr. Stanley for homeowner's insurance which Mr. Stanley stated was cancelled at the same time as his automobile insurance; it was the automobile report which he disputed (RX 495B). This explanation, on its face, appears reasonable, and no finding of violation is made.

²⁹² While consumer Roberts' testimony was presented under these paragraphs, his own testimony indicates that, after he disputed information disclosed to him, respondent conducted a reinvestigation which was sent to the insurance company involved (Tr. 3375). In addition, the record contains documentary evidence showing a reinvestigation (CX 1464A-C).

²⁹³ The testimony of consumer Dealy does not support a finding of violation. He testified that, while he disputed information in his file and he was told there would be a reinvestigation, he never was contacted by Retail regarding the results (Tr. 3402). A reinvestigation was conducted (CX 343 O-Q). Complaint counsel's contention that there is a duty to contact the consumer for disclosure of reinvestigation results (Tr. 3403) is rejected.

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 * * *." FCRA, 602(b).

To protect the confidentiality of information concerning consumers, the statute permits "consumer reporting agencies"¹ to [2]disclose "consumer reports" only to those who have a legitimate business need for the information.² Because Congress recognized [3]that some inaccuracy was inevitable, *see* 115 *Cong. Rec.* 2411 (1969) (remarks of Sen. Proxmire), it chose not to render consumer reporting agencies strictly liable for inaccuracies in a report. Instead, it (1) required the use of "reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom [a] report relates," FCRA, Section 607(b) (emphasis added); (2) prohibited, as a general rule, the communication of obsolete adverse information, that is, most adverse information reported after seven years, FCRA, Section 605; (3) required the updating of information obtained from an investigative consumer report³ before it could be included in a

¹ The Act focuses on information contained in a "consumer report," that is, "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" and "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." [FCRA, 603(d)] Section 603(d) contains several exclusions from the definition, including reports "containing information solely as to transactions or experiences between the consumer and the person making the report * * *."

A "consumer reporting agency" is, in turn, defined as a "person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages 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." [FCRA, Section 603(f)] The permissible purposes, set forth in Section 604, are quoted in note 2 *infra*.

² Section 604 of the FCRA provides as follows:

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

- (1) In response to the order of a court having jurisdiction to issue such an order.
- (2) In accordance with the written instructions of the consumer to whom it relates.
- (3) To a person which it has reason to believe —
 - (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
 - (B) intends to use the information for employment purposes; or
 - (C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
 - (D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
 - (E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

³ An "investigative consumer report" is a

consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any

(Continued)

subsequent consumer report, FCRA, Section 614; and (4) imposed restrictions on the use of public record information. FCRA, Section 613.

Congress also imposed a variety of procedural requirements designed to enable consumers to identify and correct inaccurate information. For example, the users of consumer reports must inform the consumer of the name and address of the consumer reporting agency responsible for preparing a consumer report that was used to deny credit, insurance, or employment or to increase the charge for credit or insurance. FCRA, Section 615(a). Also, the statute requires consumer reporting agencies upon request (and without regard to whether a user of the file has taken adverse action against the consumer) to inform him or her "clearly and accurately" of the "nature and substance" of information in its files on the consumer at the time of the request, the [4]sources of the information,⁴ and, with certain limitations, the identity of the recipients of any consumer report on the consumer. FCRA, Sections 609, 610.

If the consumer disputes the completeness or accuracy of any item of information contained in his or her file, the reporting agency must "within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute * * * is frivolous or irrelevant." If the information is found to be inaccurate or can no longer be verified, the agency must promptly delete the information. FCRA, Section 611(a). In case the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute, FCRA, Section 611(b), and, unless there are reasonable grounds to believe that the statement is "frivolous or irrelevant," the reporting agency, in any subsequent consumer report containing the information in question, must clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate summary. FCRA, Section 611(c). The statute directs the reporting agency, following deletion of information found to be inaccurate or unverified, or the addition of any notations as to disputed information, to notify previous recipients of the information designated by the consumer that the information has been deleted or to send them the consumer's version of the dispute. FCRA, Section 611(d).

Administrative enforcement of the FCRA is assigned to the

such items of information.

FCRA, Section 603(e).

⁴ Except in the course of discovery in an action brought under the FCRA, the consumer reporting agency need not disclose the sources of information acquired solely for use in preparing an investigative consumer report.

Commission, except to the extent that enforcement is specifically committed to other government agencies under Section 621(b). For the purposes of the Commission's exercise of its enforcement responsibilities under the FCRA, a violation of any requirement or prohibition imposed by the statute constitutes an unfair or deceptive act or practice in violation of Section 5 of the FTC Act, 15 U.S.C. 45 (1976). FCRA, Section 621(a).

B. The Respondent

Equifax Inc.⁵ is one of the nation's largest consumer reporting agencies.⁶ Directly or through its subsidiaries, among [5]other things, it supplies financial and credit reports for use in evaluating the financial reputation and payment history of individuals who seek credit; sells personnel selection reports used to evaluate applicants for employment; supplies insurance companies with information used to determine the desirability of applicants as risks for insurance; and prepares information used to assess claims made against insurers.

Since April 1, 1977, consumer reports, including personnel reports and reports sold to insurance companies for underwriting purposes and claim investigations, have been the responsibility of Equifax Services, Inc., a wholly-owned subsidiary. These reports are prepared in Equifax Services' 219 branch offices and 1000⁷ "suboffices." As of May 1974, respondent employed approximately 4600 salaried field representatives to perform the investigative work underlying the reports. (ID 75, 89)⁸

II. COMPLAINT AND INITIAL DECISION

The complaint in this case charged Equifax Inc. with a variety of

⁵ Respondent was known as Retail Credit Company when the complaint in this case issued. It was renamed Equifax Inc. effective January 1, 1976.

⁶ Some of respondent's activities are not those of a "consumer reporting agency" as defined by Section 603(f) of the FCRA.

⁷ These numbers of offices are accurate as of April 1976.

⁸ The following abbreviations will be used in this opinion:

- | | |
|---------|--|
| ID | - Initial decision finding no. |
| ID p. | - Initial decision page no. |
| Tr. | - Transcript page no. |
| CX | - Complaint counsel's exhibit no. |
| RX | - Respondent's exhibit no. |
| RAB | - Respondent's appeal brief. |
| CAB | - Complaint counsel's appeal brief. |
| R. Ans. | - Respondent's answering brief. |
| C. Ans. | - Complaint counsel's answering brief. |
| RRB | - Respondent's reply brief. |
| CRB | - Complaint counsel's reply brief. |
| RPF | - Respondent's proposed finding no. |

violations of the Fair Credit Reporting Act and Section 5 of the Federal Trade Commission Act. Violations of the FCRA alleged in the complaint include furnishing information about consumers to persons respondent has no reason to believe intend to use the information for one of the permissible purposes set out in the statute; reporting the existence of obsolete, adverse information; and failing to disclose to consumers, upon request, the nature and substance of information in its files. The complaint also alleged that respondent employs certain procedures which do not assure the maximum possible accuracy of information concerning individuals about whom its reports relate, including a "salary/production [6] system" which "requires or compels" its personnel to prepare an unreasonable number of reports, and quotas which "require or compel" its personnel to prepare a certain proportion of reports containing adverse or derogatory information.

The complaint also charged several violations of Section 5, including misrepresentations to consumers by respondent's investigative personnel that they are agents or employees of the companies to which the consumers have applied for benefits; representations to its customers (those who purchase its reports) that information was gathered in in-person interviews in cases when, in fact, the interviews were conducted by telephone; and employing authorization forms for the release of medical information which misrepresent that the information is being sought for the exclusive use of insurance companies. Finally, the complaint alleged that respondent's investigators have misrepresented to consumers the purposes of those investigations which are designed to evaluate claims for loss or injury under an insurance policy.

After a lengthy trial, Administrative Law Judge ("ALJ") Theodor P. von Brand entered a carefully documented and well-reasoned initial decision sustaining most of the complaint allegations. He found, however, that several were not supported by the record and that two of the alleged violations of Section 5 were immunized by the McCarran-Ferguson Act, 15 U.S.C. 1011, *et seq.* (1976), as the "business of insurance." The case is now before the Commission on cross-appeals filed by complaint counsel and respondent from certain of the ALJ's findings and also from his proposed order.

III. FAIR CREDIT REPORTING ACT CHARGES

A. Reasonable Procedures to Assure Maximum Possible Accuracy

In enacting the Fair Credit Reporting Act, Congress' primary

concern was the dissemination of reports containing inaccurate adverse information⁹ about consumers. The Senate report declared that "[t]he purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report." S. Rep. No. 91-517, 91st Cong., 1st Sess. 1 (1969). Senator Proxmire, upon introducing [7]the Senate bill, stated why he was concerned about even small amounts of inaccurate information in credit reports:

Perhaps the most serious problem in the credit reporting industry is the problem of inaccurate or misleading information. There have been no definitive studies made of just how accurate is the information in the files of credit reporting agencies. But even if it is 99 percent accurate—and I doubt it is that good—the 1 percent inaccuracy represents over a million people. While the credit industry might be satisfied with a 1-percent error, this is small comfort to the 1 million citizens whose reputations are unjustly maligned.

115 *Cong. Rec.* 2411 (1969).

Similarly, Representative Zablocki, one of the authors of the House bill, expressed his concern about the impact on individuals:

[W]hen we consider the fact that each time there is an error by an agency, an individual suffers not only embarrassment and inconvenience but financial loss and possibly even the loss of his job, his insurance, and even his mortgage, then we have put the danger of incorrect reports in proper perspective.

Id. at 2517.

Congress, as noted previously, imposed on reporting agencies not strict liability, but an affirmative duty to take reasonable steps to assure that the information in a consumer report is correct. Section 607(b) provides that "[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."

While the legislative history and the statute itself shed little light on the meaning of the words "reasonable procedures to assure maximum possible accuracy," it is clear that Congress intended to mandate something more than the use of some care to avoid inaccurate reporting, and something less than a duty to achieve absolute accuracy or even "maximum possible accuracy" in every report. We construe Section 607(b) to require reporting agencies to do whatever is reasonable under the circumstances to minimize the chances that consumers will be harmed by inaccurate reporting. If

⁹ "Adverse information," as used in this opinion and in the order, means information which may have, or may reasonably be expected to have, an unfavorable bearing on a consumer's eligibility or qualification for credit, insurance, employment, or other benefit, including information which may result, or which may be reasonably expected to result, in a denial of or increased costs for such benefits. (See RPF 1(h).)

an agency employs a procedure which does not offer the best assurance of producing the most accurate reports, it ought to have a strong justification for doing so. [8]

With some qualifications, we uphold the judge's findings that respondent has failed to meet this duty.¹⁰

1. Pressures To Develop Adverse Information

The complaint alleged that respondent has imposed quotas which "require or compel" its investigative personnel to prepare a "certain proportion" of reports containing adverse information. According to the complaint, these alleged quotas "have the tendency and capacity to promote incomplete or inaccurate reports." Because of Congress' concern about the serious damage which the misreporting of adverse information can inflict on consumers, we should be skeptical of any procedure which may induce employees to falsify, unduly emphasize, or exaggerate adverse information.

While the complaint implicitly asserted that quotas for the production of adverse information are inherently incompatible with the rigorous standard prescribed by Section 607(b), the ALJ found unreasonable only the particular system used by respondent. Respondent appeals from Judge von Brand's conclusion that its system was not reasonable, and complaint counsel appeal from the judge's failure to decide that such quotas are inherently unlawful.

The parties agree that respondent has conducted "quality audits" of the reports prepared by its branch offices and that these audits have included measurements of each office's production of "declinable" information (adverse information which might cause an insurance company to decline an underwriting application or to fail to renew an existing policy) and "protective" information (adverse information which might cause an insurer to charge a higher premium). (ID 281-82, 294-95; RPF 754(a), (b))¹¹ In 1975, respondent altered the audit procedure so as to obtain regional rather than individual office results and, the following year, it stopped auditing protective and declinable information. (ID 297)

Before these changes were implemented, however, branch offices were ranked into upper, middle and lower third positions according [9]to how their current performances in producing protective and declinable information compared with those of all other branch offices during the preceding year. (ID 305) This ranking created

¹⁰ We agree with respondent that complaint counsel had the burden of proving their case by a preponderance of the evidence. See, e.g., *Leonard F. Porter, Inc.*, 88 F.T.C. 546, 627 (1976). Respondent has acknowledged that the ALJ understood complaint counsel's evidence was to be tested by this standard. (Transcript of Oral Argument 16)

¹¹ Besides measuring protective or declinable information, auditors would attempt to determine whether the reports under review satisfied respondent's standards for completeness and for clerical accuracy.

pressure on respondent's employees. The judge found that "[t]here was considerable rivalry among respondent's offices, and everyone wanted to be at the top of the performance category in terms of all phases of branch office performance measured by quality audits, including production of declinable information," although "[s]ometimes a Regional Vice President was satisfied with performance in the middle third." (ID 311 & n.101)

The ALJ determined that, in the quality audits, too few reports were sampled to permit a valid survey of the performance of the individual branch offices (ID 335-36; ID p. 239),¹² and respondent does not challenge that finding. Nor does respondent question the finding that the same percentage of adverse information could not be expected from each office "because of differing geographic as well as economic and social factors." (ID 332)

Respondent does appeal, however, from the ALJ's finding that the quality audits and the subsequent rankings of offices impliedly set quotas for the production of unfavorable information. (ID 343) Respondent describes the audits simply as a training tool designed to improve the quality of its reports and asserts that it did not impose sanctions upon field representatives or "significant" sanctions upon branch office managers who failed to develop adverse information. (RAB 61-62)¹³

We need not decide whether, as the ALJ found, the pressures created by respondent's quality audits may properly be characterized as "quotas," implicit or explicit.¹⁴ The quality audits clearly resulted in the setting of objectives which field representatives [10]were expected to meet in order to assure that their offices would score well in the audits. The audits placed a premium on the production of adverse information and induced employees to prepare reports which contained inaccurate adverse information.

Contrary to respondent's contentions, the record clearly shows that respondent used the audit results for purposes other than simply identifying candidates for additional training. The amount of bonus money received by a branch office manager was based in part on audit performance,¹⁵ and the performance of the field representa-

¹² Some of respondent's own managers, including regional vice presidents, expressed doubts that the audit data were necessarily representative. (ID 331)

¹³ Related to this assertion, the judge found that "[t]he record does not demonstrate an overall pattern of overt sanctions such as firings or the withholding of salary increases or promotions as penalties for the failure to achieve specific levels of protective/declinable information." (ID p. 238)

¹⁴ Respondent argues that the audit system could not impliedly have set a quota because the ALJ did not, and could not, state what the quotas are. The record, however, is replete with references to specific objectives which were communicated to respondent's employees. (*E.g.*, ID 319; Tr. 1761-62)

¹⁵ Respondent asserts that

it is true that performance on home office audits was one factor taken into account in determining a

(Continued)

tive in the quality audits was "one factor among several" considered by the branch managers when they made their salary recommendations. (ID 312-13)

The significance of the quality audits to respondent's managers is indicated by evidence that they took steps to pressure employees to produce enough adverse information to permit their offices to score well in the audits. The manager of one office informed his field representatives that " * * * until such time as each individual met the declinable objective [for two types of reports] * * * there would be no salary increases for any [11]members of the unit." (ID 319(c))¹⁶ Investigative personnel were made aware that they were expected to obtain the specified amounts of protective and declinable information. (*E.g.*, Tr. 1761-62, 1845;¹⁷ ID 319, ID p. 239; *see* RPF 770.) A supervisor in another of respondent's branch offices was placed on probation because of management's judgment that his unit's production of declinable information was too low. (ID 319(h); RX 446B)

Respondent's higher level management brought pressure to bear on lower level management, usually branch managers, to achieve high audit scores (ID 299, 318),¹⁸ and branch managers, [12]in turn,

manager's bonus (ID at 238), but it was a minor factor that might or might not affect a given bonus (RPF 407-13), and some managers either were not even aware that it was taken into account or considered it an insignificant factor. (RPF [sic] 774c)

RAB 61 n.56. While performance on the quality audits was just one of several factors, we cannot find that it was sufficiently "minor" that it would not induce a manager to attempt to score well on the audits. In any case, the combination of incentives (such as the managers' bonus) and disincentives clearly induced many employees to take the quality audits seriously, and to conclude that they were expected to produce at least the specified amount of protective and declinable information.

Nor can it be very helpful to respondent's case that "some managers either were not even aware that it [performance on home office audits] was taken into account or considered it an insignificant factor." (RAB 61 n.56) (emphasis added)

¹⁶ Contrary to respondent (R. Ans. 54), we believe the ALJ properly relied on the memorandum (CX 1283A) cited in the finding despite complaint counsel's failure to call its author as a witness. Because the document speaks for itself, it was not complaint counsel's burden to proffer testimony as to its meaning.

¹⁷ Even though respondent called a number of current and former employees who testified that they were unaware of pressures to produce adverse information, the ALJ was entitled to find that the pressure existed. That not all employees may have been aware of, or affected by, the pressures is not inconsistent with a finding that other employees were pressured to produce the requisite amount of adverse information. Indeed, the documentary evidence cited by the ALJ requires such a finding. (ID 319)

The ALJ found the testimony of these witnesses, and that of most of the other former employees called by complaint counsel, credible as to the shortcuts they took to meet their production quotas. (ID pp. 287-88) We find no basis to accord their testimony less weight on the issues of whether pressures were imposed on them to produce adverse information and the effects of any such pressures on the manner in which they prepared their reports.

We have been presented no persuasive reasons by either complaint counsel or respondent to upset the careful credibility determinations made by the ALJ as to the various witnesses called in this case.

¹⁸ For example, one Regional Vice President told his managers:

All of us naturally would like to be furnishing customers with a service that ranks above other offices and other regions. All of us would like to be in the top third as we measure an office and region.

CX 1127A.

Another Regional Vice President expressed his dissatisfaction with the performance of one of the branches in his territory:

(Continued)

transmitted that pressure to their field representatives. A rivalry developed among branch offices and among regions to outdo each other in the audits. (ID 311)

In light of these findings, we are not troubled by the absence of an overall pattern of overt sanctions applied to employees who produced "unsatisfactory" amounts of adverse information. Incentives, like sanctions, are designed to influence behavior, and the incentives employed by respondent, together with the more subtle sanctions, impressed upon many field representatives and their supervisors the importance of ranking high in the quality audits.

The ALJ found that the audit procedure had the potential "to adversely influence report writing * * * ." (ID p. 239) The record supports this conclusion. For example, the record includes evidence of the efforts of one manager to teach field representatives to phrase adverse information in a forceful manner. A memorandum written by this branch manager to one of his suboffices urging the omission of qualifying phrases such as "it is believed" and "sources believe" (CX 1565A) was designed to strengthen the impact of the adverse information which was discovered, thus increasing the branch's production of declinable information. (ID 329(b))¹⁹ The goal, according to the manager [13] of the Albuquerque branch office, was to "put the decline across," that is, to transform what would otherwise merely be "protective" information into "declinable" information. (ID 329(a))²⁰ We agree with the ALJ that when the goal is "maximum possible accuracy," it is not reasonable to discourage the qualification of adverse information the certainty of which is in doubt, and that respondent's quality audits had this impermissible effect.

Additionally, the evidence shows that some management personnel urged lower level managers and field representatives not to

*I know you and your people are going to be disappointed with the Declinable of 5.4% in the second round analysis * * *, but I also know that the personnel in Albuquerque will immediately set about to make sure the next round analysis will reflect only upper third rankings in all categories!*

CX 772 (emphasis added).

¹⁹ Respondent contends that the point of the memorandum was not to eliminate qualifying information from reports when that qualifying information was needed to make the report accurate (RAB 64-65), but was, instead, simply a product of the manager's view that "if a source stated to a field representative that he was not certain that an individual was involved in an accident, but that he believed he was, that would not be a satisfactory basis for submitting the report." (RAB 64) We reject respondent's construction of the document. The memorandum, while urging elimination of these qualifying phrases, says nothing about omitting from reports information about which the source is uncertain. Moreover, although this communication states that these qualifying phrases "tend to disturb the confidence of the underwriter in our report," a concern which could well be unrelated to an interest in ranking high in an audit, a subsequent memorandum to the Regional Vice President, quoted in ID 329(a), supports the ALJ's inference that the suggested omission of the phrases was designed to increase the office's production of declinable information.

We are, therefore, not persuaded by the testimony that these instructions were simply part of an effort "to provide as concise and accurate [a] report as we could, and our effort was to eliminate unnecessary words and unnecessary phrases." (Tr. 11819)

²⁰ The ALJ properly was unpersuaded by the explanation offered by the author. (Tr. 11823-29)

report information which would tend to negate derogatory information discovered during the course of an investigation. A Regional Vice President, for the sake of improved audit performance, wrote to a branch office manager that “[o]ne of the biggest problems” contributing to the office’s placement in the lower third of all offices in one of the audits

was that when your people would develop declinable information it was worded in such a way that its effectiveness was decreased. These were usually such comments as[:] “[t]his is the only known instance known instance of driving while intoxicated[”] or that the subject had stopped drinking completely three months ago and was now reformed.

ID 330. [14]

A former field representative testified that, to reach his prescribed level of declinable information, he would attempt to make it appear that an “excessive” drinker drank “a little more than he actually did.” Where sources could not report how often the person had been seen drinking, the field representative would fabricate a number. (Tr. 1782)²¹

Despite this evidence, respondent complains that the record does not include any reports in which adverse information was falsified. (RAB 59) However, in view of the testimony and the [15]written instructions cited above, we do not find this shortcoming fatal. The record demonstrates that field representatives, in their effort to meet the objectives inspired by the quality audits, have been instructed, in effect, to misreport adverse information. We recognize that proof that a challenged procedure has consistently yielded reports free of inaccurate adverse information would shake a claim that a procedure is unreasonable. Similarly, proof that its use has resulted in inaccurate reporting would bolster a claim that it is not a “reasonable procedure to assure maximum possible accuracy.” Cf.

²¹ With respect to the credibility of this witness, see note 17 *supra*. The testimony of the former employee’s office manager, Mr. Yox, cited by respondent (Tr. 8491–93; RPF 775(c)(1)), does not refute Mr. Crepeau’s testimony quoted in the text that he was induced to exaggerate information. Mr. Yox disagreed with Mr. Crepeau’s testimony that the former field representative had once rewritten a report after an earlier version had been returned to him with instructions that it be worded more strongly. (Tr. 1783, 8491–92) Mr. Crepeau, however, did not testify that the practice mentioned in the text was induced by these purported instructions.

Nor is there a direct conflict between Mr. Crepeau’s testimony that instructions he received from his manager to “pick up on [his] declines * * * and protectives” affected how he wrote his reports (Tr. 1762) and the testimony of his manager that he did not “expect” Mr. Crepeau to produce a “specified percentage” of declinable and protective information. (Tr. 8490) The former manager testified that he informed his field representatives of the results of the quality audits (Tr. 8490) and Mr. Crepeau may well have inferred from these communications that he was expected to produce more adverse information, whether or not his manager intended to communicate such an expectation.

As noted by respondent, numerous current and former employees testified that the system did not affect the way in which they prepared and wrote their reports. Indeed, some of complaint counsel’s witnesses so testified. However, we do not find fault with respondent’s procedure because it caused widespread distortion of adverse information. Our conclusion that it did not meet the test set by Section 607(b) is based on the incentives it created for those employees who were either unable or unwilling to make the effort necessary to reach the objective without exaggerating or distorting the information uncovered by their investigations.

Bristol-Myers Co., 85 F.T.C. 688, 743 n.9, 745 (1975); *Coca-Cola Co.*, 83 F.T.C. 746, 809 (1973). However, in view of the difficulties of locating reports containing inaccurate adverse information, regardless of whether such reports exist, and of proving the causes of the inaccurate reporting, we do not believe that the record need contain actual inaccurate reports to sustain a ruling that respondent's procedures were not reasonably designed to assure maximum possible accuracy and conclude that the procedure was inconsistent with Section 607(b).

Indeed, as we have already observed, Section 607(b), rather than prohibiting inaccurate reporting, imposes upon reporting agencies an affirmative obligation to follow "reasonable procedures to assure maximum possible accuracy." It is the failure to follow reasonable procedures, and not the production of inaccurate reports, which violates Section 607(b). We are aware of nothing in the legislative history or the text of the statute which supports respondent's assertion that a reporting agency may not be liable under Section 607(b) unless a challenged procedure is shown already to have resulted in some inaccurate reporting.²²

Respondent correctly observes, however, that several courts have declined to consider claims that reporting agency procedures failed to meet the standard established by Section 607(b) absent a showing that an inaccurate report had been produced. Our analysis of this issue, however, is not greatly assisted by [16]decisions rendered in private FCRA lawsuits brought by consumers seeking damages for noncompliance with the statute. In private damage actions, it is not surprising that courts will be unwilling to resolve difficult liability issues absent evidence that the alleged violations have resulted in harm to the plaintiff.

The Commission's enforcement role is different from that of the individual consumer seeking to vindicate his or her own rights under the statute. The Commission is directed to treat a violation of any requirement or prohibition imposed by the FCRA as a violation of Section 5 of the FTC Act. It is settled that specific injury need not be shown to establish that a practice is "unfair or deceptive" under Section 5, *see, e.g., Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir.), *cert. denied sub nom. MacKenzie v. United States*, 423 U.S. 827 (1975), and Congress has not expressed any intention

²² Under respondent's construction of the statute, liability could not be established even if on its face, a procedure would mandate the production of inaccurate adverse reports. For example, respondent would seemingly argue that a quota system explicitly requiring each investigator to produce 10 adverse reports each day and, if necessary to meet the quota, to falsify adverse information, could not be challenged unless and until it could be shown that the procedure had actually resulted in the production of inaccurate adverse reports. Such a quota system, however, clearly would not be a "reasonable procedure to assure maximum possible accuracy," and on that basis alone would be a violation of the statute whether or not harm could be shown.

that the Commission be required to establish that an alleged violation of the FCRA has already injured consumers, even assuming Sections 616 and 617 require such proof in cases brought by consumers.²³

A procedure which encourages the production of adverse information is likely to lead employees to prepare their reports in a manner detrimental to the legitimate interests of the consumers about whom reports are written. This risk was realized in this case. Because we can hardly conclude that procedures which pressure employees to produce adverse information are necessary to the proper operation of consumer reporting agencies,²⁴ and are unaware of any justification for their use which would outweigh the risks which they pose, we find that they violate Section 607(b).²⁵

Although our analysis requires us to conclude that the ALJ was correct in holding that respondent's quality audit procedure violated Section 607(b), it also compels us to find that he erred in holding that the procedure was flawed only because [17]the audits were based on unrepresentative audit data and invalid comparisons among offices.²⁶ This error resulted in the entry of an order which fails to prevent the abuses which can be expected to result from any procedure placing a premium on the production of adverse information.

The judge reasoned that the methodological flaws had the effect of pressuring some employees, and the potential to pressure many others, to meet goals which, taking account of the special characteristics of the areas they worked, could not be met without their engaging in the practices we have described above. Nevertheless, while the flaws identified by the ALJ increased the likelihood that the system would result in inaccurate reporting, we believe that other systems which promote production of adverse information are likely also to be unreasonable.

Respondent has recognized that its employees vary in their abilities and their diligence. Its President and Chief Executive Officer, denying that the company has set specific quotas for protective or declinable information which should be developed "by a specific man or by a specific territory," testified that "[i]t has been a

²³ We should add that while Section 5 cases can be useful in construing the FCRA, we rely on our understanding of Section 607(b) in concluding that inaccuracy need not be shown. We need not rely on our authority under Section 5 "to arrest trade restraints in their incipency." *FTC v. Brown Shoe Co., Inc.*, 384 U.S. 316, 322 (1966).

²⁴ That such procedures are dispensable is supported by respondent's decision to discontinue auditing protective and declinable information. See p. 8 *supra*.

²⁵ This violation of the FCRA, and each of the other violations which we find in this case, is also an unfair or deceptive act or practice in violation of Section 5 of the FTC Act. FCRA, Section 621(a).

²⁶ See p. 9 *supra*.

widely accepted thesis that it [the amount of protective and declinable information] varied widely by line of service, by * * * man, by geography, by the type of the environment in which the reports were made and a lot of other factors." He also testified that

there has never been any feeling that there was that degree of uniformity on pertinent information by line of services, by territory and by individual.

So it would be unfair and inequitable to have a policy that would seek to develop some kind of a quota system or some kind of an average percentage of pertinent information * * *.

Tr. 5017-18, 5068.²⁷ [18]

Thus, as respondent recognizes, even if most employees can meet a given objective, that is, produce enough adverse information to qualify for a "reward" or avoid a "punishment," by using careful investigative techniques and accurately reporting the information they obtain, the less able, or less diligent, employee may not. These employees, like several of respondent's former employees, when pressed to produce an amount of adverse information which is suitable for other employees, may reasonably be expected to fabricate, exaggerate, or otherwise misreport.

We, therefore, agree with complaint counsel that the order should prohibit any procedure

whereby the performance of branch offices, regions, or other organizational units, with respect to the production of adverse * * * information is ranked against other organizational * * * units or individuals, or against previous performance by the same organizational units or individuals.

Proposed Order, ¶ II(7) (CAB 80). With some minor alterations, we will adopt this order provision.

We recognize, however, that it is not the surveys themselves which are unlawful, only the pressures their dissemination may be expected to create. Because we believe that rankings and other comparisons of performance are likely to create the kinds of pressures to produce adverse information which are demonstrated by this record, we believe their use should be prohibited, and so order. If respondent can develop a system of sampling which it believes will prevent the kinds of pressures shown on this record, it may, of course, move to modify the order.

Finally, we note respondent's objection to complaint counsel's

²⁷ The manager of one of respondent's branch offices, called by respondent, similarly testified that the percentages of protective and declinable information which field representatives will develop vary by the area they work (Tr. 8603; ID 333), and respondent has acknowledged that "field representatives have varying levels of experience and training * * * , [and] work in a variety of geographic areas * * * which have differing characteristics affecting the ease with which reports may be completed * * * ." (R. Ans. 48)

proposal that we prohibit it from "compelling or *inducing* its * * * personnel to complete or prepare a *certain* proportion * * * " [emphasis added] on the ground that the words "inducing" and "certain" are vague. (R. Ans. 58-59) We will instead prohibit respondent from rewarding or punishing, or representing that it will reward or punish, employees on the basis of the amount of adverse information they produce, or taking any action to encourage employees to produce any specified number, or proportion, of reports containing adverse information.²⁸ [19]

2. Production Quotas

The complaint also challenged respondent's imposition of a production quota which requires the field representative to complete a specified number of cases each month. Unlike pressures to produce adverse information, the production quota is not inherently inconsistent with the obligation imposed by Section 607(b).

The parties do not challenge the ALJ's description of the production quotas. Each full-time, salaried field representative is expected to meet a "production standard." The standard is set on a monthly basis and requires the field representative to produce reports which generate revenue exceeding his or her salary and expenses. The amount by which revenue must exceed salary and expenses is a product of the "reporting standard," which varies among the offices and according to the length of service of the particular field representative. Field representatives' monthly production standards are determined by dividing their salary and expenses by their reporting standard; the higher the reporting standard the less revenue the representative is expected to generate that month. (ID 109-11) Much of the evidence adduced at trial was directed to the question whether the company's reporting standards resulted in quotas requiring field representatives to produce so many reports that they were compelled to take shortcuts which sacrificed the accuracy of their reports.²⁹ [20]

²⁸ Thus, our order will not preclude respondent from distributing to field representatives information and statistics showing, for example, "the number of alcoholics in the population," (R. Ans. 59) so long as it takes reasonable steps to assure that the field representatives to whom these materials are sent are clearly informed that the materials are for information only and that they are not expected to produce any particular amount of adverse information.

Moreover, the order's prohibition against rankings of performance in producing adverse information (Order, ¶ I.D.) and against rewarding and punishing employees on the basis of the amount of adverse information they produce (Order, ¶ I.C.(1)) will not preclude respondent from *measuring* an individual field representative's production of adverse information and taking the employee's low production as a signal that the employee may be failing to investigate his or her cases carefully. Paragraph I.C. (1), however, would require that respondent base any adverse action against an employee on a determination that the employee is defaulting on his or her obligation to produce accurate rather than adverse reports.

²⁹ Management expects field representatives to meet their production standard on a quarterly basis, unless the failure can be justified by factors beyond the employee's control. (ID 114) Management also expects field

(Continued)

Although field representatives receive their normal compensation even if they fail to meet their production standard, the ALJ found that field representatives are aware of the existence of the standards, that managers of the branch offices have occasionally acted to enforce the standards, and that the standards have affected the manner in which some employees have done their jobs.³⁰

The ALJ held that use of the quotas violated Section 607(b) because "[a] substantial number of field representatives * * * were unable to complete the work in either the normal workday or workweek in accordance with Company procedures. They compensated for such inability by contacting unqualified sources, faking sources, misstating time coverage, hurrying through interviews, failing to ask a full range of questions, using the telephone in a manner not in accord with Company procedures, or working excessive overtime * * *." (ID 405)

Although the ALJ found that "[g]enerally field representatives did not fake sources in those instances where unfavorable * * * information was developed" (ID 402) and that "there is no evidence in the record of a report where *adverse* information has been falsified" (ID p. 243) (emphasis added), he concluded that the procedure was unreasonable; according to the judge, Section 607(b) does not distinguish between adverse and favorable reports. (*Id.*)

Respondent first challenges the ALJ's finding that a substantial number of employees have been unable to meet their [21]production requirements without resorting to shortcutting techniques. Judge von Brand relied principally on the testimony of 16 former employees called by complaint counsel. He found unpersuasive respondent's proof, including several statistical studies and the testimony of a number of present and former employees that they were able to meet their production quotas.

We affirm the ALJ's findings as to the credibility of complaint counsel's witnesses.³¹ We also find that the testimony offered by these witnesses demonstrates that a substantial number of employees could not meet their quotas without "cutting corners." Testimo-

representatives to prepare their reports in accordance with "Time Service" objectives which require that an office, within a set time after receiving a request for a report, complete it and mail it back to the requesting customer. Branch managers have been told that "[t]ime is an essential and marketable element of our business" and records have been maintained to measure an office's performance. (ID 348, 352)

Although part-time field representatives are compensated on the basis of the number of reports they actually produce (ID 130) and, accordingly, are not expected to produce a certain number of reports to justify their salaries, a part-time employee might "cut corners" in order to produce enough reports to meet Time Service objectives. (ID 384)

³⁰ One branch office manager testified that he might give a field representative who falls behind the production standard "a boost or a kick and possibly assign him an extra case per day or whatever it will take, whatever is necessary to bring him into the black." (ID 347)

³¹ See note 17 *supra*.

ny by other witnesses that *they* could meet *their* quotas does not undercut this limited finding; nor is it rebutted by the statistical evidence offered by respondent showing, at most, that the *typical* field representative could work enough cases to meet his or her quota.

Respondent also challenges the ALJ's holding that a procedure which does not promote the production of inaccurate reports containing *adverse* information about consumers nevertheless can properly be found to violate Section 607(b). We find respondent's argument persuasive. The expressions of congressional purpose behind the FCRA clearly demonstrate that the statute was intended to curtail the reporting of inaccurate *adverse* information.³²

The ALJ found little evidence that the production quotas increased the production of reports containing inaccurate adverse information. We agree that evidence of such an effect is scant, [22] but for the reasons stated earlier, *see pp. 14-15 supra*, do not consider the amount of evidence of actual harm dispositive. Rather, we must examine the incentives which respondent's practice is likely to create. Here, there is evidence, presented by complaint counsel's own witnesses, showing that, while field representatives often took shortcuts in reporting *favorable* information (for example, by misreporting the number of sources whom they had contacted),³³ they were careful not to fake adverse information. (*E.g.*, Tr. 316, 1837) We suspect the reason is that field representatives knew they were more likely to get caught faking unfavorable information.

The FCRA permits the consumer to learn the "nature and substance" of the information in his or her file and requires reporting agencies to reinvestigate information disputed by the consumer. It is apparent that field representatives, absent overriding pressures, such as those created by the audits, are deterred from

³² See pp. 6-7 *supra*. The concern about preventing harm to the subjects of reports is also reflected in the statement of purpose which accompanied the statute:

It is the purpose of this title 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 * * *.

FCRA, Section 602(b) (emphasis added).

Section 602(a)(1), recognizing the banking system's dependence upon accurate credit information, should be read in conjunction with Section 602(b) and the legislative history; it, therefore, does not persuade us that this consumer protection measure was designed to proscribe procedures which are not likely to harm the consumer about whom a report is written.

³³ We do not mean to suggest that this is necessarily a good result. The individual about whom an overly favorable report is written may or may not benefit, but the businesses which depend on accurate information may be harmed, and consumers as a group may be required to subsidize the bad risks who are extended credit or insurance. However, there is little reason to doubt that the customers of reporting agencies can protect themselves against the harm resulting from excessive under-reporting of adverse information.

falsifying adverse information, because reports containing such information are more likely to be challenged and reinvestigated.³⁴ The supposed failure of evidence with respect to the pressures to produce adverse information, *see* p. 14 *supra*, was not inconsistent with a finding of a violation of Section 607(b); nevertheless, our understanding of the reason for the lack of evidence of harm flowing from the production quotas—and the corroborative testimony offered by complaint [23]counsel's own witnesses—requires us to conclude that the production quotas do not violate Section 607(b).

We recognize, however, that there are some risks inherent in the combined imposition of production quotas and pressures to produce adverse information. The combination of production quotas and pressures to produce adverse information has the potential to encourage the preparation of a larger number of reports containing adverse information than would be completed absent these combined procedures.³⁵ The development and confirmation of adverse information is generally more time-consuming than the development of favorable information (ID 375), at least when care is taken to ensure that the information is accurate. Accordingly, there is a substantial risk that employees, pressed simultaneously to do more work and to prepare more reports containing adverse information, will be induced to save time by reporting adverse information which they have either faked, exaggerated, or failed to confirm.

We are sensitive, however, to the fundamental needs of firms to promote productivity and we do not lightly curtail such efforts. Since production quotas, at most, may exacerbate the evil inherent in the imposition of pressures to produce adverse information, this risk will obviously be dissipated by our prohibition of the imposition of such pressures. We are not persuaded of the need for additional relief.

3. Production Credit and Compensation for Reinvestigations

Complaint counsel appeal from the ALJ's dismissal of the com-

³⁴ It is respondent's policy to fire employees who are found to fabricate report information. (ID 407) Although the ALJ found that the production quotas have induced employees to take shortcuts other than fabricating sources and other report information, such as "hurrying through interviews" and "using the telephone in a manner not in accord with Company procedures," (ID 405; p. 20, *supra*) there has been no showing that these shortcuts would likely induce the misreporting of adverse information. (As to the use of the telephone, *see* pp. 80-81 & n.107-08.)

It does not appear that the kind of distortion or exaggeration likely to be induced by the pressures to produce adverse information, discussed at pp. 12-14 *supra*, is generally a firing offense.

³⁵ The production quotas require employees to produce more reports than they might otherwise. The adverse information pressures induced employees to see to it that specified percentages of all of the reports they prepared included protective or declinable information.

plaint's challenge to respondent's alleged policy of paying or crediting³⁶ a field representative for a reinvestigation conducted pursuant to Section 611 of the FCRA³⁷ only if the reinvestigation [24] proves that the employee was correct in the initial investigation. Complaint counsel contend that the policy provided field representatives an incentive to try to prove they were right the first time and, therefore, discouraged the correction of errors in the original report. We affirm the ALJ's dismissal of this claim. Field representatives handle only a few reinvestigations each month and there has been no showing that the loss of the few production credits or the small amount of compensation involved would provide employees a meaningful incentive to conduct inadequate reinvestigations or to misreport the results.³⁸

Indeed, a field representative could be expected to fear that any misreporting of the results of a reinvestigation would be detected by the consumer whose dispute of the original information triggered the reinvestigation. Although the prospects of detection are uncertain, we doubt that the modest incentive to falsify information afforded to the investigator by the challenged procedure would offset the risk of his or her being caught by a consumer who has already complained about the information in question and who might be expected to be skeptical about the results of the reinvestigation.³⁹ Therefore, we find that the procedure [25]is consistent with Section 607(b).⁴⁰

³⁶ Only part-time field representatives are paid on the basis of the number of reports they prepare. Full-time field representatives are salaried but are expected to meet the production standard described at p. 19 *supra*. At issue here is respondent's alleged failure to compensate the part-time field representatives and to give the full-time employees production credits for their reinvestigations when the original report is found to be inaccurate.

³⁷ The reinvestigation requirement is described at pp. 42-47 *infra*.

³⁸ If the compensation system could be expected to affect the manner in which field representatives conducted their reinvestigations and worded the results, it could also be expected to provide them an incentive to do an accurate job in the first place.

Although complaint counsel offered a few examples of misreporting which may have occurred as a result of the procedure, this scanty evidence does not convince us that the procedure is unreasonable. Although a few *law violations* are sufficient to warrant issuance of an order, *see* p. 33 *infra*, here, the alleged law violation is the use of an unreasonable procedure. That a procedure may induce a handful of employees to produce inaccurate reports does not establish that the procedure itself is unreasonable. Proof of some inaccurate reporting is neither essential nor necessarily sufficient to sustain a finding of a violation of Section 607(b). *See* p. 15 *supra*.

For this reason, although we affirm the final sentence of finding 507 that "[t]here is insufficient detail * * * in this record to determine that a pattern of inaccurate reporting has taken place by virtue of such compensation procedures," we do not believe that this lack of evidence would, by itself, preclude a finding of violation.

³⁹ The ALJ found that the impact of the failure to provide production credit or compensation may be especially great "in those areas involving subjective judgment on the part of the field representative * * * where differences of opinion are possible, [and] there would be a tendency to deny the consumer the benefit of the doubt * * * ." (ID 507) He correctly found, however, that in such cases, it is respondent's policy generally not to assign a reinvestigation to the field representative who conducted the original investigation. (ID 496) In any case, the impact of the practice of denying credit or compensation has not been shown sufficient to affect the conduct of the reinvestigation.

⁴⁰ The ALJ understood that the case had been presented to him on the theory that the interaction of various company procedures and policies, such as the production quotas, time pressures on field representatives, the methods by which employees are compensated, and the inducements to produce adverse information, could result in the misreporting of consumer report information. (ID p.233) On appeal, however, complaint counsel have elected essentially to challenge separately the reasonableness of the various procedures and have not attempted to show

(Continued)

4. Health and Arrest Information

Complaint counsel attempted to prove at trial that the collection of health and arrest information from lay sources, that is, neighbors and other acquaintances who do not have formal training or professional experience in assessing people's health or the nature of their contacts with the criminal justice system, is inconsistent with respondent's obligation to follow reasonable [26]procedures to assure maximum possible accuracy. The ALJ found that the record does not support complaint counsel's claim.

Reliance on lay sources for such technical and sensitive information is highly troublesome.⁴¹ Indeed, the Privacy Protection Study Commission has observed that "[c]ollection of such technical information [i.e., health information that only a professional is competent to report] from anyone other than the individual himself, a medical source, or a close family member invites inaccuracies." U.S. Privacy Protection Study Commission, *Personal Privacy in an Information Society* 178 (1977). The reporting of arrest information and other information about an individual's criminal record raises the same concerns.

Nevertheless, with the limited attention that was directed to this issue at trial and in the briefs filed with the ALJ and the Commission, we cannot conclude that the manner in which respondent has relied upon lay sources is incompatible with Section 607(b).⁴² Indeed, basic common sense would suggest that, in certain instances, neighbors and other acquaintances are capable of being reliable sources for information about a person's health or criminal record. Their reliability might depend on a variety of factors, including the kinds of information they are reporting, *their* sources (first-hand observation, the applicant, members of the applicant's family, as opposed to mere gossip) and any biases which may affect

how the procedures, in combination, risk the misreporting of information. (Of course, time pressures and the method by which field representatives are compensated are part and parcel of their challenge to respondent's production quotas.)

We have not ignored the possible interaction of these policies and procedures, e.g., p. 23 *supra*, but conclude that, whether viewed separately or in juxtaposition with the other challenged procedures, the production quotas and the method of compensating employees for reinvestigations have not been shown to violate Section 607(b).

⁴¹ A person may display symptoms entirely unrelated to the illness or injury to which a lay witness may ascribe them— for example, a person may appear drunk when suffering from a diabetic reaction. Similarly, the occurrence of an arrest may inaccurately be inferred from actions which in themselves lack any legal significance, such as the person's entering a police cruiser in the company of law enforcement personnel or a police officer's presence at the person's house for reasons unrelated to criminal law enforcement.

⁴² Respondent appears to acknowledge that official records are the most reliable source of information on an individual's criminal record. (R. Ans. 24) Failure to confirm such information through official records in those cases where they are available could not be part of a reasonable procedure to assure maximum possible accuracy. Complaint counsel have not satisfied their burden of proof that respondent has failed to instruct field representatives to confirm this information through official records, where available, or that the representatives have not complied with the company's instructions.

the credibility of either the informant or [27]the informant's sources.⁴³ Here, we do not have a record which permits us to define, with any precision, the circumstances in which lay sources may not properly be used, to determine whether respondent has in fact depended upon lay sources in those circumstances, and even if we could find that it had, to fashion a meaningful remedy.

Despite our concerns about the use of lay sources, we cannot find a violation on the basis of this record and therefore affirm the ALJ's findings.

B. Refusals To Disclose Files to Consumers and To Reinvestigate Disputed Information

The complaint contains a number of allegations concerning the respondent's duty to disclose information to consumers and its concomitant responsibility to reinvestigate disputed information and correct inaccuracies. In enacting the FCRA, Congress recognized that, no matter how careful consumer reporting agencies are to avoid error, some inaccuracy is inevitable. As Senator [28]Proxmire noted when the consumer credit bill was introduced in the Senate:

It would be unrealistic to expect credit reporting agencies to be absolutely correct on every single case. But it seems to me that consumers affected by an adverse rating do have a right to present their side of the story and to have inaccurate information expunged from their file. Considering the growing importance of credit in our economy, the right to fair credit reporting is becoming more and more essential. We certainly would not tolerate a Government agency depriving a citizen of his livelihood or freedom on the basis of unsubstantiated gossip without an opportunity to present his case. And yet this is entirely possible on the part of a credit reporting agency. 115 *Cong. Rec.* 2412 (1969).

Therefore, besides mandating the use of "reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom a report relates," Congress imposed a variety of procedural requirements intended to enable consumers to

⁴³ A reasonable procedure to assure the maximum possible accuracy of this information would, at the very least, attempt to ensure that field representatives do not rely on lay sources when, because of the sources' own particular limitations, or the nature of the information being reported, the sources are unlikely to be reliable. Field representatives should not be expected to make these judgments on an *ad hoc* basis; a consumer reporting agency which was interested in preventing the misreporting of such sensitive information would at least provide its employees with instructions which would guide them in making these difficult judgments.

This case was not tried on the theory that respondent failed to meet this obligation, but we wish to emphasize that we take no comfort from the instruction quoted by the ALJ, at ID 517, which provides in part:

when reporting * * * [arrest] information [and local police records are unavailable], put it in the same language as we developed it, such as "there is talk in the community that your subject has had police difficulties, but police records are not available to verify this information."

Such an instruction can hardly suffice to alert field representatives to the factors they should consider in assessing the reliability of a source's account of such vague, and potentially damaging, information.

identify and correct inaccurate information. We agree with the comment that a major goal of the FCRA "is the creation of a system of 'due process' under which consumer subjects may learn of adverse reports, be confronted with the information therein, and be able to correct or supplement false or misleading entries." Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability*, 76 *Colum. L. Rev.* 458, 466 (1976).

Compliance with the consumer disclosure, reinvestigation and correction provisions of the statute is fundamental to achievement of Congress' goal of assuring "maximum possible accuracy" in consumer reports. For the scheme to work, however, consumers must have ready access to the information, for disclosure is the trigger for the other corrective provisions. Additionally, in enacting the FCRA, Congress intended not only to prevent consumer reporting agencies from flatly refusing to disclose information to consumers, but also to bar the use of more subtle techniques to achieve the same end.⁴⁴ [29]

While the record shows that respondent has, commendably, gone beyond the requirements of the Act in some respects,⁴⁵ it also shows that respondent's employees have engaged in violations of the statute which warrant an order to cease and desist.

1. Failure To Disclose "Nature and Substance" of Information in Respondent's Files

Section 609 of the FCRA requires consumer reporting agencies, upon request and proper identification, to disclose to the consumer the "nature and substance" of all information (except medical information) in its files on the consumer at the time of the request, the sources of the information,⁴⁶ and the recipients of any report on the consumer which the reporting agency has furnished for employment purposes within the two-year period preceding the request, and for any other purpose, within the six-month period preceding the request. The complaint alleged that respondent has violated Section

⁴⁴ The Senate report illustrates these concerns:

Credit bureaus sometimes build roadblocks in the path of the consumer. For example, the credit bureau industry trade publication, in frankly discussing this problem, states that some bureaus discourage consumer interviews "by placing a nuisance charge on the investigation, or merely placing the date of the interview as much as 2 weeks away."

S. Rep. No. 91-517, *supra*, at 3.

⁴⁵ The record shows, for example, that since June 1974, it has been respondent's policy to provide consumers who visit its branch offices visual disclosure of their files. (RX 576 A-E) Since October 1976, it has also been respondent's policy to supply copies of reports to consumers after they have had visual access or, in the case of telephone disclosure, on a subsequent visit to the office. (Copies are normally furnished, however, only if the consumer agrees with the report.) (RX 122A, C-E) In addition, the record shows that respondent sometimes waives the payment by the consumer of the disclosure fee authorized by the statute. (ID 560)

⁴⁶ A consumer reporting agency may refuse to disclose investigative sources.

609 by failing to make full and accurate disclosures to consumers upon request.

The ALJ found that respondent's practice varies among offices. While employees in some offices have gone beyond the statutory requirements and provided *verbatim* disclosures, in others, they have disclosed "a summary or paraphrase of the report" or "only the part of the report which the discloser 'assumed was the factor' that [30] had caused the consumer to be rated or denied insurance * * *." (ID 541)⁴⁷

Moreover, "[i]n practice, some field personnel, while purporting to give the nature and substance of reports, failed to give adequate or complete disclosure." (ID 542) Important omissions from the disclosures included references to various consumers' being "said to be a fast and careless driver," having a drinking problem, and having "questioned" morals. (ID 543, 547)

The judge also found that some employees paraphrased or summarized items "in such a way that the full meaning, and in some cases, the derogatory tone of the report, was not conveyed to the consumer." (ID 551) For example, one consumer was told that, according to her report, she "had recently had a run-in with [her] former husband, a severe one," while the report actually stated that she had been assaulted by her husband and incurred 22 stab wounds as a result. (ID 553)

Respondent argues that, in many of the instances of incomplete disclosures relied on by the ALJ, the evidence is insufficient to support the finding of a violation. (RAB 80) We believe, however, that the omissions and dilutions of derogatory information found in this record are violations which go to the heart of the Act's procedural scheme.⁴⁸ Such practices are totally [31]inconsistent with

⁴⁷ We are not persuaded, as claimed by complaint counsel, that respondent's management instructed its office personnel to tone down or omit from disclosure derogatory information contained in the reports.

⁴⁸ Respondent challenges several of the findings of incomplete disclosure. We affirm each of the challenged findings, except for ID 544, 552 n.208, and ID 550. The witnesses cited in the first two findings testified that they had inquired why their policies had been canceled or denied. Respondent was under no duty to disclose information which, for all we can tell from the record, did not contribute to the insurer's decision. As noted at p. 32 *infra*, a consumer who requests disclosure of his or her file or of a report is entitled to more than a reading or a paraphrasing of the portions which respondent's staff believes relevant to the particular adverse action which prompted the consumer's inquiry, and the reporting agency may not assume that a consumer who requests disclosure of his or her file is only interested in why a particular adverse action was taken. There is no reason, however, to require disclosure of the entire file when the consumer plainly expresses an interest in only a portion of it. ID 550 was apparently based on a mistaken belief that the consumer's testimony was rebutted. (ID 550 n.207) Because it was contradicted by one of respondent's witnesses (Tr. 8336-37) and the ALJ has made no assessment of the relative credibility of the two witnesses, we will vacate this finding.

We are persuaded that ID 546 n.203 properly addresses the objections respondent raises to Mr. Smith's testimony.

The subsequent deletion of the information described in ID 552 is not inconsistent with the ALJ's finding that it was not disclosed. The consumer's challenge to the general information which was disclosed placed respondent on notice that she also disputed the more specific information which was not disclosed. That the general disclosure prompted this consumer to challenge its accuracy does not mean that the disclosure was adequate. Section 609 does

Section 609's mandate that, at the consumer's request, the reporting agency disclose the "nature and substance of *all* information * * * in its files at the time of the request." (emphasis added)

Section 609 should be interpreted, according to the House conferees, "to permit the consumer to examine all the information in his file except for sources of investigative information, while not giving the consumer the right to physically handle his file." H.R. Rep. No. 91-1587, 91st Cong., 2d Sess. 29 (1970).

When information is not disclosed, the consumer obviously cannot determine whether the information should be disputed. Similarly, when the discloser tones down adverse information in the file, the consumer is deprived of the opportunity to challenge the manner in which the agency has chosen to report it. If the FCRA's objective of curtailing the reporting of inaccurate information is to be achieved, consumers must be afforded an uncensored view of the information in their files.

Although we cannot conclude that the FCRA requires a reporting agency to allow consumers to inspect their files or to make *verbatim* disclosures of file information, if Congress' objective is to be achieved, the disclosures must be sufficiently detailed to enable consumers to question the accuracy of the information if they believe it is inaccurate. The omissions and dilutions shown in this record resulted in clear-cut failures to meet this standard. We recognize that the task of determining how detailed the disclosures must be may not be an easy one for a reporting agency's employees. Thus, while we will not require such a procedure, it may well be that the

not permit a reporting agency to guess whether a generalized disclosure will afford a consumer notice that the report may contain inaccurate or incomplete information. Similarly, ID 554 is not shaken by the fact that a reinvestigation was undertaken. In addition, the ALJ's finding is supported by the testimony of respondent's witness, who made the disclosures in question. As to ID 547 n.204, holding that respondent was under a duty to show that an undisclosed report was not in its files, we observe that complaint counsel established that, at the time the witness requested disclosure, a report was in existence. Since reports would customarily be found in respondent's files, see RPF 46, 46(b), the burden shifted to respondent to show that this consumer's report was not, in fact, somewhere in its files. It is immaterial whether the report was in the file of the particular office to which the witness directed her request for disclosure, since Section 609 plainly requires that, upon request, *the consumer reporting agency* must disclose the nature and substance of all information (except medical information) in *its* files. The term "file" "when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored." FCRA, Section 603(g).

We note that the parties disagreed at trial whether the report at issue in ID 549 was a "business report." (Tr. 3714-18) Respondent, however, has not challenged the ALJ's finding on appeal on the ground that the information was not disclosable as a business report.

We also reject respondent's assertions that several of the findings should be set aside because the information omitted from the disclosure was insignificant. See discussion *infra*. Nor is the possible inadvertence of the omissions material. In contrast to Sections 606 and 615, Section 609 does not provide for a defense of good faith. Cf. *Certified Building Products, Inc.*, 83 F.T.C. 1004, 1041-42 (1973), *aff'd sub nom. Thirt v. FTC.*, 512 F.2d 176 (10th Cir. 1975).

Finally, we reject respondent's challenges to several findings (e.g., ID 545-46, 548) insofar as respondent asserts that the ALJ erred in giving credence to a consumer witness' recollection. See note 17 *supra*.

most prudent way for respondent to ensure compliance with the Act will be to provide *verbatim* disclosure over the telephone⁴⁹ just as it [33]now allows consumers who visit its branch offices to observe the contents of their files.⁵⁰

Respondent argues that, assuming all of the ALJ's findings of individual violations are correct, they do not show that respondent has been guilty of such widespread violations that the entry of an order is justified. According to respondent, "[t]hese findings are based on only 13 alleged violations in 11 of respondent's more than two hundred branch offices." (RAB 79) The magnitude or frequency of prohibited activity, however, is not germane to whether the activity is, in fact, illegal, although it may be relevant to the nature of the relief. As we said in *Peacock Buick, Inc.*, 86 F.T.C. 1532, 1554 n.4 (1975), *aff'd*, 553 F. 2d 97 (4th Cir. 1977), "The facts that it was not respondents' general policy to misrepresent, and that in many cases there may have been no misrepresentations, do not in themselves negate direct testimony that in particular cases misrepresentation did occur." The same principle necessarily extends to other types of violations. We, therefore, will not excuse the incomplete disclosures shown in this record simply because, in other instances, perhaps even a majority of other instances, adequate disclosures may have been made.

We also uphold the ALJ's determination that respondent has discouraged disclosures by imposing conditions on disclosure, principally requesting the consumer to sign a form (CX 337) authorizing respondent to investigate any matter the consumer might dispute and authorizing "any business, organization, professional person or anyone else to give full information and records about" the consumer.⁵¹ Although the ALJ found that when consumers refused to sign the form, they were given disclosure anyway, an examination of the form satisfies us that consumers would have understood that they were required to sign in order to obtain disclosure. Since the statute does not authorize the conditioning of disclosure upon the signing of such an authorization, obliging consumers to execute this form, or inducing them to believe they were required to sign, amounted to a violation of the FCRA.⁵² [34]

⁴⁹ Several of respondent's witnesses testified that this is, in fact, their practice. (*E.g.*, Tr. 11081, 11671)

⁵⁰ In those instances where a reporting agency uses codes or other terminology in its reports which may otherwise be unintelligible to the consumer, disclosure of the "nature and substance" of information may require its employees to explain the information to the consumer; *verbatim* disclosures may not suffice. See FCRA, Section 610(c).

⁵¹ The practice was discontinued in 1974 or 1975. (ID 535 n.194)

⁵² Respondent argues that "[e]ven if signing the form was a condition, the Administrative Law Judge failed to explain why the consumer seeking disclosure has a legitimate right to withhold the permission to reinvestigate disputed information." (RAB 85 n.82) Although the reporting agency is under a duty to reinvestigate information which the consumer disputes, a consumer might well have legitimate reason to refuse to allow respondent access to

(Continued)

Finally, we affirm for the most part the ALJ's findings that in some instances respondent's personnel have engaged in outright refusals to make disclosure.⁵³ These findings, together with the [35] findings that respondent has imposed improper conditions upon disclosure and made incomplete disclosures, warrant the order provisions prohibiting respondent from failing to provide the "nature and substance" of the information in consumers' files so long as they meet the conditions set forth in Sections 609 and 610. We are not, however, persuaded by complaint counsel that we should require respondent to provide consumers with actual copies of their reports upon request.⁵⁴

2. Failure To Make Disclosure of Claim Reports

A second element of respondent's alleged failure to comply with the FCRA's disclosure requirements involves non-disclosure of reports used by insurance companies to assess the validity of claims under policies, or "claim reports."⁵⁵ Complaint counsel argue that respondent's claim reports are disclosable for two reasons. The first is that respondent, at least for a time (ID 588, 594; RPF 977-78, 980, 986), filed its claim reports with its other reports, including consumer reports, in a single reference filing system and permitted

any and all information (including medical information) the agency might deem relevant to a reinvestigation.

The record also supports the ALJ's finding (ID 537) that respondent refused one witness' request for disclosure unless he first obtained a "written authorization" from his insurance company. (Tr. 3110-11) Respondent has not offered any support for its assertion that the consumer was refused disclosure simply because he refused to pay the charge permitted by Section 612 and to give written permission for disclosure to be made in the presence of a third party pursuant to Section 610(d). (See ID 531.)

⁵³ We affirm findings 529-33, but qualify our affirmance of finding 532 insofar as it implies that respondent was under a duty to disclose to consumer McCune information solely about his wife. We also do not affirm finding 530 to the extent that it holds that respondent was under a duty to disclose to a consumer who had asked why her insurance policy had been canceled information which could not have contributed to the cancellation. Respondent, however, was under a duty to disclose derogatory information in the report concerning the consumer's husband; this information appeared in a report which purported to be about the consumer and the information apparently was used to cancel her policy. (CX 133) This, accordingly, was "information * * * on the consumer" seeking disclosure. FCRA, Section 609(a)(1).

We also uphold the ALJ's finding that respondent's failure to advise the McCunes (or at least Mrs. McCune) that a report was being prepared or an investigation conducted "discouraged disclosure in a manner tantamount to refusal to disclose * * * ." (ID 533) As discussed at pp. 40-41 *infra*, conduct which falls short of an outright refusal may have the same effect. Informing a consumer who requests disclosure that no file exists, without disclosing that a file is being prepared or that an investigation is underway, may effectively foreclose disclosure unless the consumer persists in requesting disclosure or somehow later learns that a file has been prepared.

⁵⁴ Nor are we persuaded that we should upset the ALJ's conclusion that respondent's failure to disclose the identities of noninvestigative sources of information and recipients of reports, absent a specific request by the consumer, was consistent with Section 609.

⁵⁵ We do not understand respondent, at RAB 85-86, to challenge the ALJ's findings that respondent has actually failed to disclose claim reports in response to requests by consumers for disclosure. We note, however, that the ALJ did not hold that "respondent's position that claim reports, business reports, and some property reports are not subject to the disclosure requirements of the FCRA" itself violates the statute (RAB 85), but instead properly inferred from that position and respondent's own statement that "on some occasions, in order to accommodate consumers, claim reports have been disclosed," (RPF 810(a)) (emphasis added) that in other instances disclosure has not been made. (ID 559) According to the ALJ, respondent's "stated position and policy * * * demonstrates the violation." (ID p. 258 n.248) The ALJ also found two instances of failures to disclose and respondent has not challenged the validity of that finding. (ID 559 n.211)

access to both by employees whose job it was to compile consumer reports (other than claim reports). The second is that respondent allowed cross-use of claim and underwriting information, so that claim reports could be said to have been collected and used in whole or in part in the preparation of consumer reports. (C. Ans. 58-59) Thus, according to complaint counsel: [36]

Respondent's procedures result in a layering of information between underwriting reports and other reports to the point where it would be impossible for respondent to determine where a particular item of information was first obtained, in an underwriting report or some other report. Thus, it is clear that all of these reports should be considered consumer reports, and for that reason subject to the Act's disclosure provisions.

C. Ans. 59.

Respondent asserts that the disclosure requirements of Section 609 apply only to "consumer reports" and that "claim reports, business reports, and some property reports" may not properly be considered to be "consumer reports," either under the plain language of the statute or consistent with its legislative history. (RAB 85-88) Respondent acknowledges that Section 609 "should be read as requiring disclosure to the consumer * * * [of] information which can be said to have been collected in whole or in part for use in a consumer report," but it adds that information collected *solely* for business or other non-consumer reports (for example, claim reports), need not be disclosed to a consumer. (RAB 88) Proceeding on this assumption that claim reports are, by their very nature, "non-consumer" reports, respondent then argues that a finding that claim reports *become* consumer reports would be inconsistent with portions of the legislative history which demonstrate that Congress intended that information relating purely to business transactions not be covered by the statute.

The ALJ, as respondent points out, "does not reject respondent's position that certain reports are not consumer reports, but rather bases his finding of a violation on a refusal to disclose, *assuming* they are *not* consumer reports." (RAB 86) (Emphasis in original) Thus, the judge held:

The language of Section 609 and Section 603 is clear. It does not limit the disclosure section to consumer reports. Had Congress so intended, it could easily have provided for such limitations. Thus, all information, including information in the reports other than consumer reports, in a consumer reporting agency's files (except medical information) is subject to the disclosure provisions.

ID p. 259.

This case was not presented to the ALJ or to the Commission on

the theory that claim reports are, in themselves, consumer reports, regardless of how they are filed or whether they are used in [37] connection with the preparation of other (consumer) reports. Compare *Beresh v. Retail Credit Co., Inc.*, 358 F. Supp. 260 (C.D. Cal. 1973) with *Cochran v. Metropolitan Life Ins. Co.*, 472 F. Supp. 827, 831 (N.D. Ga. 1979); Note, *supra* p. 28 at 478-80. Complaint counsel argue, rather, that claim reports "become" consumer reports if they are available for use in the preparation of consumer reports.

We do not reach the question whether those claim reports which were available for use in consumer reports—respondent in 1975 initiated a separate filing system which now apparently prevents interchange of information between the two types of reports (ID 594)—should be treated as consumer reports. We find it unnecessary to reach this question because we agree with the ALJ that Section 609 does not limit a reporting agency's disclosure obligation to consumer reports.

Section 609(a) requires disclosure of the "nature and substance of all information (except medical information) in [the reporting agency's] files on the consumer at the time of the request." The statute, in turn, defines "file" "when used in connection with information on any consumer * * * [as] all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored." FCRA, Section 603(g). If this language is to be accorded its natural meaning, it must be construed to require more than disclosure of the consumer reports in an individual's files. See *Fernandez v. Retail Credit Co.*, 349 F. Supp. 652, 655 (E.D. La. 1972). Because we can discern no reason to exclude from the literal terms of the statute the claim reports which have been the focus of this proceeding, reports prepared in response to claims made by consumers, the provision of our order requiring disclosure of the "nature and substance of all information * * * in [respondent's] files on the consumer" should be understood to require disclosure of these reports.⁵⁶

3. Telephone and Suboffice Disclosure

The complaint alleged two violations of the FCRA provision that sets forth the conditions under which consumers may obtain the disclosures mandated by Section 609. Section 610 of the Act⁵⁷ [38]

⁵⁶ Despite the broad language at ID pp. 258-59, both the record and the ALJ's findings (ID 521-59) focused on the duty to disclose consumer reports and consumer-related claim reports. Our order should not be construed to require disclosure of other information.

⁵⁷ Section 610 of the FCRA provides in pertinent part:

(a) A consumer reporting agency shall make the disclosures required under section 609 during normal business

(Continued)

directs consumer reporting agencies to make the required disclosures "during normal business hours and on reasonable notice." It further provides that consumers may choose to obtain disclosure of information in person at the consumer reporting agency or by telephone. The statute requires the consumer to provide adequate identification in either case, and it requires, further, that the consumer be granted telephone disclosure if such a disclosure is first requested in writing.

The complaint alleged that respondent has violated its responsibilities under Section 610 by refusing to provide or by discouraging consumers from obtaining disclosure over the telephone and by refusing to make disclosures at some of its so-called suboffices. The ALJ sustained the allegation concerning telephone disclosure, but he dismissed the charge involving disclosures at suboffices. Respondent appeals from the violation found by the judge, and complaint counsel appeal from the dismissal of the charge concerning suboffice disclosure. We affirm Judge von Brand's disposition of both issues.

a. Telephone Disclosure

Respondent's major challenge on appeal is that the record contains no evidence that respondent refused to provide telephone disclosure when it had first received a written request for it as required by the statute, and that, consequently, the finding of a violation of Section 610 is not justified.⁵⁸ [39]

Respondent is correct that the record does not show that the company, after receiving written requests, has flatly refused to grant telephone disclosures.⁵⁹ The record does, however, contain numerous instances in which respondent affirmatively discouraged telephone disclosures in a way that effectively precluded consumers from exercising their rights under the Act. (ID 562-66) The ALJ found that "respondent advised consumers obviously interested in learning what was in their files that disclosure was available in a Retail [Credit Company] office without mentioning the possibility of telephone disclosure." (ID 567) Specifically, he found instances

hours and on reasonable notice.

(b) The disclosures required under section 609 shall be made to the consumer

- (1) in person if he appears in person and furnishes proper identification; or
- (2) by telephone if he has made a written request, with proper identification, for telephone disclosure and the toll charge, if any, for the telephone call is prepaid by or charged directly to the consumer.

⁵⁸ Respondent also appears to argue that even if the record shows some instances where telephone disclosure did not occur under circumstances in which it was required under the FCRA, the fact that the company makes numerous disclosures by telephone excuses any failures to do so shown on the record. (RAB 89-90) As we have made clear elsewhere in this opinion, we do not accept such an argument as valid. See p. 33 *supra*.

⁵⁹ Complaint counsel do not contend that respondent refused to honor any written requests it may have received.

where consumers who asked how to obtain disclosure were told that "the only way disclosure could be given was in person," (ID 564) that "disclosure could not be given by telephone," (ID 564) and that "they could receive disclosure of their files at the branch offices." (ID 566) In these instances, respondent did not mention that, upon submitting a written request, the consumer could obtain disclosure by telephone. (*Id.*) The judge also found that, in some instances, "[e]ven though telephone disclosure was not specifically requested * * * , respondent, by undertaking to advise consumers of their rights regarding disclosure and only partially advising them as to their rights has, in a practical sense, made telephone disclosure unavailable to them in violation of Section 610 of FCRA." (ID 567)

Respondent argues that this latter legal theory is "novel" and "totally invalid," in that Section 610 does not impose any requirement on the consumer reporting agency to advise consumers on how to obtain disclosure. (RAB 89-90) We, however, agree with Judge von Brand that when respondent stated or implied to consumers that disclosure could only be obtained by coming to the office (ID 563-64, 566), it effectively denied consumers the option of seeking and receiving telephone disclosure. (ID p. 261)

A consumer reporting agency interested in complying with the law should avoid statements or omissions that would clearly have the effects of misleading the consumer and of foreclosing the consumer's exercise of his or her rights. Indeed, reporting agencies should make every reasonable effort to help consumers understand what they must do to obtain disclosure. We do not find, however, that respondent was under a legal duty to provide consumers with advice on how they might obtain disclosure by [40]telephone or that "if any statement is made to explain 'the availability of disclosure,' there is an obligation 'to advise *correctly and completely*' * * * and any omission in explaining the Act [is] * * * a violation of the Act." (RAB 89) (emphasis respondent's) We find only that a consumer reporting agency violates Section 610 by advising consumers, expressly or implicitly, that disclosure cannot be obtained by telephone.

Congress has enacted a statutory scheme to remedy practices which were found to generate inaccuracy and unfairness in consumer credit reporting. The provisions concerning disclosure to the consumer contained in Section 610 of the FCRA are integral to the proper functioning of that congressional scheme. Respondent does not deny that had it acted directly to preclude consumers from exercising their rights under that section—specifically, their right to obtain telephone disclosure upon filing a written request—it would

have violated Section 610. We believe that the misrepresentations of respondent's employees that disclosure could only be obtained in person at a branch office (ID 563-65) amounted to refusals to make disclosure by telephone. As a direct consequence of these statements, some consumers abandoned their efforts to obtain disclosure by telephone and, instead, were left to seek disclosure by taking the time to visit one of respondent's offices. (ID 563, 566; Tr. 3481-82, 3578-79)

For consumers who are unable to visit one of respondent's offices, the adoption of respondent's construction of Section 610 would severely frustrate the fundamental purpose of the disclosure requirements, providing consumers a mechanism to discover, and correct, inaccurate information about them in a reporting agency's files. As noted earlier, Congress, in enacting the FCRA, was concerned both that access not be flatly denied, and that more subtle techniques not be employed to achieve the same end. Congress intended to prevent reporting agencies from building roadblocks between consumers and their credit files. We cannot permit Section 610, the statute's roadblock-clearing provision, to become a source of the very obstacles it was designed to eliminate. We, therefore, agree with the judge that to "foreclose telephone disclosure is tantamount to refusing it and violates Section 610 of FCRA." (ID p. 262)⁶⁰ [41]

Besides prohibiting respondent from misrepresenting to consumers their rights to disclosure under the FCRA, the ALJ ordered that when consumers make inquiry concerning disclosure, respondent advise them that they have the right to disclosure and tell them how to exercise that right. More specifically, the judge ordered that respondent inform consumers of the means by which they may obtain disclosure by telephone and supply any forms it requires consumers to execute to obtain disclosure.

Respondent challenged the breadth of the ALJ's prohibition against misrepresentations to consumers of their rights under Sections 609 and 610. We will instead prohibit only those misrepre-

⁶⁰ Respondent notes that, according to one of the commentators,

while the FCRA is clearly a broadly remedial measure, it should be equally apparent that the Act is the product of compromise. Therefore, in interpreting the Act in marginal cases, one cannot rely, without question, on the principle of liberal construction. Rather it is necessary always to be aware of the definite and intended limitations in the FCRA's scope and effect.

Note, p. 28 *supra*, at 466 (footnote omitted). Nevertheless, whether or not the FCRA is provided the liberal construction normally accorded a remedial statute, see *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959), the character of the statute is such that we do not believe it should be construed so technically and restrictively as to eliminate the flexibility needed to effectuate its remedial purposes. The FCRA is designed to promote fairness, accuracy, and efficiency. In this case—which we by no means consider "marginal"—where the law creates a particular right, such as the right to receive telephone disclosure, we believe it must logically be read to preclude action that prevents the exercise of that right.

sentations demonstrated by this record, misrepresentations as to consumers' rights to obtain disclosure by telephone. Respondent has not questioned the propriety of the affirmative relief ordered by the judge. With some minor stylistic modifications, we will enter the affirmative order provisions which he proposed.

b. Suboffice Disclosure

Respondent concedes that it does not systematically provide disclosure at its suboffices (C. Ans. 26),⁶¹ but the ALJ declined [42]to hold that this failure constitutes a violation of the FCRA. Suboffices are located within a branch office's territory, and, as the ALJ found, they "do not maintain full file storage systems and do not have full responsibility over their territories other than in producing reports * * * ." (ID 80) Complaint counsel, however, urge on appeal that since disclosure would be feasible at some of respondent's suboffices—those "staffed by at least one full time office employee and a person in a supervisory capacity" (CAB 19)—respondent must provide it at those offices to comply with Section 610. We do not agree.

Section 610 mandates disclosure "during normal business hours and on reasonable notice." It does not, however, expressly address the question of where, or at what level of a consumer reporting agency's organization, disclosures should occur. Judge von Brand made no findings to the effect that the absence of suboffice disclosure directly or indirectly foreclosed consumers from obtaining in-person disclosure, and we are aware of no basis in the record for such a conclusion. Moreover, we agree with the judge that respondent's organizational structure is not the source of the flaws in its disclosure practices. The purpose of the suboffice in respondent's organization is to provide a centralized "pied-a-terre" where a small number of field representatives can make and receive calls concerning their investigations and, in some cases, get clerical assistance.

The statute also provides for disclosure to be made on the telephone. We are satisfied that adherence to this statutory requirement together with systematic in-person disclosure at the branch offices is adequate to afford consumers the ready access to their files

⁶¹ The judge found that

[a] suboffice is generally removed from the metropolitan area, located in a small city or town. It is staffed by one or more field representatives, and, in the case of those having more than one field representative, one of them is designated as the supervisor. There may or may not be part-time or full-time clerical personnel. In some cases, the suboffice is located in the field representative's home * * * . The number of suboffices also varies from time to time. No files are maintained in suboffices.

which Congress mandated, and that the ALJ was correct in refusing to add systematic suboffice disclosure to that mandate.

4. Reinvestigation of Disputed Information

Section 611 requires reporting agencies to reinvestigate information which is disputed by a consumer “unless it has reasonable [43] grounds to believe that the dispute by the consumer is frivolous or irrelevant.” The reinvestigation must be conducted “within a reasonable period of time” and if, after the reinvestigation, the information is found to be inaccurate or can no longer be verified, the reporting agency must promptly delete the information. FCRA, Section 611(a). Section 611 includes several other protections, including a requirement that the reporting agency, at the request of the consumer, notify past recipients of the report that information has been deleted or notify them of the consumer’s version of the dispute. FCRA, Section 611(d).⁶²

Respondent provided its field management with detailed instructions on how to comply with Section 611. (ID 574–76) Despite these instructions, which were, for the most part, consistent with the statute, the record shows that, in a number of instances, respondent’s employees have failed to reinvestigate items of disputed information.

The ALJ ordered respondent to cease and desist from failing to comply with Section 611’s reinvestigation requirement but concluded that there were too few instances of violations of other requirements of the section to warrant imposition of an order prohibiting future infractions. Respondent appeals from the judge’s findings that it has violated the reinvestigation requirement, and complaint counsel appeal from his failure to prohibit respondent from engaging in other violations of Section 611.

The ALJ found improper failures to reinvestigate in offices located in widely separated parts of the country.⁶³ Respondent acknowledges that it did not perform reinvestigations in three of the cases cited by

⁶² Notifications need only be sent to persons who have received a consumer report for employment purposes within the past two years and persons who have received a consumer report for any other purposes within the past six months. FCRA, Section 611(d).

⁶³ We agree with the ALJ’s determination that respondent failed to reinvestigate the disputed information cited in ID 578, although we differ somewhat with the ALJ’s analysis. The record shows that the consumer disputed certain information in her report. (Tr. 1530, 8061) This witness, whom the ALJ found credible on this issue, also testified that while she was told by respondent’s field representative that the information would be reinvestigated, subsequently, she was told when she “tried calling them back and nothing had happened as yet,” (Tr. 1506) that “he would be in touch.” (*Id.*) She went on to testify, “And I never did hear from him.” (*Id.*) We assume the field representative’s promise to “be in touch” was more than the classic “Don’t call us, we’ll call you” and that he intended to notify her on completion of the reinvestigation. The consumer’s un rebutted testimony that she received no such notification, the absence of any explanation in this record of the failure to notify her, and the lack of any evidence that the promised reinvestigation was completed compels us to affirm the ALJ’s determination that respondent breached its duty to reinvestigate.

the ALJ. It asserts, however, that in each of these instances, it was not required to reinvestigate, because it had reasonable grounds to believe that the dispute by the consumer was frivolous or irrelevant. (RAB 92) [44]

Equifax characterizes as frivolous a consumer's dispute as to a report it had prepared for an automobile insurer which concluded from information in the file that the consumer "shows a poor driving reputation in the area." (ID 581; CX 332A-B) The insurer had refused to issue a policy because of respondent's report, and the consumer had subsequently made two visits to respondent's office, during the course of which he disputed the information on which the conclusion had been based and furnished a list of references who, he believed, would attest to his good driving habits. Respondent first contends that the consumer's dispute was frivolous because on his first visit to respondent's office the consumer had not disputed certain adverse items in the report concerning his driving habits and, as to one item, had only raised an issue of "semantics," by challenging the report's conclusion that he was a bad driver. (RAB 92) The ALJ, however, correctly found that a factual dispute was clearly raised by the statement of dispute and reference list which, according to respondent, the consumer supplied at the second meeting. (ID 581 n.222) In any case, respondent failed to reinvestigate any of the disputed information, even that which the ALJ properly found the consumer had challenged at the first meeting.

Respondent also argues that the dispute was frivolous, and no investigation was necessary, because respondent had already interviewed two of the individuals on the consumer's list of references when it prepared the initial report. Section 611(a), however, provides that "[t]he presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant." [45]

We are unconvinced by respondent's attempts to belittle the disputes of other consumers.⁶⁴ In our view, a reporting agency may

⁶⁴ Respondent characterizes another dispute as frivolous because the consumer asserted that everything in his file, except his name and address, was incorrect but refused to specify further the items he disputed. The ALJ found, however, that the consumer did specifically challenge certain items of information. (ID 579) In any case, at least where, as here, the file is not extensive, we cannot see how the dispute can properly be regarded as frivolous merely because the consumer asserts that everything in the file is inaccurate.

In such cases, the reporting agency may properly encourage consumers to identify the particular portions of their files which they dispute and point out to them that specific identification may help expedite the reinvestigation. Moreover, even if the consumer purports to dispute the entire file, the agency need not reinvestigate those items as to which it reasonably believes the disputes are frivolous or irrelevant. For example, this consumer's file included some information—such as the date on which the consumer was interviewed—about which any purported dispute was almost certainly irrelevant or frivolous. On the other hand, where the file is extensive and contains many items which could be disputed, it would not appear to be inconsistent with Section 611(a) for the agency to require that the consumer identify the items he or she disputes and conclude from the consumer's refusal to do so that the purported dispute is frivolous.

not properly conclude that a dispute is “irrelevant” [46] unless it can conclude that the disputed information is not adverse, that is information which may have, or may reasonably be expected to have, an unfavorable bearing on a consumer’s eligibility for credit, insurance, employment, or other benefit. See note 9 *supra*. A dispute over information which might reasonably be expected to harm a consumer simply cannot be “irrelevant.”

Nor do we see how a reporting agency may properly conclude that a dispute is “frivolous” unless it is clearly “beyond credulity” or made in bad faith. *Cf. NLRB v. Lucy Ellen Candy Div. of F & F Laboratories, Inc.*, 517 F.2d 551, 555 (7th Cir. 1975); *Dickinson v. French*, 416 F. Supp. 429, 432 (S.D. Ala. 1976); *Boruski v. Stewart*, 381 F. Supp. 529, 533 (S.D.N.Y. 1974). Relevant factors under this standard include whether the dispute is repetitious of earlier disputes already reinvestigated, whether it is clear that reinvestigation would not reveal information contrary to that contained in the original report, or, perhaps, whether the dispute has been raised only for the purpose of harassment.

The statutory “frivolous or irrelevant” standard for dispensing with a reinvestigation may be seen as similar to that applied by the courts in deciding whether a claim need not be tried because there is “no genuine issue as to any material fact.” As one court has put it, the standard must be met with such “clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances.” *Nathanson v. United States*, No. 79-2013, slip op. at 8-9 (8th Cir. Aug. 12, 1980). In view of the importance of the reinvestigation requirement to the statutory scheme, the “frivolous or irrelevant” exception should also be construed sufficiently narrowly that doubts are resolved in favor of reinvestigation.

Respondent has also proposed that we read two more exceptions into Section 611. The ALJ properly found that, upon obtaining disclosure, a consumer disputed the accuracy of her report and also informed one of respondent’s employees that she intended to undertake some follow-up research herself (ID 582)—a not unlikely reaction in light of the fact that she was not informed that a

Respondent justifies its failure to reinvestigate a third case because it deemed the disputed information to be irrelevant. After he was informed by his insurer that his premiums were being increased on the basis of a report supplied by respondent (Tr. 3142), the consumer obtained disclosure of his report and disputed two items concerning his financial affairs. (ID 580) Respondent asserts that its office manager had reasonable ground to believe that the insurance premiums were being increased because of other information in the report which the consumer did not dispute. (RRB 42) Respondent’s duty to reinvestigate, however, was not limited to information it reasonably believed to be relevant to the denial of a particular benefit. The report labeled the consumer’s “finances” as a “significant” feature. (CX 138A) As long as it remained in the consumer’s file, the information could be used by another customer to deny a benefit, and, therefore, should have been reinvestigated.

FEDERAL TRADE COMMISSION DECISIONS

Opinion

96 F.T.C.

investigation would be conducted. (*Id.*) Respondent argues that "it is reasonable to defer any action on reinvestigation until [the consumer] returned or responded." (RAB 92) The statute, however, requires that the reporting agency *promptly* reinvestigate disputed information unless the dispute is irrelevant or frivolous. Reporting agencies, not consumers, are responsible for reinvestigations and, accordingly, may not avoid, or postpone, conducting reinvestigations on the expectation that consumers will do their work for them.

In another instance, respondent claims that it was under no duty to reinvestigate because the consumer had stated that he intended to sue. Respondent argues that it "can certainly conclude that a consumer has waived his right to a reinvestigation * * * when the consumer states that he is going to sue." (RAB 93) [47] Even assuming the statute permits the consumer to waive a reinvestigation of disputed information, respondent has not explained why a threat to litigate would amount to a waiver, as opposed to a forceful assertion of the consumer's right to have challenged information reinvestigated and corrected. Nor do we believe that the prospect of litigation renders a reinvestigation pointless, as asserted by respondent. Although the purpose of a reinvestigation is clearly to resolve the differences between the consumer's understanding of the facts and those contained in the file, we cannot agree that "[i]f the consumer is going to sue in any event, conducting a reinvestigation is 'baseless' since the consumer has made it clear that the dispute cannot be resolved in that manner and the reinvestigation would be purely an academic exercise." (RRB 42) The statutory purpose of the reinvestigation requirement is to encourage the correction of errors rather than to discourage litigation, and the reporting agency's ability to remedy error is not foreclosed by the prospect of litigation concerning the accuracy of the file.

We are not persuaded by complaint counsel that we should broaden the ALJ's order to prohibit violations of Section 611 other than failures to reinvestigate.

C. Reporting of Obsolete Adverse Information

Section 605 of the FCRA generally prohibits consumer reporting agencies from reporting any "adverse item of information which antedates the report by more than seven years." This prohibition reflects a determination by Congress that it would be "unfair to burden a consumer for life" with adverse information when the consumer "has improved his performance." S. Rep. 91-517, *supra*, at

4. The complaint alleges that Equifax has violated Section 605 by its use of the following “stock sentence” in certain employment reports:

In compliance with the Fair Credit Reporting Act, no additional information can be reported from this former employer covering employment experience prior to seven years ago.

Complaint, ¶ 18(1). Respondent has stipulated that it is a “matter of established procedure” to include this stock sentence in reports, or otherwise to indicate that the FCRA does not permit the reporting of “such” information, “when respondent obtains adverse information more than seven years old from a former employer * * *.” (CX 1445D) The stock language is *not* used if no obsolete adverse information is discovered. (ID 272) The ALJ found that this selective use of the stock sentence serves to “signal the existence of adverse information in violation of Section 605.” (ID p. 229; *see* ID 272.) We affirm.

Respondent does not assert that Section 605 prohibits only the reporting of specific items of information. Such a reading of the [48] statute, which would be consistent with ratifying the selective use of the stock sentence, would produce an absurd result. As the judge pointed out, it would effectively preclude the consumer from taking advantage of the disclosure requirements of the Act and to challenge the items with which he or she disagrees. (ID p. 230) However, even though respondent does not make that assertion, it does challenge the judge’s finding of a violation on the ground that the sentence does not, necessarily, indicate the existence of obsolete adverse information.

It is clear, under the circumstances, that use of the stock sentence signifies that the file contains adverse information.⁶⁵ We are not persuaded by respondent’s argument that a violation depends on evidence that employers actually interpret the stock sentence to suggest the existence of adverse information that is over seven years old, since we agree with the ALJ that it would be difficult to interpret the sentence otherwise. Respondent further argues that this position “ignore[s] the thrust of [its] contention” that “[a]n ‘item of information’ is not ‘adverse’ (within the meaning of FCRA Section 605(a)(6)) unless likely to cause adverse action.” (RRB 23) We agree with respondent’s characterization of “adverse information” and have adopted, in essence, the definition of “adverse information”

⁶⁵ Respondent argues that a report that contains no mention of the obsolete information is an “artfully ambiguous report[] that seek[s] to conceal the existence of unfavorable data.” (RAB 52) Respondent, however, could simply inform its customers generally of the limitations imposed by Section 605 or could include the boilerplate in all its reports with an appropriate explanation that no inference should be drawn from the language as to the existence of adverse information in the file.

contained in respondent's proposed findings. *See* note 9 *supra*; RPF 1(h). Regardless of how adverse information is defined, however, respondent effectively admits that the rationale for its use of the boilerplate language is to communicate to the user of the report that the consumer's file contains information which respondent believes falls within the scope of Section 605(a)(6) as being both adverse and obsolete and which respondent believes it cannot disclose under the terms of that section. (RAB 52)

Finally, respondent challenges the scope of the judge's order which bans all violations of Section 605. The ALJ found no violations of Section 605 other than the "signaling" of obsolete adverse information by selective use of the stock sentence. There is no evidence in this record that respondent has included obsolete adverse information, except for its use of the boilerplate language, and we are unaware of anything in the record which would otherwise [49] support the need for "fencing-in" relief.⁶⁶ Accordingly, we modify the order to preclude respondent from signaling the existence of obsolete adverse information by indicating in employment reports directly or indirectly, through use of a "stock sentence" such as the one shown on the record, the existence of adverse information which antedates the report by more than the applicable period of time specified in Section 605.⁶⁷

D. Use of Consumer Reports for Permissible Purposes

The FCRA is intended not only to ensure the accuracy of consumer reports but also to protect the individual consumer's right to privacy. This latter purpose is articulated in Section 602(a):

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.

The most important of the sections promoting the privacy of individual consumers is Section 604, which severely restricts the circumstances under which consumer reporting agencies may disclose consumer reports to third parties.⁶⁸ The complaint alleges that respondent has violated this section by providing its customers with

⁶⁶ Complaint counsel did not appeal from the ALJ's rejection of the complaint allegation that respondent violated Section 605 by "furnishing * * * photocopies of motor vehicle reports reflecting masked out or obliterated driving violations which antedate the report by more than seven years, but which indicate the existence of said obsolete violations." (Complaint, ¶ 18(2))

⁶⁷ If respondent chooses to use a stock sentence, it will be required to include an explanation that the language is used regardless of whether obsolete information was discovered. This explanation will be necessary to dispel the inference which customers will continue to draw absent an explanation, that use of the sentence signifies the presence of adverse information.

⁶⁸ *See* note 2 *supra*.

what it terms a "Voluntary Follow-Up Service." According to the complaint, through this and other similar services, respondent, on an unsolicited basis, submits to customers adverse information about consumers as to whom previous reports have been furnished, even though "respondent has no reason to [50]believe that it will be used in connection with a business transaction such as the underwriting of insurance." (Complaint, ¶ 16)

The complaint also alleges that, as a result of the manner in which information contained in claim reports and consumer reports is interchanged, respondent disseminates consumer reports in violation of the requirements of this section. (Complaint, ¶¶ 28, 29)

1. Voluntary Follow-Up Service and Monetary Savings Plan

a. *Voluntary Follow-Up Service*

Until April 1974, respondent routinely furnished its customers follow-up information on consumers about whom it had already furnished a consumer report.⁶⁹ Under this "Voluntary Follow-Up Service," subsequently developed adverse information was supplied to update a consumer report which had not identified a "risk or hazard." (ID 264 n.87) The complaint alleged, and the ALJ found, that the subsequent information constituted consumer reports which respondent did not have reason to believe would be used for a Section 604 permissible purpose. We agree.

Respondent does not dispute that the Voluntary Follow-Up Service reports were consumer reports. It does contend, however, that it reasonably believed that the recipients of the information would use it for a permissible purpose.

The parties and the ALJ seem to agree that the customer—in each case an insurance company—could use the supplemental information for a permissible purpose if the insurer had a policy in effect with the consumer who was the subject of the report.⁷⁰ Moreover, the insurance company could clearly put the information to a permissible use if, at the time it received the follow-up report, it had not yet acted on the insurance application.

From this, respondent argues in its appeal that

[i]n light of the fact that the vast majority of report subjects do in fact qualify for and receive insurance from the company that has [51]ordered a report * * * and the further fact that voluntary information was reported only shortly after the furnishing

⁶⁹ Respondent discontinued this service two months after issuance of the instant complaint. Respondent's decision to terminate the service was based, according to its Senior Vice President, "to some extent" on the pendency of the complaint. (Tr. 5187-88) See pp. 77-78 *infra*.

⁷⁰ The information might trigger an investigation by the insurer to determine whether the policy should be rescinded. (Tr. 2678)

of the original report * * *, respondent surely had a reasonable basis for believing that the report was being forwarded for a permissible purpose.

RAB 48.

We take this as a concession that in *some* cases the recipient of the report would not have a policy in force at the time it received the follow-up information.⁷¹ Nor do we understand respondent to contend that in *every* case in which a policy was not in effect, the recipient had yet to act on the consumer's application. Indeed, the record shows that follow-up information was sometimes transmitted a substantial time (up to 90 days or more) after the sending of the initial consumer report.⁷² [52]

The essence of respondent's argument, however, is that it had "reason to believe" the information would be used for a permissible purpose because, in *most* cases, the insurance company either could be expected to use the information to determine whether to grant a pending application (the application which triggered the initial consumer report) or had an insurance policy in force with the subject of the follow-up report. We reject respondent's understanding of its obligation. The consumer reporting agency's belief that a report will be used for a permissible purpose must be based on what it can reasonably conclude the particular customer will do with the specific information. Section 607(a) provides:

Every consumer reporting agency shall maintain reasonable procedures designed to * * * limit the furnishing of consumer reports to the purposes listed under section 604. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose.

These requirements, designed to prevent violations of Section 604,

⁷¹ Indeed, in its proposed findings of fact, respondent stated:

Insurance companies who received voluntary information sometimes had a policy in force in connection with the individual who was the subject of the voluntary follow-up and other times did not. * * * When the companies did not have an insurance policy in force on an individual, the information was placed in an inactive file or simply discarded.

RPF 245 (citations omitted) (emphasis added).

⁷² One of respondent's instruction manuals advised field representatives that

[i]f, within 90 days from the date a [life] report is submitted, protective information comes to our attention that might have a definite bearing on the subject's insurability, the customer should be notified by wire. If more than 90 days have elapsed, then the Voluntary Information Report, Form 121, should be used.

CX 667Z-29.

Whether or not, as respondent claims, field representatives submitted information for voluntary follow-up purposes only to management personnel, who would decide whether to send the information to the customer (RRB 18), the manual makes it clear that it was company policy to forward voluntary information as much as 90 days after an original report was submitted to the customer.

Other testimony indicates that voluntary follow-up information was transmitted as long as six months after the original report. See Tr. 4665, 5784-85.

assure that the reporting agency will have at least some information about how the particular customer will use the information which it seeks.⁷³ These safeguards would make no sense if a reporting agency could satisfy its obligation under Section 604 by assuming that, because most customers use such information for a permissible purpose, so will any particular customer to which it proposes to send a consumer report.

b. Monetary Savings Plan

Complaint counsel have challenged another program by which respondent supplies unsolicited information about consumers to the insurance companies who purchase its consumer reports. Equifax calls this program, which was still in use at the time the record [53] closed, its Monetary Savings Plan. Under this program, respondent's sales force transmits to customers information about the subject of a previously prepared consumer report. This may be done if respondent discovers that an event has occurred which would cause an insurance company a loss and the initial report would have permitted the insurance company to identify the risk and either rate or decline the application. The parties agree that this additional information has been supplied as a sales tool to demonstrate the value of respondent's reporting service. The ALJ also found that these follow-up reports are "consumer reports" and that respondent has violated the statute by furnishing them to persons whom it has no reason to believe intend to use the information for one of the permissible purposes set out in Section 604.

The threshold question is whether the Monetary Savings Plan reports are "consumer reports" within the meaning of Section 603(d), since it is only the furnishing of consumer reports for impermissible purposes that is prohibited by Section 604. A consumer report is a communication bearing on any of the seven criteria listed in Section 603(d) "which is used or expected to be used or collected in whole or in part for" any of the purposes listed in Section 603(d) or Section 604. See note 1 *supra*. Thus, as we noted in *Howard Enterprises, Inc.*, 93 F.T.C. 909 (1979), 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. We also held that a report of information "is used or expected to be used" for one of the purposes enumerated in Sections 603(d) and 604 so long as it "could be used"

⁷³ The complaint did not allege, and complaint counsel do not assert, that respondent has failed to comply with § 607(a) by failing to obtain the certifications prescribed by that section. We, therefore, do not find that any failures to obtain certifications were, in themselves, violations of the statute.

for one of those purposes. *Id.* at 933 n.9. See also *Belshaw v. Credit Bureau of Prescott*, 392 F. Supp. 1356, 1359-60 (D. Ariz. 1975). Finally, we held that the residual category of permissible uses included in Section 604—use by a person whom the reporting agency has reason to believe “otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer”—is limited to business transactions “between report users and consumers acting as consumers.” 93 F.T.C. at 933 n.5.

Use of information by customers to assess the value of respondent’s services is clearly not one of the permissible uses listed in Sections 603(d) and 604. It does not follow, however, that Monetary Savings Plan reports are not consumer reports within the meaning of Section 604. Even though these reports were not disseminated for one of the permissible purposes, they were consumer reports so long as they included information which was either “collected in whole or in part,” or which could be used by the recipient, for one of the permissible purposes.

The record shows that Monetary Savings Plan reports at times include information falling squarely within the definition of a consumer report. Respondent’s Senior Vice President testified that Monetary Savings information would include information subsequently [54]developed for “the same type of report” as that originally furnished the customer. (Tr. 5237) Respondent’s Executive Vice President likewise testified that the company would supply information developed by a field representative during a subsequent investigation in connection with a “different” report. (Tr. 5855)⁷⁴ Consumer reports, that is, reports which are “used or expected to be used or collected in whole or in part” for one customer for one of the statutory purposes, do not lose their status as consumer reports once they are communicated to another customer for some other purpose. If they did, Section 604 would be drained of all meaning. Therefore, because the Monetary Savings Plan reports are consumer reports their dissemination for other than a permissible purpose violates Section 604.

c. Order

Because of the limited nature of the violations we have found — furnishing information to prior recipients of consumer reports who presumably once had a permissible purpose for receiving the information — we agree with respondent that the ALJ’s order should

⁷⁴ The witness was clearly referring to an investigation leading to a consumer report which had been requested by a different insurance company.

be narrowed. Rather than prohibiting respondent from submitting consumer report information to any person it lacks reason to believe will use the information for one of the permissible purposes, we will prohibit respondent from transmitting updated consumer report information to customers which have received a previous report concerning the same consumer except under the circumstances listed in Section 604.⁷⁵

We will also delete the ALJ's requirement that respondent first obtain a specific request for a follow-up disclosure. Depending on how it is worded, the certification of purposes from the customer required by Section 607(a) may be broad enough to encompass follow-up information.

The certification, however, will not necessarily provide respondent "reason to believe" that the customer intends to use particular follow-up information for a permissible purpose. Respondent's Executive Vice President acknowledged that Equifax "has no way to determine [how long it takes an insurance company to underwrite a policy] because I would guess their work load and their systems and so forth would vary from one customer to another and it would take one company longer than another." (Tr. 5855) In some cases [55] respondent may be able reasonably to assume that customers will use for a permissible purpose a follow-up report supplied a few days after the original report was sent. The assumptions respondent may reasonably make will depend on the circumstances of the case and its knowledge of the user's practices. Our order will only require that respondent, before sending such follow-up information, have reason to believe that the customer intends to use it for a permissible purpose as set out in Section 604. Respondent may be able to obtain this reason to believe simply by inquiring of the customer how soon it intends to act on the application or whether, before acting, it will await the follow-up report. Respondent might also have reliable general knowledge of the time it takes a certain customer to act on an application, once the customer has received an initial report from respondent.

Finally, respondent asserts that a prohibition against its disseminating "information obtained from newspapers or public records" would violate the First Amendment. (RAB 51 n.48) However, circulation of these items of information would be prohibited by our order only if they are consumer reports within the meaning of Section 603(d). Respondent contends, and it appears from the record, that they are not. We are unaware of any evidence which contradicts

⁷⁵ As modified, the order permits disclosure under any of the circumstances listed in the section, rather than only the circumstances listed in Section 604(3).

respondent's assertion that the news clippings and other public record information disseminated in this program are not "used or expected to be used or collected in whole or in part"⁷⁶ for one of the permissible purposes listed in Section 604. FCRA, Section 603(d).

2. Interchange of Information between Claim Reports and Consumer Reports

The complaint alleged that in the preparation of its consumer reports and claim reports, respondent uses all of its file information interchangeably—it uses claim report information in the preparation of its consumer reports and consumer report information in the preparation of its claim reports. The complaint further charged that, by these practices, respondent has failed to comply with various provisions of the FCRA governing the preparation and dissemination of information which is used or expected to be used in consumer reports. (Complaint, ¶¶ 28 and 29) During the course of the trial, complaint counsel sought to establish that claim [56]reports *become* consumer reports when they are used or are available for use in preparing consumer reports and that they are, accordingly, subject to all the requirements of the FCRA pertaining to consumer reports. The judge rejected this latter contention, and complaint counsel do not appeal from the ALJ's determination.

Instead, the ALJ held that Section 604 does not permit the use of consumer report information in the preparation of claim reports. Respondent's challenge to the ruling is limited, principally, to a contention that this theory of violation was not properly before the ALJ. (RAB 94-95) We are doubtful about the validity of the theory relied on by the ALJ and neither of the parties has adequately briefed the issue. We also do not believe that the public interest would be served by an order about which we entertain substantial doubt. Rather than requesting further briefing, we conclude that the public interest would best be served by our setting aside the ALJ's findings on this issue.

IV. SECTION 5 CHARGES

A violation of any requirement or prohibition imposed by the FCRA and enforced by the Commission constitutes an unfair or deceptive act or practice in violation of Section 5 of the FTC Act.

⁷⁶ Although employees were instructed to place newspaper clippings in the files (CX 1365Z-25), it does not follow that the clippings which have been transmitted as part of the Monetary Savings Plan are "used or expected to be used or collected in whole or in part for" the purposes enumerated in Sections 603(d) and 604.

We are not persuaded that follow-up information is necessarily a consumer report merely because it is relevant to a customer's assessment of the value of a consumer report. (ID p. 226)

FCRA, Section 621(a). The complaint in this case also challenged as violations of Section 5 several alleged practices which the FCRA does not address.

A. Misrepresentations of Identity in Preparation of Consumer Reports

The complaint alleged that respondent's investigators have represented to those whom they interview, directly or by implication, that "they are agents or employees of the company to which the consumer has applied for a benefit, such as insurance * * * and/or [that] the information furnished by the consumer or others during an interview, will be used exclusively by the company to which the consumer has applied for a benefit * * * ." These practices, the complaint alleged, are "unfair, false, misleading and deceptive in violation of Section 5 of the Federal Trade Commission Act." (Complaint, ¶¶ 5, 6)

The judge found that, in practice, respondent's employees did not always identify themselves as being employees of Retail Credit, in large part, because the company name "sometimes confused consumers and led to the impression that credit rather than insurance was the reason for the investigation."⁷⁷ (ID 160-61; [57]ID p.216 n.227) Instead, according to the judge, field representatives identified themselves to consumers by stating that they were "from," "with," "calling for" or "conducting an investigation for" the insurance company or other customer of respondent who had requested the report, or that the interview was in connection with a particular insurance application. (ID 162)⁷⁸

The judge reasoned:

An introduction by a field representative stating that he was "from" or making contact "for" an insurance company, that he was calling in connection with an insurance application or a similar introduction unaccompanied by the disclosure that he worked for Retail, had the tendency to create the impression that the field representative was an insurance company employee or agent rather than the employee of a third party consumer reporting agency.

ID 163.

⁷⁷ There is also testimony on the record that, when respondent's field representatives did not volunteer that they were employed by Retail Credit at the start of an interview, if pressed by the consumer for further identification, they eventually gave Retail Credit's name and sometimes produced company identification cards.

⁷⁸ Prior to amendments made in 1973, the company's Field Representative Manual stated that the name Retail Credit should be used when interviewing the subject of a report, but also suggested that when the requesting company desired use of its name in the introduction, then "the Field Representative should state that he is 'calling for the X Insurance Company.'" (ID 159) The ALJ correctly determined that this introduction "would misrepresent, by implication, the identity of the caller if Retail Credit were not mentioned." (ID 159 n.54) The 1973 Manual instructed field representatives to state their names and Retail Credit's name when interviewing the subject of the report and both permitted and encouraged them to mention the name of the company requesting the report. (ID 158)

The judge also determined that the identity of the interviewer is material to the consumer. He based this determination on the testimony of several consumers who either refused to answer the interviewer's questions when they were eventually told that the interviewer was a field representative of Retail Credit Company rather than an employee or agent of the insurance [58]company. In addition, he cited the testimony of one witness who might not have answered the questions had the interviewer's true identity been revealed. (ID 164)

The ALJ also found that respondent's field representatives have misrepresented the use to which the information they sought would be put: that is, their actions implied that the information would be used only by the customer, rather than being retained by respondent for future use. However, he determined that this misrepresentation was implicit in the field representatives' misrepresentations of identity and did not premise his finding simply on "respondent's failure to affirmatively disclose to consumers that it keeps a file copy [of the report] and may subsequently use it." (ID 165 & n.57) Accordingly, the order provisions only prohibit respondent from representing, directly or by implication, that its investigative personnel are agents or employees of the company to which the consumer who is the subject of the report has applied for a benefit.

We affirm the ALJ's findings and his order, as well.

Evidence of actual deception is not necessary to finding a violation of Section 5. It is well settled that only the "capacity to deceive need be shown." *Trans World Accounts, Inc., supra*; *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944); see *FTC v. Raladam Co.*, 316 U.S. 149 (1942).

In determining whether deception exists, the Commission may rely upon its own first-hand evaluation of the evidence. *Carter Products, Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963); see *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965); *ITT Continental Baking Co., Inc.*, 83 F.T.C. 865, 954 (1973), *modified*, 532 F.2d 207 (2d Cir. 1976). "The Commission has the discretion to interpret the meanings of various communications and 'the impressions they would likely make upon the viewing public' * * * [and] [t]he Commission may draw its own inferences regarding the likelihood of deception based upon the representations before it." *Trans World Accounts, Inc. v. FTC, supra*, 594 F.2d at 214; see also *Libbey-Owens-Ford Glass Co. v. FTC*, 352 F.2d 415, 417 (6th Cir. 1965); *Stauffer Laboratories, Inc. v. FTC*, 343 F.2d 75, 78 (9th Cir. 1965).⁷⁹ We agree

⁷⁹ Respondent argues that we should, nevertheless, follow the course we took in *Leonard F. Porter, Inc.*, 88

with Judge von [59]Brand that the failure of field representatives to identify Retail Credit as their employer combined with their assertions that the inquiries are “for” or “on behalf of” the insurance company had the tendency or capacity to deceive.

Respondent’s objection to the judge’s findings—that the initial decision “does not establish by the preponderance of the evidence that the alleged failure of field representatives to identify respondent as their employer is material” (RAB 13)—is without merit. Materiality is a matter which the Commission in its expertise may infer. *FTC v. Colgate-Palmolive, supra*, 380 U.S. at 392. We do not find it surprising that many consumers would be less willing to answer a question if they believed that the information were going to be made available for a variety of uses, in connection with insurance, credit, and employment applications, than they would if they believed the information would be used in connection with a single insurance application.⁸⁰

Respondent also challenges the ALJ’s finding “that respondent misrepresents by implication the use to be made of information which it obtains during interviews when field representatives fail to disclose the identity of their employer * * * even though there is no evidence that any field representative employed by respondent ever made an affirmative misrepresentation that respondent does not keep a file copy of the report.” (RAB 14) Respondent asserts that this finding erroneously assumes that

the average consumer is not only mistrustful; he or she is *selectively* mistrustful. He or she [60]supposedly believes that respondent is riddled with dishonest employees and is prone to disobey its legal obligations under Section 604 of the FCRA; yet he or she also believes that insurance companies not only are the epitome of discretion and integrity but will never have any occasion to disclose the information to others.

RAB 14–15 n.10 (emphasis in original).

We agree with the judge that at least some consumers who are informed that they are being interviewed by someone “calling on behalf of” an insurance company will likely be misled, as well, into

FTC. 546 (1976). In that case, the Commission held that testimonial evidence by consumers was needed because the Commission could not otherwise conclude whether respondent’s practices had the capacity to deceive. This case, however, raises no such unusual problems. It takes no further evidence to demonstrate that a statement by some unknown caller to the effect that he or she is “calling for the X Insurance Company,” without any mention of the person’s employer—Retail Credit—would have the capacity to mislead the consumer into believing that the caller was, indeed, “from” or “employed by” the insurance company. The existence of corroborating evidence, such as the consumer testimony here, merely strengthens our conclusion, and the respondent’s argument that the evidence is not overwhelming in quantity is irrelevant.

⁸⁰ Respondent notes that a number of present and former field representatives testified that they could not recall ever having been asked by an applicant or outside source if respondent maintained file copies of reports. (E.g., Tr. 359–60, 12929, 13175–76; RPF 132(b)) However, other field representatives testified that consumers did ask them whether reports were retained (Tr. 9183, 12454; RPF 132(c)), and more might have expressed interest if they had not been led to believe that it was a single insurance company which was seeking the information.

believing the information which they supply will be used solely by that insurance company. Respondent, on the other hand, is in the business of collecting and reporting information about consumers for a variety of customers and, unlike an insurance company, can be expected to—and does—retain information collected for one customer for use in reports ordered by other customers.

We also note that, according to the ALJ,

[t]o a considerable degree, the failure by respondent's personnel to identify themselves was occasioned by the confusion engendered by the name Retail Credit when the interview was in connection with an insurance investigation not involving credit, *e.g.*, insurance. To avoid the requisite explanations, respondent's field representatives would omit the name of their employer. The incentive to engage in such practices has been reduced by respondent's name change to Equifax (Findings 160-61).

ID p. 216 n.227. Respondent argues that “the alleged potential for confusion in the name ‘Retail Credit Company’ served as the foundation for all of the findings and the rationale of the Administrative Law Judge with respect to paragraphs 5 and 6 of the complaint,” and that “[w]ith the abandonment of this name by respondent, the evidentiary basis and the process of reasoning employed by the Administrative Law Judge can have no continued validity.” (RRB 5) If we were persuaded that the only reason for the misrepresentations was the possible confusion inherent in the name Retail Credit Company, we would be inclined to doubt the continued existence of a “cognizable danger of recurrent violation of Section 5” under the standard set out in *Kraftco Corp.*, 92 F.T.C. 416 (1978), *aff'd sub nom. SCM Corp. v. FTC*, 612 F.2d 707, 708 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3245 (October 6, 1980).

The deceptions, however, in at least some instances, went far beyond anything needed to alleviate confusion over respondent's name—confusion, we might add, which respondent was not at all eager to avoid in its conduct of the indirect interviews [61]described below. We, therefore, conclude that, even with the abandonment of the name Retail Credit Company, there remains a cognizable danger of recurrence of the violation.

Finally, principally in connection with this complaint allegation, respondent argues that the FCRA limits the scope of Section 5 with respect to consumer reporting agencies. In this regard, respondent asserts:

The procedures utilized by consumer reporting agencies with respect to the acquisition, retention and use of file information have been sanctioned and regulated by Congress through the FCRA and cannot constitute an unfair trade practice under Section 5, absent a violation of the provisions of the FCRA or absent an affirmative misrepresentation.

RAB 17 (footnote omitted).

Respondent notes that its challenge extends "only to those paragraphs of Count I [of the complaint] directed to the acquisition, retention, and use of information by respondent, matters that have been specifically considered by Congress and regulated in the FCRA." (RAB 17 n.12) Respondent states further that while the FCRA does not preclude all applications of Section 5 to consumer reporting agencies, it does preclude all such applications "[w]ith regard to issues that were * * * brought to Congress' attention during deliberations on the FCRA * * * ." (RAB 21) Finally, however, having said all of the above, respondent seems to limit its preemption argument to "two issues that have overriding importance in connection with assumptions underlying the Initial Decision: (a) the extent to which fairness precludes the very act of retaining information about consumers for later use; and (b) the extent to which fairness requires that consumers be given advance notice that the information they reveal will be acquired and retained by a reporting agency." (RAB 21) As to those issues, respondent claims that "the FCRA and the FTC Act are definitely *in pari materia* and the later, more specific enactment is controlling." (RAB 21)

We have not found that any practices sanctioned or even addressed by the FCRA violate Section 5. Rather, we have found that certain practices not treated in the FCRA have the capacity to mislead. As respondent points out, the FCRA effectively recognizes the validity of consumer reporting agencies' use of certain types of procedures in connection with consumer reports (e.g., interviews and retention and reuse of information). Respondent, however, does not explain why the fact that Congress has enacted some provisions concerning acquisition, retention and use of information by consumer reporting agencies immunizes from Section 5 all other related practices. [62]

There is no evidence that Congress, in enacting the FCRA, intended to immunize the kinds of unfair or deceptive practices at issue in this case. See generally *L. Heller & Son, Inc. v. FTC*, 191 F.2d 954, 956-57 (7th Cir. 1951); *Perpetual Federal Savings and Loan Ass'n*, 90 F.T.C. 608, 656 n.14 (1977). Nowhere does the statute or its legislative history suggest an intent to condone deceptive practices in connection with the sanctioned activities of a consumer reporting agency. Respondent concedes that the FCRA does not preclude all possible applications of Section 5 to consumer reporting agencies, and it concedes, as well, that Section 5 reaches "affirmative" misrepresentations. (RAB 17 & n.12) We can see no justification for

respondent's distinction between "affirmative" and implied misrepresentations, as both are reached by Section 5.

Even if, however, respondent's distinction were adopted here, this record contains evidence of "affirmative" misrepresentations sufficient to meet respondent's test. In any case, we do not premise our findings on either of the theories which respondent claims is foreclosed by the FCRA: "the very act of retaining information about consumers for later use" or the failure to provide consumers with "advance notice that the information they reveal will be acquired and retained by a reporting agency" is unfair. We simply find that in conducting its activities as a consumer reporting agency, respondent has engaged in a practice which deceives or has the capacity to deceive the consumer, and which, therefore, violates Section 5.⁸¹

We believe that the violation will be cured by a simple provision prohibiting respondent's field representatives from misrepresenting directly or by implication that they are agents or employees [63] of the company to which the consumer who is the subject of the report has applied for a benefit. There is no evidence to suggest that if Equifax employees comply with the order as proposed by the judge, their actions will have a tendency to mislead consumers either as to their identity and that of their employer or as to the intended use to be made of the information.⁸² We therefore see no need for the additional prohibitions and affirmative disclosures proposed by complaint counsel. [64]

B. Indirect Interviews and Misleading Medical Information Authorizations

The judge sustained the complaint allegations that (1) respondent's investigative personnel, in the course of preparing claim

⁸¹ Respondent also argues that "[t]he *in pari materia* principle dictates that, in the instant case, the FTC Act must not be interpreted without regard for the lines Congress drew when it passed the FCRA, particularly in a situation where Congress declined to provide the Commission with the power to issue regulations having the force and effect of law [footnote omitted]." (RAB 20) (emphasis in original) As we have already stated, however, Congress had indicated no intent to condone or immunize from Section 5 deceptive practices in connection with the other legitimate activities of a consumer reporting agency. Moreover, regardless of whatever authority the Commission may have to promulgate trade regulation rules under Section 5 covering the credit reporting industry, here, we are simply construing the FTC Act in the course of an adjudication.

⁸² Complaint counsel urge us to go beyond the findings of the ALJ and to determine that, wholly apart from the misrepresentations of identity, respondent's "failure to disclose to consumers that [it] will retain information for future reference has the tendency to mislead consumers as to a material fact." (CRB 19) Therefore, they argue, the Commission should order respondent affirmatively to disclose "not only its identity, but also the nature of its operation and its practice of retaining file copies of reports for future reference * * * ." (CRB 21)

As noted in the text, the ALJ correctly found that "[t]he record fails to show that respondent affirmatively misrepresented that it did not keep file copies of the reports or that information furnished during an interview would be used exclusively by the company to which the consumer had applied for a benefit such as insurance." (ID p. 215) Complaint counsel have not shown that, absent the misrepresentations of identity which our order will prohibit, the failure of respondent to make affirmative disclosure as to the retention and future use of the information gained from interviews by its field staff would render the interviews deceptive under Section 5.

reports, have used deception to induce claimants to participate in interviews; and (2) respondent has obtained medical information about consumers from physicians and other medical personnel without proper authorization. Although he found that both practices violate Section 5, he determined that changes in respondent's procedures have obviated the need for an order addressed to the latter practice and that, in any case, the McCarran-Ferguson Act bars the Commission from ordering any relief.⁸³

Respondent appeals from the findings that it has violated Section 5, and complaint counsel appeal from the judge's failure to order respondent to cease and desist from using the challenged procedures in the future.

1. The Indirect Interview

Until 1966, respondent instructed its employees to use a "pretext" in their attempts to obtain information from third-party claimants, that is, persons filing a claim against someone else's insurance company. Investigators might, for example, represent to the claimant that they were "looking for a person [they] believe[d] that resided in the neighborhood, [and ask whether the claimant] had ever heard of that person." (ID 168 & n.59) The primary purpose of these contacts was to afford the field representative an opportunity to observe the physical condition of consumers who had filed claims for personal injuries. The pretext was designed to encourage individuals who might otherwise be uncooperative to participate in the interview and, of course, permit respondent's employees to observe their condition. Respondent does not challenge the ALJ's findings that these procedures were unfair or deceptive (ID 167-75),⁸⁴ and we affirm those findings.

In 1966 and, again, in 1971, respondent modified its method of obtaining information from third-party claimants. Field representatives were instructed in 1966 to "give the name 'Retail Credit [65] Company' and indicate that [they were] making inquiry, ostensibly for credit purposes." (RX 651A) They were to complete a form bearing the title "Credit File Audit" (RX 651B), which "was designed so that when seen by the interviewee * * * it would give the impression that the investigation being conducted was a credit investigation * * * ." (ID 172) In 1971, respondent replaced the "Credit File Audit" form with a "Personal Interview" form (RX

⁸³ Respondent has raised the McCarran-Ferguson Act exemption only with respect to these two alleged violations.

⁸⁴ We also understand respondent to acknowledge that misrepresentations were made in connection with the procedure used until 1971 (the "Credit File Audit" approach) (RAB 23 n.22), despite its assertion that this interview technique did not violate Section 5 standards. (RAB 22 n.21)

575C), which the claimant was allowed to "handle * * * if he [were] so inclined." (RX 119V) If the claimant asked the field representative the purpose of the interview, the representative was to state that he or she was not permitted to divulge the purpose or the source of the request. Employees were instructed that "[i]t is imperative that our approach not include any misrepresentation." (ID 176)

The ALJ correctly decided that the changes initiated in 1966 and 1971 did not strip the indirect interviewing technique of its deceptiveness. The 1966 procedure clearly involved representations to claimants that credit checks, rather than claim investigations, were being conducted. The 1971 procedure involved more subtle misrepresentations of the purpose of the investigations.

The ALJ found that the "Personal Interview" approach, "while not involving affirmative misrepresentations," when used in conjunction with the Retail Credit Company name, "was likely to lead the consumer to believe the purpose of the interview was to obtain credit information, rather than data about the health and activities of a claimant in an insurance claim." (ID 179)

Respondent contends that the ALJ's finding will not support an order because of its abandonment of the name "Retail Credit Company." (RAB 23 n.23) We agree that whatever the former name "Retail Credit" may have signified about the purpose of the investigation is certainly not implied by the name "Equifax Inc."

We nevertheless find that the form itself has the capacity to mislead. The form asks questions which to many consumers would seem more relevant to a credit check than to a claim investigation.⁸⁵ While responses to the questions might, in some cases, be relevant to the disposition of a claim, we find that the questionnaire, as written, has the capacity to deceive consumers into believing that they are the subject of a credit investigation.⁸⁶ Moreover, [66]there can be no doubt of the materiality of the deception, that, but for the deception, third-party claimants would be less likely to speak to the interviewer.

⁸⁵ The form also seeks information which would seem relevant to an employment or other consumer or business report designed to elicit information about the individual's finances and his or her standing in the community.

⁸⁶ As to respondent's argument at RAB 24, we do not rely on witness Murray's testimony (Tr. 9596-97) but instead base our finding as to the misleading nature of the "Personal Interview" approach on our examination of the interview form. Nor, contrary to the ALJ (ID 178), do we make any finding that respondent intended consumers to be misled about the purpose of the "Personal Interview."

Respondent notes that the Privacy Protection Study Commission has criticized the use of the "pretext" interview, which it defined as one in which the interviewer "(1) pretends to be someone he is not; (2) pretends to represent someone he does not; or (3) misrepresents the true purpose of the interviewer. Mere silence on any or all of these points would not normally constitute a pretext interview." U.S. Privacy Protection Study Commission, *supra* p. 26, at 190. Respondent, however, can take little comfort from this language, as the "Personal Interview" approach has involved misrepresentations, as opposed to mere silence, about the purpose of the interview.

2. Acquisition of Medical Information

The complaint alleged that respondent has obtained medical information from physicians and other medical personnel on the basis of medical authorizations, signed by consumers, which misrepresent that the information would only be used by the insurance company to which the consumer executed the release when, in fact, a copy of the medical information is retained in respondent's files and is sometimes used in the preparation of subsequent reports for other customers. (Complaint, ¶¶ 11-13) The ALJ found a violation, based on his conclusion that the authorization forms

would not put the consumer on notice that disclosure would be made to a third party consumer reporting agency which, for a portion of the relevant period, kept copies of such reports in its files and which could use such data in connection with unrelated transactions for which no authorization had been given. Consumers signing such authorizations did not give informed consent to the disclosure of such information to respondent.

ID 255. [67]

Respondent obtains medical information from physicians, hospitals, and clinics in connection with its Underwriting Medical History ("UMH") report and also certain claim reports. In the case of the UMH reports, the signed forms by which applicants for insurance authorize the release of their medical records are generally provided to Equifax by the insurance company. The language of the authorizations has varied. Some have authorized disclosure of information to respondent by name—the ALJ found that respondent has encouraged the use of such forms—while others have authorized the release of information to the "bearer," to the named insurance company, its "representative" or its "agent," or simply to the named insurance company. (ID 228; see RPF 219(a).)

In the case of claim investigations, respondent usually obtains authorization directly from the claimant and, in those cases, it uses its own form which expressly authorizes it to receive medical information about the claimant. (ID 229) Insurance companies, however, sometimes obtain authorizations from claimants and then furnish them to Equifax, and some authorize disclosure to a named insurance company or its "representative." (Tr. 10650)

Whether these authorizations are misleading, or whether consumers have not provided informed consent to the disclosure of medical information, depends on whether the information has actually been used in a manner consistent with the language of the authorization forms which they have signed. When the UMH service was first instituted, the company retained copies of UMH reports in its

regular alphabetical files and, although field representatives were instructed not to quote from a UMH report in a subsequent underwriting report, they could use the information as a "tip," that is, as a lead to assist them in the conduct of a new investigation. In July 1972, however, it became respondent's practice to retain copies of UMH reports for only 90 days⁸⁷ and in November 1973, respondent adopted the policy of destroying file copies as soon as the supervisor determines that the report has been properly prepared. (ID 237-39) As the judge found, in securing medical information for UMH reports, respondent now performs a "courier" service. (ID 227)

The filing procedures for medical information gathered in connection with a claim report have also changed. Before May 1974, claim reports were placed in the regular alphabetical files and medical information in these reports could be used as a "tip" in a subsequent investigation. Respondent also permitted disclosure in a new report that a prior claim report had been made together with the name of the doctor and hospital, and the dates and causes of [68]any hospital confinement. Beginning in May 1974, new claim reports were placed in separate files and previously prepared reports were to be pulled from the regular files and placed in the separate claim files. In December 1975, respondent instructed its staff not to retain medical information obtained in connection with a claim report. Instead, medical information was to be recorded on a separate form attached to the claim report and all copies of the medical attachment were to be destroyed once the report was mailed to the customer. (ID 240-44)

Because of the changes in respondent's procedures, and the limits imposed by the McCarran-Ferguson Act on our authority, we will not decide in this case whether an authorization can be valid only if the patient provides "informed consent" and, if so, what it takes for the consent to be informed. We do find, however, that so long as it was respondent's practice to retain for future use health information obtained pursuant to a signed authorization, those forms which authorized release to a named insurance company, without disclosure that the information would also be released to a reporting agency, had the tendency to mislead consumers into believing that the information would be released only to the insurance company. Forms which authorized release to a "representative" or the "bearer," again without disclosure that information would also be used by respondent, at least implied that disclosure would only be made to someone acting solely on behalf of the insurer. Consumers

⁸⁷ The copies were retained in case the original was lost, either in the mail or by the customer, and to assist in responding to questions about billing, and were not to be used in the preparation of other reports on the consumer. (ID 238)

would tend to infer from the language, and would be entitled to assume, that their authorizations would not be used by a reporting agency to obtain sensitive medical information which it would then be free to retain for future use.⁸⁸

Moreover, the materiality of the misrepresentation is self-evident. It is obvious that consumers will be more likely to authorize release of medical records if they have been informed that the information will be used for a single purpose—the underwriting of a single insurance policy or adjustment of a particular claim—rather than for an undetermined number of future uses.⁸⁹ [69]

The forms were generally no longer misleading, however, once it became respondent's practice not to retain medical information for future use. Once respondent, in collecting medical information, acted only as a courier for the insurance companies, it was in fact no more than an agent, or representative, of the insurer.⁹⁰

3. McCarran-Ferguson Act

a. "*Business of Insurance*"

The ALJ determined that the acts and practices he found unfair or deceptive are excluded from our authority by the McCarran-Ferguson Act because they are the "business of insurance."⁹¹ We agree with the ALJ that the methods by which respondent collects [70]

⁸⁸ It is immaterial that, in some cases, the misleading forms were prepared, and signatures were obtained, by insurance companies. Respondent, by its use of these forms to gather medical information and its subsequent retention of the information for uses which were not authorized by the consumer, participated in the deception. Indeed, it was respondent's retention and subsequent use of the information which made the insurance companies' authorization forms deceptive.

⁸⁹ On the propriety of basing findings of deception and materiality on the exercise of the Commission's expertise, see pp. 58–59 *supra*.

In challenging the ALJ's conclusion that consumers did not provide informed consent to the release of medical information to a consumer reporting agency, respondent contends that "[t]he release of medical information pursuant to an authorization is the act of a physician" and that "to find unfairness by respondent, the Administrative Law Judge has to draw the further inference . . . that respondent 'should have been aware' of the 'fact' (not established by evidence in the record) that its customers obtained authorizations given without 'informed' consent." (RAB 41)

As noted earlier, our finding does not turn on any failure to provide "informed consent" but instead on the deceptive nature of the authorization forms. Complaint counsel were under no burden to show that the deception in these forms was never remedied by additional disclosures furnished by insurance companies or physicians.

⁹⁰ While forms which authorized disclosure to a named insurance company may have been misleading, we are not persuaded that any deception was material.

⁹¹ The McCarran-Ferguson Act provides in relevant part:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, . . . the Sherman Act, . . . the Clayton Act, . . . and the Federal Trade Commission Act, as amended . . . , shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

information for insurers are immunized from Section 5, but only to the extent the information is collected for use in connection with the underwriting or spreading of an insurance risk. When, as in the past, information has been collected for a variety of uses, clarity of analysis requires that we distinguish between collection of information for business of insurance uses and collection of information for non-insurance uses.

The McCarran-Ferguson Act renders the federal antitrust laws and the FTC Act inapplicable to the business of insurance insofar as such business is regulated by state law and is not subject to the "boycott" exception in Section 3(b) of the Act. In creating the exemption,

Congress was concerned with the type of state regulation that centers around the contract of insurance * * *. The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance."

SEC v. National Securities, Inc., 393 U.S. 453, 460 (1969). "[T]he underwriting or spreading of risk is a critical determinant in identifying insurance." *Group Life & Health Insurance Co. v. Royal Drug Co., Inc.*, 440 U.S. 205, 213 (1979).

Decisions whether to grant an application for an insurance policy are the essence of "the underwriting of * * * risk." No part of an insurance-related transaction could be more within the core of the business of insurance. The adjustment of claims is likewise at the core of the "business of insurance," as it bears directly on the interpretation and enforcement of the insurance policy.⁹² [71]

Complaint counsel properly acknowledge that a firm need not be an insurer to be "in the business of insurance." (CAB 56)⁹³ See also

⁹² Although "[t]he primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk," *Royal Drug Co.*, *supra*, 440 U.S. at 211 (emphasis added), we are not persuaded by complaint counsel of the materiality of the fact that "to the extent that the indirect interview was used in connection with investigations of third party claimants * * *, the information furnished in the report would be used in connection with a claimant who was not a policyholder." (CRB 42) We cannot see how the determination of a claim submitted by a third party is any less the business of insurance than the resolution of a claim made by the policyholder. See R. Keeton, *Insurance Law* § 1.2(a) (1971) ("Insurance is an arrangement for transferring and distributing risk. It is an arrangement under which one (called an insurer) contracts to do something that is of value to another (usually called an insured but sometimes called a beneficiary) upon the occurrence of a specified harmful contingency.") (emphasis added) (section cited in *Royal Drug*, *supra*, 440 U.S. at 211). The insurer's payment to a third-party tort claimant involves the "spreading * * * of a policyholder's risk," and directly benefits the policyholder, since it satisfies a claim which might otherwise have been made against the policyholder.

Royal Drug, of course, affirms that not all insurer activities that ultimately affect the insurer's costs in settling claims, and the level of its premiums, are part of the business of insurance. In so doing, it raises but does not resolve the complex policy and factual issues involved in the process of defining the outer limits of the business of insurance. Since this case involves practices that clearly constitute the business of insurance, we need not reach those definitional questions here or attempt to identify a bright line dividing all aspects of the business of insurance from those activities which do not so qualify.

⁹³ Complaint counsel's acknowledgment is fully consistent with *Royal Drug's* holding that the Act exempts the "business of insurance" rather than the "business of insurance companies." 440 U.S. at 232-33.

Providence Washington Ins. Co., 89 F.T.C. 345, 401 (1977). It follows that an insurance company's election to contract with a non-insurer to gather information it deems important to its determination whether to underwrite a risk or to grant a claim—an activity which, if performed by its own employees, could only be viewed as the business of insurance—does not, by itself, alter the coverage of the McCarran-Ferguson Act exemption.

We also observed in *Providence Washington*, however, that “[w]here [McCarran-Ferguson Act] protection is sought for the activities of non-insurers, we think it especially critical that the transaction(s) in question be analyzed with precision, to ensure that the mere involvement of an insurance contract is not used to confer blanket immunity upon a wide range of activities [72] that are not the business of insurance.” *Id.* at 401. See also *Peacock Buick, Inc.*, 87 F.T.C. 379, 381 (1976), *aff'd*, 553 F.2d 97 (4th Cir. 1977).

Accordingly, the collection of information for use in both McCarran-Ferguson insurance transactions and non-insurance transactions cannot be said to be only the “business of insurance;” moreover, the fact that the information is collected primarily for use in insurance transactions is insufficient to deprive the Commission of authority to reach the practice to the extent it is not the business of insurance. The collection of information for a multitude of insurance and non-insurance uses can more accurately be described as the business of collecting and using information—the business of a consumer reporting agency—than as the business of insurance. The ALJ, however, explaining his conclusion that respondent’s retention of medical information, originally gathered for the use of insurers in the “underwriting or spreading of risk,” is the business of insurance, stated:

[I]t is apparent that securing such information initially is part of the business of insurance. In many instances, insurance companies perform such functions themselves. Respondent’s practices in connection with the retention of medical information and the uses thereof which might otherwise violate the Federal Trade Commission Act arise directly out of the transactions subject to state regulation as the business of insurance. At best, it may be said that the activities here complained of are abuses by respondent in participating in the business of insurance.

ID p. 220.⁹⁴ [73]

We disagree that merely because a practice “arise[s] directly out of

⁹⁴ Respondent also argues that “[s]ince inadequate disclosure is at the heart of the alleged violation, the proper remedial order, if any is justified, is one that affords more complete disclosure. And the McCarran Act undoubtedly places the authority for such regulation exclusively in the hands of state authorities.” (R. Ans. 89) The Commission, however, may reach the practice if the failure to disclose is in connection with the gathering of information which is used for non-insurance purposes. Moreover, prohibitions against deception are not the only appropriate remedies for such violations. Another remedy is a ban on the continued use of information obtained as a result of the deception. See note 104 *infra*.

transactions subject to state regulation as the business of insurance" it is necessarily the business of insurance. *Royal Drug*, decided after the ALJ issued his initial decision, plainly rejects the notion that practices which may arise out of the business of insurance—the underwriting or spreading of risk—are necessarily immunized. Indeed, the contracts between the insurers and third-party providers of services at issue in *Royal Drug*, which the Court held outside the scope of the statutory exemption, could readily be characterized exactly as the ALJ described the practices in this case, as alleged "abuses by [the insurer] in participating in the business of insurance." (ID p. 220)⁹⁵ The practices themselves must be the business of insurance in that they directly relate to the contract between the insurer and the insured and involve the underwriting or spreading of risk. *Id.* at 212-15. The gathering of information to be used in an underwriting or claim report is the business of insurance; the gathering of information for use in a personnel, credit or other report not prepared in connection with the "underwriting or spreading of risk" is not. Any other result would contravene the rule that "[b]road exemptions from the antitrust laws and from major consumer protection legislation ought not be conferred lightly * * *." *Providence Washington, supra*, 89 F.T.C. at 407; see *Royal Drug, supra*, 440 U.S. at 231.

b. State Regulation

The business of insurance is immunized from federal law only insofar as it is regulated by the states. McCarran-Ferguson Act, Section 2(b). We agree with respondent that those practices in this case which are the business of insurance are also regulated by state law and that, accordingly, they are beyond the reach of Section 5.

As of August 1979, 45 states had adopted laws based on the Model Unfair Practices Act for Insurance ("Model Act"). See 2 National Ass'n of Ins. Commissioners, *Model Regulation Service*, 900.11 (August 1979).⁹⁶ The Model Act prohibits any "individual, corporation * * * and any other legal entity engaged in the business of insurance * * *," Model Act, Section 2(a), from "[m]aking, publishing, disseminating, circulating or placing before the public, * * * an advertisement, announcement or *statement* containing any assertion, representation or statement with respect to the business [74]of

⁹⁵ The Court did not reach the question whether the policies offered by the respondent health insurers were the business of insurance within the meaning of the Act. 440 U.S. at 230 n.37.

⁹⁶ The Model Act appears at 2 *Model Regulation Service, supra*, at 900.1 *et seq.* (January 1977).

insurance * * * which is untrue, deceptive or misleading." Model Act, Section 4(2) (emphasis added).⁹⁷ This prohibition amounts to "state regulation" within the meaning of Section 2(b) of the McCarran-Ferguson Act.⁹⁸

The deceptive interviewing practices and medical authorization forms shown in this record appear to be clearly within the scope of the prohibition as they involve statements made by persons "engaged in the business of insurance" "with respect to the business of insurance,"⁹⁹ and complaint counsel have not contended that, insofar as they are the business of insurance, these practices are outside the scope of the Model Act. Nor have complaint counsel asserted that these statutory provisions are "mere pretense." *National Casualty Co., supra*, 357 U.S. at 564.¹⁰⁰ [75]

4. Violations and Order

In view of the McCarran-Ferguson Act, only the gathering of information by deceptive means for use in the preparation of non-insurance reports, or the actual use of the information for such non-insurance purposes, would violate Section 5. We will not bar

⁹⁷ Under the Model Act, violations of its prohibitions may subject the alleged violator to a cease and desist order. Model Act, Sections 7, 8. Section 7(a), as amended in 1977, also authorizes the state Commissioner of Insurance to proceed against unfair or deceptive acts or practices which are not specifically defined in Section 4.

⁹⁸ The Supreme Court, in *FTC v. National Casualty Co.*, 357 U.S. 560, 564 (1958), held that in view of state legislation adopted by nearly all of the states prohibiting unfair insurance advertising and authorizing enforcement through a scheme of administrative supervision, the practices at issue were subject to state regulation.

⁹⁹ In addition to those states which have enacted the Model Act, other states have adopted laws regulating unfair trade practices which contain provisions prohibiting untrue, deceptive or misleading statements similar to that contained in Section 4 of the Model Act. See, e.g., Wash. Rev. Code Ann. Section 48.30.040 (1947); Wis. Stat. Ann. Section 628.34 (1976) (West).

¹⁰⁰ We are not persuaded by complaint counsel's presentation of the difficulties a state would face in attempting to protect its citizens against a report which was prepared and used in other states. (CAB 66) This is, accordingly, not a case in which the state laws in question cannot, or do not, adequately address the practices in question. See *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960); *American General Ins. Co.*, 81 F.T.C. 1052 (1972); 89 F.T.C. 557 (1977), *remanded*, 589 F.2d 462 (9th Cir. 1979).

Respondent, citing *United Corp. v. FTC*, 110 F.2d 473 (4th Cir. 1940), contends that, because "it has already eliminated the spillover effects of claim investigations upon its non-insurance business," the Commission no longer has jurisdiction to reach its retention and use of information obtained by means of the indirect interview for non-insurance purposes. (R. Ans. 81)

In *United Corp.*, during the course of the administrative proceeding, the respondent had acquired the status of a packer, within the meaning of the Packers and Stockyards Act, 7 U.S.C. 181 *et seq.* (1976). The court noted that, once respondent became subject to the Packers and Stockyards Act, the Commission could no longer "grant effective relief," 110 F.2d at 476, because the respondent's status placed its operation outside the reach of the Commission's jurisdiction. In this matter, however, whether or not the McCarran-Ferguson Act exemption is jurisdictional, compare *Dexter v. Equitable Life Assurance Society*, 527 F.2d 233, 237 (2d Cir. 1975) with *National Casualty Co. v. FTC*, 245 F.2d 883, 888 (6th Cir. 1957), *aff'd*, 357 U.S. 560 (1958), respondent's practices that are not the business of insurance remain within the scope of Section 5, and an order prohibiting use of information for non-insurance purposes would, therefore, be "effective." The Commission may conclude, from a respondent's past violations (for example, unfair or deceptive acts or practices not part of the business of insurance) that there is a "cognizable danger" the violations will be repeated. See pp. 77-78 *infra*. Under respondent's reasoning, unfair or deceptive practices would be outside our authority unless we could determine that, as of the precise time an order issued, violations were still occurring. We believe it enough that the record support a conclusion that an order is needed to prevent, or to remedy, violations of Section 5, as limited by the McCarran-Ferguson Act.

respondent from using for non-insurance purposes information obtained through the indirect interview (in connection with the business of insurance), since these uses, particularly in credit reports but also in personnel and other non-insurance reports, would appear to be consistent with the representations implicit in the "Personal Interview" form.¹⁰¹ The only uses [76] which would seem to be "unfair or deceptive" are immunized by the McCarran-Ferguson Act.¹⁰²

We are persuaded by complaint counsel, however, that there is sufficient evidence to support an inference that medical information obtained through the use of misleading authorizations has been used in credit, personnel selection, and, perhaps, other reports which are not prepared as part of the business of insurance, in violation of Section 5.

Respondent has instructed its field representatives that "reference files are one of the Field Representative's most valuable tools" and that "[r]eference file information can help [the field representative] to make more accurate, thorough, and conclusive reports by: * * * [r]educing unnecessary duplication of effort[,] * * * [i]ndicating points deserving special attention[,] * * * [and] [a]iding in better source selection." (CX 666K) (Field Representative Manual)

Respondent's Credit Reporting Manual advised field representatives that "[f]ile information can be used to advantage on Credit Reports" and noted that "reports made for insurance or other purposes" could be used "as a source to secure leads." (CX 665N) The record also includes testimony that file information is normally consulted by employees engaged in the preparation of personnel reports. (Tr. 4430-31)

Moreover, as noted above, respondent's procedures allowed reference files containing medical information to be used as sources for leads in the preparation of other reports (presumably including non-insurance reports) until July 1972, in the case of the UMH reports and May 1974, in the case of claim reports, [77] and it should be inferred that such information actually was consulted in the preparation of non-insurance reports.¹⁰³

¹⁰¹ Until 1971, respondent explicitly represented that the purpose of the interview was to update the individual's credit file. We cannot conclude from this record that this use is materially different from use in personnel reports or the other kinds of non-insurance reports at issue in this case.

¹⁰² Complaint counsel have not persuaded us that we should upset the ALJ's implied finding that, at least since 1966, the indirect interview has always been used in connection with "business of insurance" reports. (ID 178, 181) Although the ALJ did find that "pretexts" were used in some work other than claims, he also found that in 1966 the pretext interview was supplanted by the Credit File Audit procedure. (ID 168 & n.58)

¹⁰³ Respondent appeals (RAB 41-44) from the judge's implied finding that the use in a subsequent investigation of medical information as a tip has had the effect of disclosing confidential information to sources to whom leading questions might be asked (ID 246, 249) and his finding that, in any case, use of medical information as a tip breaches confidentiality because "use of tip information necessarily influences an investigation irrespective of whether leading questions are asked." (ID 249 & n.79) It also appeals from his refusal to find that certain medical information is not privileged. (ID 249 n.78)

Finally, over complaint counsel's objection, the judge found that "[t]he extensive changes in respondent's procedures which ultimately eliminated the retention of medical reports, ha[ve] effectively prevented further unauthorized use of medical information." (ID 256) Although these changes appear to ensure that medical reports which respondent now obtains will not be retained for future use, the record does not show that respondent has destroyed those portions of its claim reports containing medical information which were filed before it put into effect the procedural changes cited by the ALJ. It had been respondent's practice to retain this information and the absence of evidence that the information has been destroyed supports an inference that some of this information remains in respondent's files.

In any case, we find that there is a "cognizable danger of recurrent violation" of Section 5, *SCM Corp. v. FTC, supra*, 612 F.2d at 708, in view of the persistency of the violations (ID 237-43), and the fact that respondent stopped retaining copies of new reports that included medical information only after the Commission commenced its investigation (and in the case of claim reports long after the Commission issued the complaint). "[W]ith corporations as with individuals, past conduct is probative of [78]future behavior," *Kraftco Corp., supra*, 92 F.T.C. at 419, and an inference may accordingly be drawn that, absent an order, the violations will be repeated in the future. *Id.* at 419-20. *See also Official Airline Guides, Inc. v. FTC*, No. 1217, slip op. at 5708 (2d Cir. Sept. 18, 1980), *petition for cert. filed*, No. 80-961 (U.S. Dec. 12, 1980) (where practice abandoned before the conclusion of the proceedings, "Commission has discretion to find that an order is warranted because of the possibility of unlawful recurrence of the activity").

We will order respondent to cease and desist from using medical information obtained by means of the misleading authorizations described in this opinion except in connection with reports the sole purpose of which is "the business of insurance."¹⁰⁴

Respondent has not persuaded us that ID 246, ID 249, or ID 249 n.78 is erroneous. We note, however, that our judgment that respondent has violated Section 5 does not turn on any finding as to whether field representatives have disclosed confidential information to sources or on any finding that the medical information described in ID 249 n.78 is "privileged." As to ID 249 & n.79, we need not decide whether the use of medical information in respondent's files as a tip in a later investigation breaches the confidentiality of the information. We only observe that, in some cases, it was a non-insurance use of information obtained by means of a misleading authorization form.

¹⁰⁴ As to the propriety of prohibiting the use of information obtained by a respondent in violation of Section 5, *see Beneficial Corp.*, 86 F.T.C. 119, 179 (1975), *aff'd in part and rev'd in part on other grounds*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

We recognize that Section 605 of the FCRA generally prohibits the reporting of adverse information which is more than seven years old and that Section 614 requires the updating of adverse information contained in an investigative consumer report. Respondent's practice was generally only to use adverse information in a previous

(Continued)

C. Misrepresentations of the Manner in Which Respondent Prepares its Reports

The complaint alleged that respondent has violated Section 5 by misrepresenting to customers how it prepares its consumer reports. Specifically, respondent was charged with having falsely represented to customers that (1) its reports are compiled through in-person interviews (rather than by telephone) and direct observations of consumers' physical surroundings, and (2) all sources listed in reports have actually been contacted by respondent's investigative personnel. The complaint also asserted that users of the reports would not rely on them as much in making a decision as to a consumer's eligibility for a benefit such as insurance, had the manner in which the reports were prepared been truthfully and factually represented. In fact, in certain instances, according to the complaint, users would not have rejected a consumer's application for a benefit such as insurance, or increased the rate for or canceled the consumer's insurance coverage, had the manner in which the information been gathered been truthfully and factually represented. (Complaint, ¶¶ 9, 10) [79]

The ALJ sustained the complaint allegation as to the use of in-person interviews and direct observations. He also found that respondent's employees have listed sources who had not actually been contacted, but did not find that the practice violated Section 5. Respondent appeals from the ALJ's findings regarding in-person interviews and direct observations, and complaint counsel appeal from the judge's failure to issue an order prohibiting the listing of sources who have not been interviewed.

The complaint did not assert that respondent has violated Section 5 by encouraging customers to purchase its reports on the basis of misrepresentations of their worth. Instead, it alleged that respondent's representations may induce customers to give more weight to information in the reports than they would if they understood how the reports had actually been prepared. The complaint also alleged that customers may be induced to take adverse action against the subject of a report (for example, by declining an insurance application) because of the misunderstanding induced by the misrepresentations. In view of Congress' concern about preventing the dissemination of reports containing inaccurate *adverse* information¹⁰⁵ and what we understand to be the thrust of the complaint, we will not sustain these complaint allegations unless we conclude that respon-

report as a "tip" and the FCRA would not prohibit such use, so long as the information was properly updated. As explained above, however, such use would violate Section 5.

¹⁰⁵ See pp. 6-7, 21 *supra*.

dent's representations have made it more likely that users of the information would take adverse actions against consumers than they otherwise would have taken had they not been misled.

Respondent concentrates its appeal on a challenge to the legal theory which supports this portion of the complaint. Respondent asserts that the judge's findings should be set aside because of the lack of any evidence that respondent's customers have been deceived into buying a service. (RAB 31-32) Respondent, however, offers no explanation why Section 5's prohibition against "unfair or deceptive acts or practices in or affecting commerce" should be confined to acts or practices which mislead the victim "into buying something which he might not otherwise have bought." (RAB 31-32) Although these are probably the most common "unfair or deceptive acts or practices," our cases have also addressed other deceptions "in or affecting commerce," practices ranging from failures to disclose that responses to advertisements will be followed by a visit by a salesperson (*Encyclopedia Britannica*, 87 F.T.C. 421, 530 (1976), *aff'd*, 605 F.2d 964 (7th Cir. 1979), *cert. denied*, 100 S.Ct. 1329 (1980); *Mather Hearing Aid Distributors, Inc.*, 78 F.T.C. 709, 740 (1971)), to misrepresentations that legal action will be taken if a debt is not promptly paid (e.g., *Trans World Accounts, Inc.*, 90 F.T.C. 350 (1977), *aff'd in part and rev'd and remanded in part*, 594 F.2d 212 (9th Cir. 1979)), and misrepresentations to prospective employees of the training [80] or income they will receive (e.g., *Encyclopedia Britannica, Inc.*, *supra*, 87 F.T.C. at 527-28).

Cases holding that a claim is not material unless complaint counsel show that the consumer, if not deceived, would be less likely to buy the product, e.g., *Leonard F. Porter, Inc.*, *supra*, simply articulate the standard to be used in the most common of the cases involving unfair or deceptive acts or practices, those addressing misrepresentations which might induce a consumer to purchase a product. They do not hold that the Commission may infer materiality only where a claim makes it more likely that a consumer will purchase a product.¹⁰⁶

Nevertheless, although the complaint is sound in theory, the record compiled in this case does not support a finding of liability. We affirm the ALJ's findings that respondent has misrepresented the extent to which it relies on face-to-face interviews as opposed to interviews conducted over the telephone, and that it has impliedly represented that some items of information are based on direct

¹⁰⁶ Respondent also claims that "a finding of violation of Section 5 by the Commission based on a failure to disclose what it deems to be a material fact relating to persons other than those to whom the representations were made would be a wholly unwarranted extension of the Commission's powers." (RAB 32) Nevertheless, if there are misrepresentations, they are about the products, that is, the reports respondent sells to its customers.

observations when, in fact, they are not. (ID 198-201, 211, 214-15) The record, however, does not support an inference that the misrepresentations have made it more likely that users of the information will take adverse action against consumers.

At least two underwriters called by complaint counsel testified that they understood interviews with applicants and sources are sometimes conducted by telephone. (Tr. 1088, 2634) We are dubious that underwriters generally assume that, in the absence of an express representation in the report, any particular applicant or source has been the subject of a face-to-face interview, since the record shows that they realize some interviews are conducted by telephone.¹⁰⁷ We are unwilling to speculate whether [81]these customers would give any less weight to a particular piece of information if they had a more precise understanding of the extent to which respondent's employees use the telephone. Moreover, although the judge correctly found that descriptions of the applicant and of his or her home and neighborhood impliedly (and in some cases falsely) represent that they are based on direct observations made by the investigator (ID 201, 204-05, 210-11), we lack sufficient evidence to conclude that the manner in which information has been gathered is more likely to lead to the misreporting of adverse information.¹⁰⁸ [82]

¹⁰⁷ The ALJ found that some underwriters construed a statement in a report that the applicant had been interviewed as representing that there had been a face-to-face interview. (ID 204) However, it is difficult to see how this assumption would make it more likely that the underwriter would take adverse action against the subject of the report. Applicants would be unlikely to provide adverse information about themselves in telephone interviews which would not be revealed in face-to-face interviews and underwriters could not be expected to regard adverse information supplied by the applicant over the telephone as particularly unreliable. If anything, underwriters would likely be concerned that adverse information had been overlooked if the applicant had not been the subject of a face-to-face interview.

¹⁰⁸ The ALJ found that "[c]ertain of respondent's field representatives have reported information concerning the appearance of the subject of the report or his home or physical surroundings, when they did not personally observe the subject of the report or his physical surroundings * * * ." (ID 211) Several of the witnesses cited in the finding testified that they used the telephone because, in view of their production quotas, they did not have time to observe personally the applicant or the applicant's home and neighborhood. Only two of the witnesses, however—Mr. Buckley and Ms. Wallace—testified that they reported *adverse* information about the applicant or his or her surroundings. (Tr. 1349, 3009)

Complaint counsel proposed the following finding as to Mr. Buckley's testimony: "Mr. Buckley testified that 'fudging' information about an applicant's home is too specific. However, 'you can decline a case sitting in the office if you know the area. * * * ." (CPF 221) We agree with complaint counsel's characterization of Mr. Buckley's testimony. Because he apparently did not fabricate information about the applicant's home and his testimony does not indicate the kind of information he would report about the applicant's surroundings, we cannot find that this former employee's use of the telephone resulted in the reporting of inaccurate adverse information or misrepresentations as to how he had obtained adverse information.

Similarly, Ms. Wallace, while testifying as to how she reported information concerning the "environment" in which an applicant for life insurance lived, stated that "by working in the same area all the time, I knew pretty much what the area was like and what each specific area was like and so * * * I would mark it okay unless it was one of the really, really bad areas." (Tr. 3005) Immediately following this testimony, however, she testified that if she obtained over the telephone information on the applicant's "living conditions," she "always marked that favorable." (*Id.*) There is no evidence that the information Ms. Wallace reported about the applicant's environment was inaccurate or was not based on her personal observation, albeit not necessarily an observation occasioned by that particular application.

Finally, Judge von Brand found that some field representatives have listed on their reports sources whom they did not actually interview, either in-person or by telephone, and that some report users give more credence to report information which purports to be based on more than one source. (ID 216-17) He nevertheless made no finding that this practice violates Section 5 and did not order any relief addressed specifically to these findings.¹⁰⁹

Although the ALJ found that “[g]enerally field representatives did not fake sources in those instances where unfavorable * * * information was developed” (ID 402), the record includes some evidence of the listing of “fake” sources of adverse information. (ID 394) In view of the materiality of the number of sources listed (ID 216-17), we find that there is adequate evidence that the falsification of sources makes it more likely that adverse actions will be taken against consumers by users of the information. We therefore conclude that the faking of sources of adverse information is unfair or deceptive.

Like the ALJ, we are not, however, persuaded of the need for an order provision addressed specifically to this practice. Respondent already prohibits its employees from listing sources they have not interviewed, and it has been respondent’s policy to discharge employees who violate that rule.¹¹⁰ Although respondent’s production quotas have induced some employees to list fake sources,¹¹¹ we are convinced that the relief we have ordered with respect to the pressures to produce adverse information will at least remove any incentives to falsify sources of such information. We have [83]no reason to suspect that an order specifically prohibiting falsification of sources of adverse information would add anything useful to the remedy ordered to eliminate pressures to produce adverse information.

V. SCOPE OF ORDER

Respondent challenges the scope of the order entered by the ALJ on the ground that it applies “to corporate entities whose products and services have no rational relationship to ‘the facts and circumstances of the particular case.’” (RAB 8) More specifically, respondent urges, assuming *arguendo* that any order is justified by the record, that the order “be [framed] in terms of the activities, or types of activities, shown by the record to be conducted by Equifax

¹⁰⁹ But see ¶¶ I.B., II.G.-I. of the ALJ’s order. (ID pp. 277, 281-82)

¹¹⁰ See note 34 *supra*.

¹¹¹ See p. 20 *supra*.

Services.” (RAB 9 n.8) We agree, but we believe that the ALJ’s order is so limited.

We reject respondent’s challenge as entirely without merit—the order is expressly limited to the types of activities conducted by Equifax Services, which were the subject of this proceeding.¹¹² The breadth of a Commission order is governed by whether “the remedy selected has [a] reasonable relation to the unlawful practices found to exist.” *FTC v. Colgate-Palmolive Co.*, *supra*, 380 U.S. at 394–95; *see also United Biscuit Co. v. FTC*, 350 F.2d 615, 623 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966). In addition, Commission orders need not be directed only to violations actually shown on the record but may generally prohibit similar acts and practices. *See, e.g., Moog Industries Inc. v. FTC*, 238 F. 2d 43, 52 (8th Cir. 1956), *aff’d* 355 U.S. 411 (1958). In our view, the order in this case is fully consistent with these principles.

The record shows that subsidiaries of Equifax Inc. other than Equifax Services, for example, Retailers Commercial Agency, engage in activities similar to and sometimes overlapping those of Equifax Services. (CX 665H, I)¹¹³ Indeed, respondent’s Chief Executive Officer testified:

Equifax, Inc., is the parent corporation of some 14 companies and divisions, some [84] of which are separately incorporated and some are autonomous operating divisions of Equifax, Inc. These various companies perform for special markets. However, they are all in the information industry, fundamentally furnishing business information to businesses and others who need to have information on which to base a business decision.

Tr. 4847–48. In addition, respondent called as witnesses two employees, both of whom served simultaneously as field representatives for Equifax Services (or Retail Credit Company) and as managers of Retailers Commercial Agency offices. (Tr. 12280, 12585) Another witness called by respondent, a manager of sales administration for Equifax (Tr. 6870), testified that, while the activities involved in producing certain telephone reports relating to employment experience are “almost handled exclusively by Retailers Commercial Agency” (Tr. 6881), an Equifax Services field representative might “do this type of report” in cities “other than the major metropolitan areas,” where there was no Retailers Commercial office. (Tr. 6882) Moreover, the Credit Reporting Manual, which respondent provided

¹¹² Complaint counsel agree with the ALJ’s exclusion from the order of credit reports prepared by Credit Bureau, Inc., of Georgia, Credit Bureau of Montreal Ltd., and Credit Marketing Services.

¹¹³ Respondent notes that it “recognize[s] the need, if an order is entered, to cover the activities which are the subject of this proceeding even if they are subsequently transferred to another division or subsidiary” (RAB 9 n.8) and agrees with complaint counsel that, if an order issues, it need not be restricted to a single subsidiary. (RRB 4 n.3)

to its field representatives, describes the Retailers Commercial Agency as

a credit reporting organization, serving not only credit customers of the Retail Credit Company [now Equifax Services] but also local retail merchants, financial institutions, mortgage loan agencies, and other businesses engaged in consumer credit transactions.

CX 665 H. It notes that "[f]iles and record information are maintained to provide prompt and protective information for the users of its service" (*id.*) and states:

In those locations where there is both a Retail Credit Company Branch Office and a Retailers Office, the Retailers Commercial Agency completes all Credit Reports including those received by Retail Credit Company. On the other hand Retail Credit Company completes all Character Financial Reports for these locations. If the credit inquiries are located outside of the Retailers territory, they are handled by Retail Credit Company.

CX 665 H, I. [85]

Because respondent has offered no explanation as to how the consumer-related information-gathering activities of other subsidiaries which are subject to the ALJ's order differ from those of Equifax Services, we reject its request that we somehow attempt to tailor the order to the precise kinds of reports prepared by Equifax Services.¹¹⁴

FINAL ORDER

This matter having been heard by the Commission upon the cross-appeals of respondent and complaint counsel from the initial decision and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying opinion having determined to affirm in part and reverse in part the initial decision:

It is ordered, That the initial decision of the administrative law judge be adopted as the findings of fact and conclusions of law of the Commission, except to the extent inconsistent with the accompanying opinion.

¹¹⁴ We have, however, narrowed the coverage of the order to "consumer reports," "investigative consumer reports" and "file" as those terms are defined in Section 603 of the FCRA, and deleted the judge's reference to "other reports containing information about consumers." The latter reference might be broad enough to include reports which are outside the scope of this proceeding. See note 56 *supra*.

As part of its general attack on the scope of the order entered by the ALJ, respondent also argues that "[i]n several instances, the order * * * enjoins any and all violations of various sections of the FCRA, whereas the evidence introduced by complaint counsel with respect to such sections related *exclusively* to narrow, specific practices of respondent." (RAB 7) (emphasis in original) In this connection, respondent cites four order provisions, each of which the Commission has narrowed.

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:

I

It is ordered, That respondent Equifax Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the collection, preparation, assembly, sale, or distribution of consumer reports, investigative consumer reports, and files, as "consumer report," "investigative consumer report," and "file" are defined in Section 603(d), (e) and (g) of the Fair Credit Reporting Act (Pub. Law No. 91-508, 15 U.S.C. 1681 *et seq.*) ("the Act") and interpreted in the accompanying Opinion of the Commission (except credit reports prepared by Credit Bureau, Inc. of Georgia, Credit Bureau of Montreal, Ltd., and Credit Marketing Services), shall cease and desist from:

A. Representing, directly or by implication, during the preparation of any report, that investigative personnel employed by Equifax are agents or employees of the company to which the consumer who is the subject of the report has applied for a benefit.

B. Submitting consumer report information to any of its customers who has previously received a consumer report regarding the same consumer, unless: in response to the order of a court having jurisdiction to issue such an order; in accordance with the written instructions of the consumer to whom it relates; or respondent has reason to believe the requester intends to use the information for a permissible purpose as set out in Section 604 of the Act.

C. (1) Rewarding or punishing employees, or representing to employees that they will be rewarded or punished, on the basis of the amount of adverse information (*i.e.*, information which may have, or may reasonably be expected to have, an unfavorable bearing on a consumer's eligibility or qualification for credit, insurance, employment or other benefit, including information which may result, or which may reasonably be expected to result, in a denial of, or increased costs for such benefits) or the proportion, or number, of consumer reports or investigative consumer reports they prepare which contain adverse information about or relating to the consumers who are subjects of said reports; or (2) Encouraging employees, directly or indirectly, to produce a specified number, or proportion, of reports containing adverse information.

D. Using any system of quality audits or any other plan or procedure whereby the performance of branch offices, regions, or other organizational units, or individuals, with respect to the production of adverse information, is ranked against that of other organizational units or individuals, or against previous performance by the same organizational units or individuals.

E. Including in a consumer report concerning employment at an annual salary of less than \$20,000 any notice or other statement that indicates directly or indirectly by means of boilerplate language the existence of items of adverse information, the disclosure of which is prohibited by Section 605 of the Act; *provided, however*, that language notifying the customer of the statutory limitations on the reporting of adverse information may be included in the type of consumer report to which this paragraph applies if it is included in all such reports, regardless of whether a particular consumer's file contains adverse information which the statute prohibits from being reported; and *provided further*, that it is accompanied by an explanation that the notification is included in all reports of the type to which this paragraph applies and is not intended to imply the existence of obsolete adverse information which may not be reported.

F. Misrepresenting to any consumer who requests information concerning himself or herself in respondent's files, the consumer's rights to obtain disclosure by telephone under Section 610 of the Act.

G. Failing:

1. To make available to any consumer who requests information concerning himself or herself in respondent's files, in person or by mail, at the consumer's option, all forms which he or she must execute in connection with the requirements of Section 610 of the Act to receive disclosure to which the consumer is entitled under the Act and this order; and

2. To inform the consumer: that he or she has the right to disclosure upon proper identification, by telephone if he or she pays any toll charge, or in person, at the consumer's option; and what constitutes proper identification.

H. Failing to give disclosure required by Section 609 of the Act to any consumer who has requested disclosure, has provided proper identification as required by respondent under Section 610 of the Act, and has paid or accepted any charges which may be imposed under Section 612 of the Act.

I. Failing, when giving consumers disclosure, to disclose the nature and substance of all information (excluding medical information as defined in Section 603(i) of the Act) in its files on the

consumer at the time of the request, as required by Section 609 of the Act.

J. Requiring a consumer, as a prerequisite to disclosing information from the consumer's file pursuant to Section 609 of the Act, to fill out or sign a form which authorizes respondent to conduct a reinvestigation of any item the consumer may dispute, or to transmit the results of such reinvestigation to persons to whom it has previously reported the disputed information or which authorizes any business, organization, professional person or anyone else to give full information and records about said consumer to respondent; or interposing any other similar condition or requirement which exceeds those specified in Section 610 of the Act.

K. Failing within a reasonable period of time to reinvestigate any item of information in a consumer's file, the completeness or accuracy of which is disputed by the consumer, unless it has reasonable grounds to believe the dispute is frivolous or irrelevant, as required by Section 611(a) of the Act.

L. Furnishing, directly or indirectly, other than for reports prepared solely for use in the business of insurance, medical information, as defined in Section 603(i) of the Act, obtained in response to a written authorization signed by a consumer, unless the authorization clearly identifies respondent as a recipient of the medical information.

II

It is further ordered, That respondent deliver a copy of this order to all present and future employees who are engaged in the preparation of consumer reports and investigative consumer reports or who are engaged in the disclosure or reinvestigation of information required by the Act.

It is further ordered, That respondent distribute a copy of this order to each of its operating divisions and subsidiaries.

III

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

IV

It is further ordered. That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Pitofsky did not participate.

Complaint

96 F.T.C.

IN THE MATTER OF

MURATA MANUFACTURING CO., LTD.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

Docket C-3053. Complaint, Dec. 16, 1980—Decision, Dec. 16, 1980

This consent order requires, among other things, "Murata," a Japanese manufacturer and seller of electronic components, including various types of ceramic capacitors, to divest itself of the Arizona Division of Erie Technological Products, Ltd. (ETP), to a Commission-approved buyer within nine months from the effective date of the order. Should Murata fail to divest ETP's Arizona Division in the specified time, it must divest the entire company to an eligible party within the four months following the initial divestiture period. Respondent is further required to hold ETP's business and assets completely separate and apart from its business and assets pending divestiture, and barred from acquiring, without prior Commission approval, certain firms engaged in the manufacture or sale of ceramic capacitors.

Appearances

For the Commission: *Steven R. Newborn, Sandra G. Wilkof and Virginia L. Snider.*

For the respondent: *W. Clayton Sparrow, Jr., Hurt, Richardson, Garner, Todd & Cadenhead, Atlanta, Ga., and Calvin Collier, Hughes, Hubbard & Reed, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondent, Murata Manufacturing Co., Ltd. ("Murata"), subject to the jurisdiction of the Commission, has entered into an agreement providing for the acquisition of a majority of the stock of Erie Technological Products, Ltd. ("ETP"), which, if consummated, would violate Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended; and that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows: