Sickle,[289] Vail,[290] Stanley, [291] [299]Roberts,[292] and Dealy[293] 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 report[3] 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 1000[7] "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 information[9] 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,

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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. (RFP [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

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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. 11828–29)

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[:] ["]this 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.*

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[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

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[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 incipiency." *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]

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[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 crediting[36] a field representative for a reinvestigation conducted pursuant to Section 611 of the FCRA[37] 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]

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[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

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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

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[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

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[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 unrebutted. (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

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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

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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. Thiret* 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 telephone[49] 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]

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[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

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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 Act[57] [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.

ID 569 (citations omitted).

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 unrebutted 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.

*(Continued)*

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.

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.

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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

*(Continued)*

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

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F.T.C. 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

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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.

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[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 days[87] 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.

15 U.S.C. 1012.

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*

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[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)

*(Continued)*

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]

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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* information[105] 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.

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[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.

IN THE MATTER OF

# MURATA MANUFACTURING CO., LTD.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISION 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 espondent, Murata Manufacturing Co., Ltd. ("Murata"), subject to ıe jurisdiction of the Commission, has entered into an agreement roviding for the acquisition of a majority of the stock of Erie echnological Products, Ltd. ("ETP"), which, if consummated, would olate Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and ›ction 5 of the Federal Trade Commission Act, as amended (15 S.C. 45); that said agreement constitutes a violation of Section 5 of e Federal Trade Commission Act, as amended; and that a ›ceeding in respect thereof would be in the public interest, hereby ues its Complaint, pursuant to Section 11 of the Clayton Act (15 3.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 3.C. 45(b)), stating its charges as follows:

## I.

### DEFINITIONS

1. For the purposes of this Complaint, the following definitions apply:

(a) A "*capacitor*" is an electrical energy storage device constructed of electrodes (conducting layers) separated by dielectric (insulating) material and included within code 3675 of the 1972 Standard Industrial Classification Manual. Capacitors are used in almost all electrical and electronic equipment.

(b) A "*ceramic capacitor*" is a capacitor incorporating ceramic material as the dielectric material, included within codes 3675080 through 3675086 and 3675089 of the 1972 Standard Industrial Classification Manual.

(c) A "*single layer ceramic capacitor*" is a ceramic capacitor constructed of two electrodes separated by one layer of ceramic dielectric material. Single layer ceramic capacitors may be shaped as discs, plates or tubes, included within code 3675080 of the 1972 Standard Industrial Classification Manual.

(d) A "*monolithic (or multilayer) ceramic capacitor*" is a ceramic capacitor consisting of many layers of electrodes and ceramic dielectrics which are sintered at high temperatures to form a monolithic block, included within codes 3675081–3675086 of the 1972 Standard Industrial Classification Manual.

(e) A "*fixed capacitor*" is a capacitor of which the capacitance (energy storing capability) is fixed at a given level at manufacture.

(f) A "*variable capacitor*" is a capacitor designed and manufactured to provide various ranges of capacitance, rather than a single capacitance rating, and the capacitance of which can be adjusted manually after insertion into circuitry, included within code 3675089 of the 1972 Standard Industrial Classification Manual. A ceramic variable capacitor is a variable capacitor incorporating ceramic material as the dielectric material.

## II.

### MURATA MANUFACTURING CO., LTD.

2. Murata is a corporation organized and existing under the laws of Japan.

3. Murata manufactures and sells electronic and electrical components including, but not limited to, capacitors, piezoelectric products, resistors, tuners, active filters, and CR networks. Murata

has subsidiaries and manufacturing operations in the United States, Germany and the Far East, and its products are distributed in more than thirty countries worldwide. Murata had 1979 sales of over $200 million.

4. Murata does business in the United States through and with its wholly-owned subsidiary, Murata Corporation of America ("MCA"). MCA, with headquarters at Marietta, Georgia, sells products manufactured by Murata and manufactures and sells fixed ceramic and variable capacitors.

5. In 1979, Murata ranked among the top eight sellers of fixed ceramic capacitors in the United States (with a 4.4% market share) and second in sales of single layer ceramic capacitors (with a 10.4% market share). Murata was the sixth largest seller of ceramic variable capacitors (with a 5.7% market share) in the United States.

6. At all times relevant herein, Murata has been and is now engaged in commerce within the meaning of the Clayton Act, as amended, and is a corporation whose business is in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

## III.

### ERIE TECHNOLOGICAL PRODUCTS, LTD.

7. ETP is a corporation organized and existing under the laws of Canada.

8. James J. Walsh, an American citizen and the company's president, owns and controls the largest block of ETP's stock. The remaining stock is owned by 23 other shareholders.

9. ETP manufactures and sells passive electronic components and assemblies including capacitors, noise interference filters, rectifiers and other products used in electronic and electrical applications. ETP has manufacturing and testing facilities in Erie, State College, and Carlisle, Pennsylvania; Tucson, Arizona; Nogales, Mexico; Canada; and Germany. In 1979, ETP's worldwide sales were over $40 million.

10. ETP ranks among the eight largest sellers in the United States of all fixed ceramic capacitors (with a 4.4% market share), and among the four largest sellers of single layer ceramic capacitors (with a 9.4% market share). It is the second largest seller of ceramic variable capacitors (with a 23.3% market share) in the United States.

11. At all times relevant herein, ETP has been and is now engaged in commerce within the meaning of the Clayton Act, as

amended, and is a corporation whose business is in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

## IV.

### THE ACQUISITION

12. On November 30, 1979, Murata and ETP entered into a purchase agreement providing for the acquisition by Murata of 75% of ETP's stock for a purchase price of up to $5,200,000. Under the terms of the agreement, Murata has the option to acquire the remaining 25% of each shareholder's stock at an escalating rate.

## V.

### TRADE AND COMMERCE

13. The relevant geographic market is the entire United States.

14. The relevant product markets are:

(a) the manufacture and sale of all fixed ceramic capacitors;
(b) the manufacture and sale of single layer ceramic capacitors;
(c) the manufacture and sale of ceramic variable capacitors.

15. Concentration in the manufacture and sale of the relevant products is high.

## VI.

### EFFECTS OF THE ACQUISITION

16. The effects of the proposed acquisition may be to substantially lessen competition or tend to create a monopoly in the relevant markets enumerated in Paragraphs 13 and 14 of this Complaint in the following ways, among others:

(a) it will eliminate substantial actual competition between Murata and ETP in the relevant markets;
(b) it will significantly increase the already high levels of concentration in the relevant markets;
(c) it will further raise the barriers to entry that exist in the relevant markets;
(d) the competitive benefits of internal expansion and innovation may be eliminated; and
(e) customers of ceramic capacitors, single layer ceramic capaci-

tors, and ceramic variable capacitors and ultimate consumers of products incorporating such products may be denied the benefits of free and open competition.

## VII.

### VIOLATIONS CHARGED

17. The proposed acquisition set forth in Paragraph 12, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

18. The purchase agreement described in Paragraph 12 violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

## Decision And Order

The Federal Trade Commission, having initiated an investigation of the proposed acquisition of Erie Technological Products, Ltd. ("ETP") by Murata Manufacturing Co., Ltd. ("Murata"), and Murata having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Murata with violations of the Federal Trade Commission Act and the Clayton Act; and

Murata, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Murata of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Murata that the law has been violated as alleged in such complaint, and waivers provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Murata has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Murata is a corporation organized, existing and doing business under and by virtue of the laws of Japan with its principal executive offices at 26-10, 2-Chome, Tenjin, Nagaokakyo-shi, Kyoto 617, Japan.

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

## ORDER

### I.

*It is ordered,* That for the purposes of this order the following definitions shall apply:

1. *"Murata"* means Murata Manufacturing Co., Ltd., a corporation organized, existing, and doing business under and by virtue of the laws of Japan with its principal offices at 26-10, 2-Chome, Tenjin, Nagaokakyo-shi, Kyoto 617, Japan, as well as its officers, employees, agents, its parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, employees or agents of Murata's parents, divisions, subsidiaries, affiliates, successors or assigns.

2. *"ETP"* means Erie Technological Products, Ltd., a corporation organized, existing, and doing business under and by virtue of the laws of Canada with its principal offices at Suite 408, 1 Eva Rd., Etobicoke, Ontario, Canada, as well as its officers, employees, agents, its parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, employees or agents of ETP's parents, divisions, subsidiaries, affiliates, successors or assigns. "ETP" also means the entire company, including all assets, properties, titles to property, interests, rights and privileges of whatever nature, tangible and intangible, including but not limited to all real property, buildings, inventory, customer lists, tradenames, patents, patent applications, trademarks and all other property of whatever description presently owned or operated by ETP with all additions, replacements and improvements hereafter made to ETP.

3. *"Divested Products"* means all ceramic disc capacitors, ceramic plate capacitors, ceramic variable capacitors, ceramic tubular capacitors, and ceramic high voltage capacitors manufactured by ETP on or within three years prior to the effective date of this order.

4. *"Arizona Division"* means all assets, properties, titles to property, interests, rights and privileges of whatever nature, tangible and intangible, including but not limited to all real property, buildings, machinery, equipment, raw materials, inventory, customer lists, tradenames, patents, patent applications, trademarks, orders

for purchase of Divested Products from ETP that are unfilled on the date of the divestiture, and all other property of whatever description presently owned or operated by ETP for the manufacture of the Divested Products located in the case of tangible property in State College, Pennsylvania, Tucson, Arizona, and Nogales, Mexico, with all additions, replacements, and improvements hereafter made to the Arizona Division and such additional property of ETP that Murata determines to include in the Arizona Division. The term "Arizona Division" excludes all: (1) real estate and buildings located in State College, Pennsylvania; (2) other property located in State College, Pennsylvania, that the Commission, Murata, and the Eligible Person (as defined below) may agree is not necessary for the manufacture of the Divested Products; (3) debts and liabilities (except trade accounts payable and not overdue, accrued salaries, payroll taxes, payroll taxes withheld, accrued interest, insurance, utilities, and other similar operating expenses, to the extent these liabilities do not exceed accounts receivable); and (4) future leasehold obligations relating to ETP's facilities in Tucson, Arizona, and Nogales, Mexico.

5. "*Eligible Person*" means any individual, corporation (including subsidiaries thereof), partnership, joint venture, trust, unincorporated association, other business or legal entity, or any combination thereof, approved by the Commission. Such approval shall be in the sole discretion of the Commission.

6. "*Initial Divestiture Period*" shall mean a period ending nine months from the date of issuance of this order, except that if prior to the expiration of such nine month period, Murata has proposed a person as an Eligible Person and the Commission has neither approved nor disapproved of such person, then such nine month period shall be extended until thirty days following the Commission's approval or disapproval of such person as an Eligible Person. In no event shall the initial divestiture period be extended more than once.

## II.

*It is further ordered,* That within four months after the end of the Initial Divestiture Period, Murata shall divest absolutely ETP to an Eligible Person, unless within the Initial Divestiture Period Murata shall have divested absolutely the Arizona Division to an Eligible Person.

III.

*It is further ordered,* That divestiture under paragraph II shall be in a manner which preserves the assets and business divested as a going concern and as a viable competitor.

IV.

*It is further ordered,* That pending divestiture under paragraph II required by this order:

A. Murata shall operate ETP as a separately managed subsidiary, separately maintaining its own financial books and records, auditors, employees and management. All earnings and profits of ETP shall be retained by ETP and shall not be distributed to Murata or any third party as dividends or in any other form.

B. Murata: (1) shall exert no control over or influence on or interfere in any way in any of the business decisions or operations of ETP; (2) shall not cause ETP, directly or indirectly, to adopt policies preferred, suggested, or dictated by Murata; (3) shall not change ETP's existing policies or methods of operation. Furthermore, no Murata officer, director, employee, representative, or agent shall serve in any ETP position and no Murata officer, director, employee, representative or agent shall serve on ETP's Board of Directors.

C. Murata shall refrain from consolidating, directly or indirectly, its manufacturing, planning, purchasing, marketing, sales, research and development, personnel, or any other operations with those of ETP, *provided,* that Murata may continue to use ETP's office space and computer facilities in Germany, to the limited extent it is already using those facilities as of the date this agreement is accepted by the Commission for placement on the public record.

D. Murata shall refrain from taking any action, directly or indirectly, which would cause any changes or alterations to be made in ETP's business or operations or organization, including, but not limited to, changes in the executive, management, personnel, research and development, manufacturing, marketing, and distribution aspects of ETP.

E. Murata shall refrain from interfering with ETP's presently used trademarks and tradenames and ETP shall continue to be free to use such trademarks and tradenames to identify products, and Murata shall not use such trademarks and tradenames to identify any products other than those manufactured by ETP.

F. Murata shall refrain from taking any actions with respect to

ETP likely to diminish ETP's sales or interfere with its corporate opportunities.

G. Murata shall refrain from marketing and/or selling its products through the same representatives or employees through which ETP markets and/or sells its products, except to the extent to which Murata's products and ETP's products were marketed and/or sold through the same representatives prior to November 30, 1979.

H. Murata shall refrain from promoting the products of ETP as its own products.

I. Murata shall refrain from buying or using any advertising that promotes the products of Murata and ETP together or discloses the relationship between the two companies.

J. Murata shall refrain from engaging in joint selling of Murata products and products of ETP.

K. Murata shall refrain from, directly or indirectly, selling, disposing of, or causing to be transferred any assets, property, or business of ETP, except that ETP may sell or transfer manufactured products in the ordinary course of business.

L. Murata shall refrain from mortgaging or pledging the assets of ETP pursuant to any loan transaction in which the borrower is Murata, or any entity other than ETP, except in connection with divestiture pursuant to paragraph II.

M. Murata shall refrain from causing ETP to guarantee any debts or obligations pursuant to any loan transaction in which the borrower is Murata, or any entity other than ETP, except in connection with divestiture of the Arizona Division pursuant to paragraph II.

N. Murata shall refrain from making available or communicating to ETP any confidential or proprietary information, and Murata shall not seek to obtain or exploit, directly or indirectly, any of ETP's trade secrets, manufacturing processes, patents, know-how, formulas or other technical information, unpublished price lists, customer lists, non-public financial and accounting books and records, or any other competitively sensitive information.

O. Murata shall hold in strict confidence and shall not divulge to any third party or use for its own or any third party's benefit any confidential information which Murata has obtained or may obtain from ETP since November 30, 1979, except for the limited purpose of effecting divestiture pursuant to paragraph II.

P. Murata shall provide the Federal Trade Commission with written notice immediately upon termination, resignation, retirement, or transfer of any officer or director or senior executive of ETP.

Q. During the life of this agreement and for the purpose of assuring compliance herewith, duly authorized representatives of the Federal Trade Commission shall be permitted, upon written request and reasonable notice to Murata, to interview officers, directors, and employees of Murata and ETP and examine documents, at reasonable times and in the presence of Murata counsel (if Murata employees) and ETP counsel (if ETP employees), regarding matters covered by this agreement.

V.

*It is further ordered,* That the divestiture ordered and directed by this order shall be made in good faith and shall be absolute and unqualified; *provided, however,* that an Eligible Person may give, and Murata may accept and enforce, any bona fide lien, mortgage, deed of trust or other form of security on all or any portion of the assets or business divested. If a security interest is accepted, in no event may such security interest give Murata a right to participate in the operation or management of such assets or business. In the event that Murata, as a result of the enforcement of any bona fide lien, mortgage, deed of trust or other form of security interest, reacquires possession of the assets divested, then Murata shall redivest the reacquired assets, as a going concern and as a viable competitor, to an Eligible Person within six months of the reacquisition.

VI.

*It is further ordered,* That, for a period of ten years from the date of issuance of this order, Murata, its parents, divisions, subsidiaries, affiliates, successors, or assigns, shall not, directly or indirectly, acquire any stock, share capital, or equity interest in any concern, corporate or noncorporate, engaged in the manufacture or sale in or to the United States of ceramic capacitors, without the prior approval of the Federal Trade Commission, if such concern:

A. is incorporated in the United States or organized under the laws of one of the United States or has its principal offices within the United States; or

B. manufactures ceramic capacitors in the United States; or

C. had annual net sales of ceramic capacitors of five million dollars or more in or into the United States in the most recently completed calendar year prior to the date of the requested approval.

VII.

*It is further ordered,* That Murata shall, within sixty days from the date of issuance of this order and every sixty days thereafter until divestiture is completed, submit in writing to the Commission a report setting forth in detail the manner and form in which Murata intends to comply, is complying, and has complied with the terms of this order and such additional information relating thereto as may from time to time reasonably be required. All such reports shall include a summary of contacts or negotiations with anyone for the specified assets, the identity of all such persons, and copies of all written communications to and from such persons. After divestiture is completed, Murata shall submit in writing annual reports showing the manner and form of compliance with this order.

VIII.

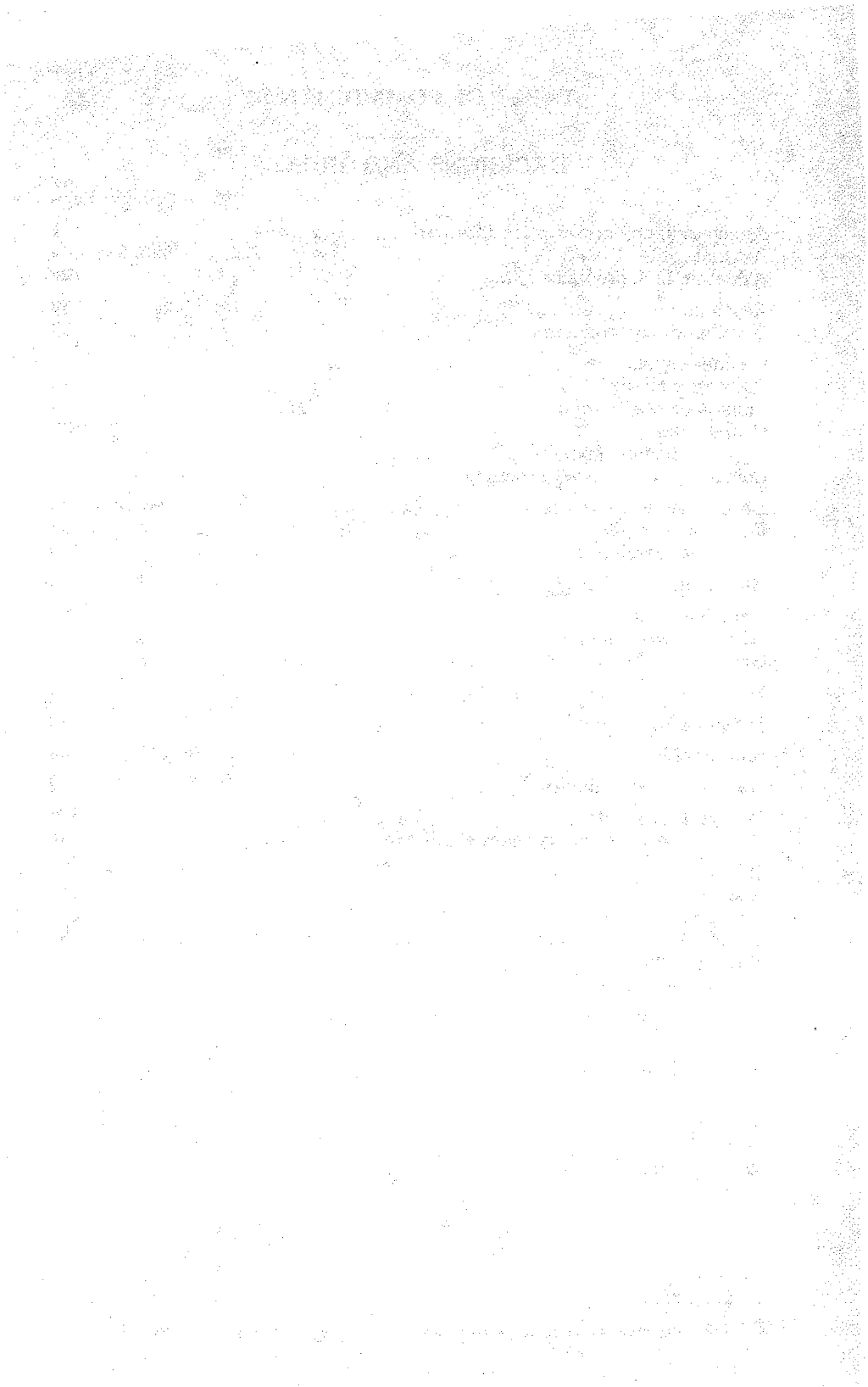
*It is further ordered,* That for a period of ten years from the date of issuance of this order, Murata shall notify the Commission at least thirty days prior to any change in Murata which may affect compliance with the obligations arising out of this consent order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation.

# TABLE OF COMMODITIES*

## DECISIONS AND ORDERS



*Commodities involved in dismissing or vacating orders are indicated by *italicized* page reference.



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## DECISIONS AND ORDERS



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