

Complaint

116 F.T.C.

IN THE MATTER OF

TRANS UNION CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION
OF THE FAIR CREDIT REPORTING ACT*Docket 9255. Complaint, Dec. 15, 1992--Decision, Nov. 18, 1993*

This consent order requires, among other things, an Illinois-based consumer reporting agency to require, in its contracts, that those who obtain consumer reports from the company, in the form of lists developed through credit prescreening, make a firm offer of credit to each person on the list, and to take reasonable steps to enforce those contract provisions. In addition, the respondent is required to provide company officials with a copy of the order, and obtain their signature acknowledging receipt.

Appearances

For the Commission: *Arthur B. Levin* and *David Medine*.

For the respondent: *Roger Longtin, Keck, Mahin & Cate*,
Chicago, IL.

COMPLAINT

The Federal Trade Commission having reason to believe that Trans Union Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

DEFINITIONS

For the purposes of this complaint, the terms, “person,” “consumer,” “consumer report,” and “consumer reporting agency” are defined as set forth in Sections 603(b), (c), (d), and (f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(b), 1681a(c), 1681a(d) and 1681a(f).

“*Credit information*” means the information that respondent maintains bearing on any of the characteristics listed in Section 603(d) of the Fair Credit Reporting Act, 15 U.S.C. 1681a, as amended, with respect to any consumer that respondent obtains from subscribers, court records or any other source and from which respondent creates consumer reports.

“*Permissible purpose*” means any of the purposes listed in Section 604 of the Fair Credit Reporting Act, 15 U.S.C. 1681b, as amended, for which a consumer reporting agency may lawfully furnish a consumer report.

“*Prescreening*” means the process whereby respondent, utilizing credit information, compiles or edits for a client a list of consumers who meet specific criteria and provides this list to the client or a third party (such as a mailing service) on behalf of the client for use in soliciting those consumers for an offer of credit.

“*Subscriber*” means any person who furnishes credit information to respondent or who requests or obtains a consumer report from respondent, excluding consumers.

PARAGRAPH 1. Respondent, Trans Union Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 555 West Adams Street, Chicago, Illinois.

PAR. 2. Respondent is, and has been, regularly engaged in the practice of procuring and assembling information on consumers for

the purpose of furnishing for monetary fees, consumer reports to subscribers and consumers. Respondent furnishes these consumer reports through the means and facilities of interstate commerce. Hence, respondent is a consumer reporting agency, as defined in Section 603(f) of the Fair Credit Reporting Act.

PAR. 3. Respondent regularly provides consumer reports in the form of prescreened lists to credit grantors and fails to require or monitor that credit grantors that receive such lists make a firm offer of credit to each person on the list.

PAR. 4. By and through the acts and practices alleged in paragraphs two and three, and others not specifically set forth herein, respondent has violated Sections 604 and 607 of the Fair Credit Reporting Act by furnishing consumer reports to persons whom respondent did not have reason to believe intended to use the information for a Permissible Purpose under Section 604.

PAR. 5. Respondent regularly compiles, for sale to clients, lists of consumers, based in whole or in part on information contained in its consumer reporting database bearing on the characteristics enumerated in Section 603, thereby creating consumer reports, and provides such consumer reports in the form of target marketing lists to persons that do not intend to make a firm offer of credit to all those consumers on the list and who intend to use the information for purposes not authorized under Section 604 of the Fair Credit Reporting Act.

PAR. 6. By and through the acts and practices alleged in paragraphs two and five, and others not specifically set forth herein, respondent has violated Sections 604 and 607 of the Fair Credit Reporting Act by furnishing consumer reports to persons whom respondent did not have reason to believe intended to use the information for a Permissible Purpose under Section 604.

SUMMARY DECISION

By: Lewis F. Parker, Administrative Law Judge

I. HISTORY OF THE PROCEEDING

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

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

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

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

Complaint counsel have now moved for summary decision as to that portion of the complaint challenging Trans Union's sale of its target marketing lists, and they have filed documents and a memo-

randum in support of their motion.¹ Respondent has filed a response, together with supporting affidavits, in opposition to this motion.

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

II. FINDINGS OF FACT

A. *Trans Union's Business*

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

2. Trans Union is, and has been, regularly engaged in the practice of procuring and assembling information on consumers for the purpose of furnishing, for monetary fees, consumer reports to subscribers and consumers. Trans Union furnishes these consumer reports through the means and facilities of interstate commerce. Thus, Trans Union is a consumer reporting agency, as defined in Section 603(f) of the FCRA (Cplt paragraph 2; Ans paragraph 2; Botruff Aff., paragraph 4).

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

² Abbreviations used in this decision are:

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

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

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

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

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

B. Trans Union's Credit Reporting Database

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

8. Credit grantors generally provide credit information on individual consumers to Trans Union in the form of accounts receiv-

able tapes which usually contain the name, address, zip code, social security number, account number and account activity for each consumer account (Botruff Aff., paragraph 7).

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

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

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

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

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

14. The second part of the tradeline section of a credit report includes the following information for each tradeline: (a) the high credit amount (highest amount ever owed) and the date it was verified; (b) the maximum amount of credit approved by the credi-

tor; (c) the date the account was closed; (d) the present status of the account, *i.e.*, the balance owing and amount past due; (e) the maximum delinquency - date, amount and manner of payment; (f) remarks; and (g) type of loan (Botruff Aff., paragraph 17).

15. The third portion of the tradeline section of a credit report includes the following information for each tradeline: (a) the payment pattern, *i.e.*, 1-12 months or 13-24 months; (b) the historical status in number of months, *i.e.*, either 30-59, 60-89 or 90+; and (c) the type of account and manner of payment, *e.g.*, current, 30 days past due, bankrupt, etc. (Botruff Aff., paragraph 18).

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

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

C. Trans Mark's Target Marketing List Databases

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(HX 2).

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

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

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

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

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

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

TIE evaluates individual consumer income based upon a mix of credit data from Trans Union's database and census demographic data.

TIE . . . is based on the notion that consumer spending and payment behavior is closely related to income.

(HX 1).

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

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

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

(HX 1).

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

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

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

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

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

43. Prior to sending out a computer tape, Trans Mark deletes the name and address of each consumer who satisfies the criteria selected by the customer but whose name and address appears in the Opt Out Database to ensure that each consumer who has chosen not to have his or her name and address used for target marketing purposes does not receive a mail piece (Frank Aff., paragraph 18).

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

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

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

(g) Phillips Publishing, to mail consumers the Better Retirement Report.

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

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

47. Trans Mark has several competitors such as Donnelley Marketing, Metromail and R.L. Polk, who have generated much more revenue from the rental of consumer lists than has Trans Mark (\$4,700,000 in 1992).

<u>Name</u>	<u>Revenue</u>
Donnelley Marketing	\$60-100 million
Metromail	\$40-60 million
R.L. Polk	\$50 million

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

III. CONCLUSIONS OF LAW

A. Summary Decision Is Appropriate In This Case

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

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

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

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

B. The Purpose Of The FCRA

In enacting the FCRA, Congress found that "there is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy" Sec. 602(a)(4), and, in Section 602(b) of the Act, it required consumer reporting agencies [to] adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information

C. The Complaint Allegations

There is no dispute that Trans Union is a consumer reporting agency as defined in Section 603(f) of the FCRA (F. 2). The remaining issues raised by the complaint in this proceeding are whether its target marketing lists are "consumer reports" under the

FCRA³ and, if so, whether those reports are sold to its customers for a permissible purpose under Section 604.⁴

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

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

In January 1993, the Commission approved a consent order with TRW Inc. which allowed it to use only the following identifying information from its consumer reporting database to compile target marketing lists of consumers for sale to its customers: name, telephone number, mother's maiden name, address, zip code, year

³ Section 603(d) of the FCRA defines a consumer report as: any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes or (3) other purposes authorized under Section 604.

⁴ Section 604. Permissible purposes of reports: A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order
(2) In accordance with the written instructions of the consumer to whom it relates.
(3) To a person which it has reason to believe--

(A) Intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

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

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

(D) Intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

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

of birth, age, any generational designation, social security number, or substantially similar identifiers, or any combination thereof.

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

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

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

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

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

One of the central purposes of the FCRA was to restrict the purposes for which consumer reports may be used, for the simple reason that such reports may contain sensitive information about consumers that can easily be misused...

...the purpose for which the information contained in a credit report is collected determines whether the report is a consumer report as defined by the FCRA.

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

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

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

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

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

FCRA Commentary at 18807.

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

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

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

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

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

FCRA Commentary at 18815.

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

List sellers and those who sell consumer goods and services are always eager to obtain personal information about consumers' finances and lifestyles for

marketing purposes. When they obtain such information from sources other than consumer reporting agencies, the FCRA is inapplicable. When credit bureaus supply such information on consumers from their consumer reporting data bases, however, the privacy protections of Section 604 come into play because the Commission views such lists as a series of consumer reports.

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

Another Commission statement to Congress took the same position:

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

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

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

1991 Prepared statement, footnote 12 at 12.

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

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

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

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

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

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

Thus, while the language of Section 604(3)(E) could be construed as supporting Trans Union's position, congressional history suggests otherwise as does the Commission's opinion that target marketing is not a permissible purpose. This opinion, which is not unreasonable in view of the reasons for passage of the FCRA, is persuasive. *See Cochran v. Metropolitan Life Ins. Co.*, 472 F. Supp. 827, 831 (N.D. Ga. 1979):

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

Id. at 832.

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

G. There Are No Constitutional Impediments To This Proceeding

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

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

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

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

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

I also reject Trans Union's equal protection argument because the FCRA applies equally to all consumer reporting agencies.

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

H. Conclusion

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

ORDER

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

- a) Cease and desist from compiling and/or selling consumer reports in the form of target marketing lists to any person unless respondent has reason to believe that such person either intends to make a firm offer of credit to all consumers on the lists or to use such lists for purposes authorized under Section 604 of the FCRA.
- b) Maintain for at least five (5) years from the date of service of this order and upon request, make available to the Federal Trade Commission for inspection and copying, all records and documents necessary to demonstrate fully its compliance with this order.
- c) Deliver a copy of this order to all present and future management officials having administrative, sales, advertising, or policy responsibilities with respect to the subject matter of this order.

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

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

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been served thereafter with a copy of a Complaint that the Commission issued on December 15, 1992, that charged the respondent with violations of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order on those portions of the matter alleged in sections four and five of the complaint, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn the aforesaid portions of this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25

(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Trans Union Corporation is a corporation organized, existing and doing business by virtue of the laws of the State of Delaware, with its office and principal place of business located at 555 West Adams Street, Chicago, Illinois.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, and the proceeding is in the public interest.

ORDER

For purposes of this order, the following definitions shall apply:

a. “*Trans Union*” means Trans Union Corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device.

b. The Fair Credit Reporting Act (“FCRA”) refers to 15 U.S.C. 1681-1681t, as amended or as it may hereinafter be amended.

c. The terms, “*Person*,” “*Consumer*,” “*Consumer Report*,” and “*Consumer Reporting Agency*,” are defined as set forth in Sections 603(b), (c), (d), (f), respectively, of the FCRA, 15 U.S.C. 1681a(b), 1681a(c), 1681a(d), and 1681a(f).

d. “*Credit Information*” means the information Trans Union maintains bearing on any of the characteristics listed in Section 603(d) of the FCRA with respect to any Consumer that Trans Union obtains from Subscribers, court records or any other source and from which Trans Union creates Consumer Reports.

e. “*Credit Prescreening*” means the process whereby Trans Union, utilizing Credit Information, compiles or edits for a client a list of Consumers who meet specific criteria and provides this list to the client or a third party (such as a mailing service) on behalf of the client for use in soliciting those consumers for an offer of credit.

I.

It is ordered, That respondent Trans Union, in connection with the furnishing of consumer reports, does cease and desist from failing:

1. Within ninety (90) days of the date of this order, to require in Trans Union's contracts that those who obtain Consumer Reports from Trans Union in the form of lists developed through Credit Prescreening make a firm offer of credit to each person on the lists and take reasonable steps to enforce those contracts.

II.

It is further ordered, That respondent shall distribute a copy of this order to all present and future management officials having supervisory responsibilities for administration, sales, advertising or policy with respect to the subject matter of this order in each of its subsidiaries and operating divisions dealing with credit pre-screening, and shall secure from each such individual a signed statement acknowledging receipt of this order.

III.

It is further ordered, That for the five (5) year period following entry of this order, respondent, its successors and assigns shall notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in respondent which may affect compliance obligations arising out of the order.

IV.

It is further ordered, That respondent shall maintain and upon request make available to the Federal Trade Commission all records that will demonstrate compliance with the requirements of this order.

V.

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this order, file with the Commission a report, in writing, signed by the respondent and setting forth in detail the manner and form of its compliance with this order.

VI.

If the FCRA is amended (or other similar federal legislation enacted) or the FTC issues any interpretation of the FCRA, relating to any obligation imposed on Trans Union herein, which creates any new requirement that directly conflicts with any obligation imposed on Trans Union by this order, Trans Union may conform the manner in which it conducts its business as a Consumer Reporting Agency or its use of Credit Information to the requirements of such new statutory provision or interpretation; provided however that, Trans Union shall notify the Commission promptly if it intends to change its conduct as provided for in this Section, and provided further that nothing in this provision shall limit the right of the FTC to challenge Trans Union's actions hereunder and to seek enforcement of Trans Union's obligations under this order. For purposes of this order, and by way of example only, a "direct conflict" between this order and a new statutory amendment or interpretation shall include a requirement in any such amendment or interpretation that a Credit Reporting Agency complete a task or obligation addressed in this order in a greater period of time than is specified in the order.

VII.

This order does not address the current practice engaged in by Trans Union of compiling, for sale to clients, lists of consumers with certain credit-related characteristics, based in whole or in part on credit information, which lists are not developed through Credit Prescreening and it does not in any way limit the right of the Federal Trade Commission to take any appropriate action after entry of this order pursuant to the FCRA relating to this practice, nor does it limit in any way Trans Union's defense of any such action.

IN THE MATTER OF

COLUMBIA HOSPITAL CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3472. Complaint, Nov. 19, 1993--Decision, Nov. 19, 1993*

This consent order requires, among other things, the respondents to divest Kissimmee Memorial Hospital, and this divestiture has been consummated. In addition, it prohibits, among other things, the respondents from acquiring, for 10 years, any acute care hospital in Osceola County, Florida without prior Commission approval. The prior approval requirement also is to be met before respondents permit any acute care hospital they operate in the county to be acquired by any entity that already operates a hospital there.

Appearances

For the Commission: *Mark J. Horoschak* and *David M. Narrow*.

For the respondents: *Ky Ewing, Vinson & Elkins*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents, Columbia Hospital Corporation ("Columbia") and Galen Health Care, Inc. ("Galen"), corporations subject to the jurisdiction of the Commission, have entered into an agreement whereby Columbia will acquire 100 percent of the voting stock of Galen; that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended; that the proposed acquisition, 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; and it appearing to the