them, and if there was anything wrong with him, he would stop me and he would discuss it and clear it up" (Crepeau 1759).

401. Field representatives discussed with each other the prevalence in their office of such practices as faking sources or other shortcuts (Hille 4517-18; Silar 3924; Buckley 1255, 1257; Monson 3254-55, 3260, 3287). Field representatives in their conversations also expressed the view that the job was virtually impossible (Wines 390; Dodson 3069-70, 3067-68). The existence of such conversations demonstrates a state of mind in branch offices likely to lead to infraction of Company policy such as the falsification of sources.[161]

402. Generally, field representatives did not fake sources in those instances where unfavorable or protective/decline information was developed (*e.g.*, Monson 3302; Moxham 3515; Pollard 316, 356, 361; Feriante 4448-49 cf. Wallace 3014; Hille 4534-35).

403. Field representatives were subjected to conflicting pressures; namely, to produce a certain number of reports in a normal workweek and meet Time Service requirements and, at the same time, to produce protective/ declinable information by careful interviewing and by asking a full range of questions (see Findings 315, 344, 354-55, 372-74; see also Findings 370, 371). [145]

404. Many field representatives were able to complete the caseload assigned within a normal workweek in accordance with Company procedures and to earn a full or partial bonus; certain of them put in some overtime in earning the bonus (*e.g.*, Baranek 9703, 9698-99; Bender 7687-88, 7683-84; Getz 12348-49, 12397; Harroun 9512, 9506-07; Hilderbrand 12011-12; L. Jones 10454-55; C. Matthews 12788, 12795, 12803; Rawls 11065-66; Saltzgaber 11972-74, 11983-84).

405. A substantial number of field representatives, however, were unable to complete the work in either the normal workday or workweek in accordance with Company procedures. They compensated for such inability by contacting unqualified sources, faking sources, misstating time coverage, hurrying through interviews failing to ask a full range of questions, using the telephone in a manner not in accord with Company procedures, or working excessive overtime (Findings 377-94, 400).

406. Respondent instructed its field representatives:

Honesty—Fairness

Our business has been built upon integrity and character; nothing in it is mo

[161] Another field representative felt he could falsify sources when he saw reports prepared by others v vague listings such as "resident" and an address (Pollard 358).

important. As a service company, the nature of our business makes it essential that we maintain and adhere to strict principles of honesty.

In many businesses, the term 'dishonesty' implies mishandling of money or merchandise. We sell a service—therefore, such actions, for example, as recording hours not worked and miles not driven, or listing sources not contacted, constitute dishonesty in our type of business. For obvious reasons, anyone found lacking in honesty, in our strictest sense of the word, cannot be retained as an employee. [146]

There is no room for prejudice in our work. The person on whom we report is entitled to scrupulous fairness on our part. This obligation is co-equal with our responsibility to our customers as well as to our Company. You are not being fair to them unless you are also fair to the subject.

(RX 102D.)

407. It was respondent's policy to terminate immediately all field representatives falsifying information such as sources during the course of an investigation (RX 102D; Jenkins 5778, Lieber 9015, Browning 6062, Baranek 9703, Dodson 3096–97, Pollard 358, Ledum 4717).[162] This policy was communicated to respondent's field representatives and was generally carried out when such practices were detected (*e.g.*, Tr. 4717, Shaffer 8389, Burk 10380, Getz 12349, Curtis 7152–53).[163]

408. It is not possible for a manager or supervisor to determine whether all information was properly obtained and whether all sources listed were, in fact, interviewed simply by reading a report (A. Brown 7747, J. Curtis 7154, Freeman 10199, Hives 9735–36, J.F. Moore 10043–44, J. Moore 8842). Reading a number of reports prepared by a field representative may lead to a suspicion that there has been falsification. However, it is seldom possible to be certain from a reading of the reports alone. Vague source listings in a series of reports may raise a question as to whether all listed sources were, in fact, interviewed [147](Curtis 7154, Freeman 10199–200, J. Moore 8842, Brothers 7420–21, Lieber 9015–17). Reports consistently containing minimal amounts of information may raise the same question (Lieber 9015–16). And, respondent's management believes that the absence of protective and declinable information on a consistent basis may also indicate that sources have been falsified (Brothers 7420–21, Laugavitz 10328, Jenkins 5779–80). An excessive number of reopened cases (Jenkins 5778, Lieber 9016, Curtis 7153) may raise similar suspicions.

409. Respondent employs various measures such as the put-up system (Curtis 7153, Lieber 9016), the regular review process in the office (Lieber 9015), and analyses of field representatives' cases

[162] Two of the Commission witnesses testifying herein were terminated for that reason.

[163] There were some exceptions: see CX 1592A–H. In the Denver office, the discipline meted out depended "largely on the degree of fabrication." In that office, falsification of time coverage, according to one of respondent's witnesses, apparently was not considered as serious as other infractions (Hilderbrand 12012–13).

covering such subjects as source listing, source selection and information content, to check the integrity of reports (Brothers 7375–77, J. Curtis 7146–47, Lieber 9034–35, Crawford 12568–69).

410. Performance reviews are conducted on trainees, and, periodically, on other field representatives and on an as-needed basis. They involve going on the street to recheck with the sources listed by field representatives in previously completed reports to determine that the sources were, in fact, contacted, that all the questions were asked, and that the reports accurately reflected the answers (Brothers 7377, Browning 6062–63, Curtis 7148, Jenkins 5701–02, Eldred 11202, Crawford 12568–69, Hilderbrand 12014). Performance reviews may be utilized when there is an indication the reports may have been falsified (Lieber 9016–17, Ross 9343–44). Performance reviews are a cost to the branch office (Bresnahan 567–68).[164] [148]

411. Respondent failed to effectively police falsification of sources by certain of its field representatives.[165] Its supervision must be deemed ineffective.

412. A substantial number of field representatives have falsified information such as sources (Finding 405). The widespread nature of this practice and the fact that such facts were committed by field representatives knowing they risked termination for such infractions compels the inference that a substantial number of field representatives were unable to complete the job assigned to them in a normal workday in accordance with respondent's instructions.

413. Such inability resulted from the fact that particular field representatives were given more cases than they could complete in accordance with Company procedures in the particular areas where they worked or under the conditions prevalent in the offices and areas to which they were assigned. Such inability led to shortcuts such as faking. Thus, respondent's investigative procedures may result and have resulted in inaccurate reporting. Certain field representatives taking shortcuts, such as falsifying sources or utilizing unqualified sources, may have been ill-suited for the job because of lack of competence, disorganization or personal problems. This evidences only that respondent has hired a substantial number of employees unable to cope with the workload and the working conditions generated by respondent's compensation system and other policies. Inaccurate reporting is likely where considerable

[164] Normally, it is computed on an hourly basis at the normal hourly investigative rate (Tr. 567).

[165] *E.g.*, faking sources 10 to 20 percent of the time on a circuit run (Tr. 3515). Faking sources 2 to 3 times a month (Tr. 3298–99); not interviewing sources listed about 75 percent of the time (Tr. 3063); listing sources not seen in 30 percent of the cases (Tr. 4514–15); listing outside sources not seen 40 percent of the time in those instances where a direct interview with the insured was obtained (Tr. 2870); faking sources on the order of one out of 15 cases (Tr. 356); faking by a long-time field representative known to management as "consistently sporadic in his work habits" (Tr. 455, 458, 460–61; RX 483A).

numbers of field representatives are unable to meet the requirements of respondent's system for whatever reason, notwithstanding the fact that others with more ability or more favorably situated are able to cope. **[149]**

C. Respondent's Computations Pertaining to Reasonableness of Compensation Procedures

(1) Respondent's 1969 and 1973 Product Cost and Effort Studies

414. Respondent has, from time to time, made product cost and effort or time studies to determine the effort required to complete various types of reports in different parts of the country (Burge 5012–13).

415. Analysts in respondent's research department used data from such studies for two major purposes:

1. To compute profitability by type of report, and
2. To develop standard cost estimates for proposed new reports. (RX 566 III–5.)

416. Time studies were conducted in 1967, 1969, and 1973 (Bruns 13912–14; RX 566).[166]

417. The 1969 time study had a goal of timing 5,000 reports and, in fact, 3,619 timings were completed in that study (Bruns 13914, Deibig 13614–15). Analysts conducting the study spent approximately 222 man-days in making observations in the field (RX 566 I–1). One hundred seventy field representatives out of a population of 6,031 were timed in the 1969 study (RX 566 II–11).

418. The scope of the 1973 study was more limited than the 1969 study. It included observations of approximately 1,500 individual reports. Analysts conducting the study spent approximately 151 man-days in making observations in the field (RX 566 I–1–I–2). Eighty-eight field representatives out of a total population of 5,145 were timed in the 1973 study (RX 566 II–11). **[150]**

419. The timers or analysts who conducted the 1969 and 1973 studies observed each field representative selected for inclusion in the studies for one full day. The procedures involved in such observations included the following major steps:

> The analyst worked with the manager of the office where he was to conduct observations to determine which field representatives were to be observed . . . The analyst met the field representative at the beginning of his day's work. He

[166] Since 1973, respondent has conducted timings in 1975 and 1976 (Deibig 13878).

then observed his activities throughout the day and timed each of the field representative's tasks with a stopwatch.

The analyst entered the stopwatch timings and other pertinent information on standard forms. . . .

(RX 566 I-5.)

420. For the 1969 study, respondent sought to select a representative group of offices per region, including larger metropolitan branch offices, smaller branch offices in the country and suboffices (Bruns 13938). Some consideration was also given to selecting offices not timed in 1967 (Bruns 13969).

421. In 1973, the branch offices to be timed were selected by respondent's employee James Deibig, who broke down all branch offices then existing into three categories: large, medium and small. Selections were made from the three categories, with an attempt to secure a geographic mix of all three types (Deibig 13623-24).[167] The study, however, was cut short and a number [151]of the branch offices and suboffices originally scheduled for timing were not timed. Respondent's witness responsible for selecting the cross section of offices was unable to state how many were dropped (Deibig 13631, 13866).

422. Field representatives chosen for timing were not chosen on a random sampling basis (RX 566 II-8-II-9).[168] Since random sampling was not used, the data obtained in the study cannot be relied upon on a purely theoretical statistical basis to make predictions about total population (Brown 14172-73, 14214).

423. Respondent described the procedures for selecting field representatives as follows in its exhibit, RX 566:

General guidelines were provided to the study analysts for requesting field representatives to be made available for timing by each branch office visited. The final decision as to which individuals would be timed was left to the analyst and the branch office manager.

. . . The study procedures specified that advance notice was to be given to the offices to be visited regarding the types of reports that should be covered in the timings. The analysts had been instructed to request individuals to be timed who would provide maximum coverage of the basic report types. The procedures specified that they were to avoid timing field representatives whose reporting standards reflected subsidies provided by the Company, and that they [152]should attempt to obtain timings for a cross-section of field representatives by length of service and by level of performance. These guidelines would tend to exclude from the study field representatives working primarily special, nonbasic reports. The guidelines would

[167] To cut down on driving time for the timers, an attempt was made to line up the three to four suboffices that the timers would visit each week within an hour's driving time of each other (Deibig 13878).

[168] For a sample to be random, the procedures used to select the sample from the total population must assure that each element in the population will have an equal chance of being selected for inclusion in the sample (RX 566 II-9).

also exclude high and low-performing representatives, since only trainees and management-level representatives have subsidized reporting standards. (RX 566 II-8.)

424. In fact, the field representatives to be timed were selected by the branch office managers (Tr. 13887, 14050).

425. Some of the more prevalent reports timed in 1969 were the regular life report, life NORS written, life NORS non-written, intermediate life, streamlined life, special narrative life, automobile, streamlined automobile, ballpoint pen auto, personnel selection, double rate personnel selection, and triple rate personnel selection (Deibig 13533).

426. In selecting cases to be timed in 1973, respondent's employee, James Deibig, listed 85 services which constituted "almost 90 percent of the total revenues produced by Retail Credit at that time." He excluded from these "target cases" those on which numerous samplings had been obtained in the 1969 study and provided tally sheets to the timers so that a minimum of 30 timings could be completed on each report scheduled for timing. Although regular life and regular auto cases were not targeted, timings of such cases were completed in 1973 due to "the nature of those two reports." (Deibig 13624-25).

427. On the basis of the 1973 study, respondent computed the following average effort in minutes required to complete its basic life and auto reports: [153]

	No. Cases Completed	*Average Effort (Minutes)**
Life	188	28.750
Auto	275	31.317
Normal Report Time (weighted average of Life and Auto)		30.275

(RX 566 III-7.)[169]

(2) Evaluation of the 1969 and 1973 Time Studies by Arthur Andersen & Co. (The Andersen Study)

428. Arthur Andersen & Co. (Andersen), respondent's outside auditing firm (Woodham 14094), was retained to review the procedures utilized by respondent in its time studies to gain an understanding of those procedures and to prepare a report giving

[169] Arthur Andersen & Co. recomputed the effort necessary to complete those reports and determined that spondent's computation had overstated the average effort per report. Its computation showed an average of 26.64 nutes and 28.75 minutes, respectively for the basic life and auto reports (RX 566 IV-14). The Andersen study (see ra), after adjustment, relied upon 191 observations of the regular life report and 273 of the regular auto report X 566 V-8, IV-15).

Andersen's evaluation of the procedures utilized (Tr. 14095). Andersen was also asked to examine the data from the timing sheets and to relate the findings from the study to the performance standards of the Company for field representatives (Tr. 14096). RX 566 is the study prepared by Andersen at respondent's request.

429. Andersen's stated purpose in making the review was:

—To gain an in-depth understanding of the purpose, scope, procedures, and results of the studies conducted in 1969 and 1973; [154]
—To evaluate the studies and identify any weaknesses in procedures and scope; and
—To perform additional analyses of the data obtained during the studies to determine whether the results support the reasonableness of the Company's field representative reporting standards.
(RX 566 I-13.)

The completed study was transmitted by Andersen's letter, dated May 30, 1975 (RX 566).

(3) Andersen Evaluation of Respondent's 1969 and 1973 Product Cost and Effort Studies

430. Work measurement is a systematic method of recording observations of work activity usually for the purpose of establishing or revising standards for performance in a job. It is generally employed in manufacturing or purely clerical situations where the worker location is fixed, where the task to be performed can be divided into small elements, and the task itself is repetitive and brief in duration (RX 566 II-2).

431. Andersen concluded that completion of investigative reports by field representatives was not a typical application of work measurement technique and that the basic steps followed by respondent would be expected to differ from those that would be followed in a manufacturing or clerical environment. It concluded further that basic work measurement concepts were, nevertheless, applicable (RX 566 II-2).

432. Respondent's product cost and effort studies, utilized for the purpose of determining how long it takes to prepare reports for the purpose of using the data to price the product were innovative at the time they were conducted (Prince 14476, 14478). Work measurement was being extended beyond industrial activities to service industries (Tr. 14477). In this connection, Andersen felt that respondent was on the leading edge of using work measurement techniques for such purposes (Tr. 14477).

433. Andersen concluded that, although the sampling technique used for selection of field representatives could not have resulted in a

random sample, the actual results [155]obtained appear to correspond reasonably well to the Company's total population of field representatives in terms of length of service with the Company (RX 566 II-9).

434. It is difficult to determine whether bias exists in the samples from a visual comparison of the length-of-service percentages in the samples to the total population of field representatives. Andersen, therefore, utilized a statistical test to determine whether the samples were biased. The results of the test did not indicate a biased sample in the 1973 study. The test did show a biased sample for the 1969 study with more field representatives timed in the 1 to 5, 5 to 10, and 10 to 15 years length-of-service groups (RX 566 II-9–II-10).

435. Andersen, in its review of the procedures used by respondent in conducting the product cost and effort studies, concluded that the techniques utilized were reasonable in relation to the studies' purpose and scope, and that they generally conformed to widely used work measurement techniques and that the timing data obtained could, therefore, be expected to be representative (RX 566-10). Andersen, subsequent to the completion of its study, RX 566, suggested that respondent, in future cost and effort studies, make changes in the selection of offices and field representatives to make selection procedures in further studies more objective and more mechanical (Brown 14417-18, Woodham 14110).[170] The revised procedure suggested makes use of random number tables for such selections (Woodham 14122-23). Andersen's recommendations in this respect have been adopted (Deibig 13751).

(4) Andersen's Analysis To Determine the Reasonableness of Reporting Standards (The Bonus Contribution Calculations)

436. Andersen chose monthly bonus contribution as a measure of the reasonableness of the field representative [156]reporting standard (Woodham 14108-09; RX 566 IV-7). Andersen determined that an 8-hour day, 40-hour week was a normal workweek and based its review on that assumption (RX 566 IV-6; Woodham 14108).

437. For the purposes of its study, Andersen defined Monthly Bonus Contribution as "the excess of earnings credit over salary and expenses that would be earned by a field representative with a given set of reporting standards and a workload consisting solely of a given type of report." (RX 566 IV-7).

438. Andersen determined at the outset of its review that the

[170] Andersen's "recommendation was that all subjective types of decisionmaking be eliminated whenever possible respecting [selection of] branch offices and field representatives" (Brown 14418-19).

scope of its analysis of the study results should be limited to the following basic type of reports offered by respondent:

—Regular Life
—Life-NORS Notification
—Auto
—Streamlined Auto
—Health
—Streamlined Life
—Life-NORS Written

439. These seven basic type reports were selected because life and auto reports represent the Company's largest volume of business and on the assumption that the seven basic type reports are those that comprise the typical workload for a field representative with 1 to 5 years of service with respondent (RX 566 I-13-I-14).

440. Andersen concluded that:

> The results of the analysis of bonus contribution shown on pages IV-24 and IV-25 [of RX 566] support the reasonableness of Retail Credit Company's field representative reporting standards. For the one to five year length of service and code 4 office reporting standard, the analysis shows a positive contribution to bonus for each of the seven types of reports. For the composite reporting standard, only report codes 27 and 9999 (Streamlined Auto and Life-NORS Written) show a negative bonus contribution. [157]Since these two types of reports are relatively low volume in terms of the Company's overall business, it is likely that any losses against standard resulting from the under-rating of these reports would be offset by gains against standard for the other reports in an actual field representative's mix of work.

(RX 566 IV-22-IV-23.)

441. Andersen's Table IV-24, RX 566, is an analysis of bonus contribution on the basis of the 1973 study for the 1 to 5 year length-of-service group in Code 04 offices. According to Andersen's calculations in that table, the following monthly bonus contributions are shown for the reports indicated:

Report	*Bonus Contribution*
Code 1 (Life)	$120
Code 20 (Auto)	93
Code 9 (Life-NORS Notification)	136
Code 27 (STRL Auto)	33

Report	*Bonus Contribution*
Code 115 (Health)	97
Code 133 (STRL Life)	158
Code 9999 (Life NORS Written)	77 [158]

442. Andersen's Table IV-25, RX 566, is an analysis of bonus contribution derived from the 1973 study calculated on the average for all lengths of service for all offices. According to Andersen's calculation in that table, the following bonus contributions are shown for the reports indicated:

Reports	*Bonus Contribution*
Code 1 (Life)	$29
Code 20 (Auto)	1
Code 9 (Life NORS Notification)	40
Code 27 (STRL Auto)	(66)
Code 115 (Health)	6
Code 133 (STRL Life)	63
Code 9999 (Life NORS Written)	(16)

443. The only test performed by Andersen to examine respondent's basic premise that field representatives are adequately compensated in preparing basic life and auto reports was the foregoing monthly bonus contribution analysis (Brown 14301).

444. The tables at IV-24 and IV-25, RX 566, contain the calculations on which Andersen based its original conclusion that field representatives are adequately compensated on the basic life and automobile reports. In reaching this conclusion, Andersen relied equally on both charts (Brown 14302-03). [159]

445. As a result of deficiencies concerning the exhibit brought out

in cross-examination of an Andersen witness, the schedule shown on RX 566 IV-24 was recomputed as RX 566 F, G and H.[171] Because of disclosure of the same data, Andersen determined that the chart, RX 566 IV-25, was invalidly computed and could not be relied upon for any meaningful purpose (RPF 623). Andersen did not recalculate RX 566 IV-25 "because upon learning of the different rates and reflecting upon the relationship of the variables involved it looked to us as if we would be drowning in a sea of averages anyway, [160]that the answer is not meaningful." (Brown 14448).[172]

446. RX 566 F, G, and H were substituted by respondent for RX 566 IV-24. Each deals with the computation of "bonus contribution" for the seven basic reports timed during the 1973 study.

447. RX 566 F computes bonus contribution for the 1 to 5-year field representative length-of-service group for field representatives in Code 04 branch offices in 1973, which branch offices had been assigned a Code 04 designation in 1972 (RX 566 F). With correction of one mathematical error, it is identical to RX IV-24 (Brown 14395-96, 14404-05; Deibig 14618).

448. RX 566G computes bonus contribution for the 1 to 5-year field representative length-of-service group for field representatives in suboffice locations of Code 04 branch offices in 1973, which suboffices themselves did not carry a Code 04 designation (RX 566 G; Deibig 14626).

449. RX 566 H computes bonus contribution for the 1 to 5-year field representative length-of-service group for field representatives

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[171] RX 566 IV-24 was prepared on the assumption "that there was only one rate [price of report] in effect for a Code 04 branch office in 1973." (Brown 14390-91, 14404). Mr. Brown testified that he "[made] a mistake [in] following the assumption that there was one rate in effect in 1973." (Brown 14446).

During the first day of cross-examination of Mr. Brown, it was suggested that a Code 04 office had more than one rate applicable to it in 1973 (Tr. 14296-98, 14301, 14308-10, 14391, 14404). Mr. Brown confirmed that fact in conversation with Mr. Deibig after conclusion of the first day's cross-examination (Brown 14379, 14393; Deibig 14615). Prior to the preparation of RX 566 in May 1975, Mr. Deibig had informed representatives of Arthur Andersen & Co. that there was only one rate in existence for the Code 04 office (Deibig 14615; Brown 14296-98, 14301, 14308-10, 14379-80; Woodham 14650-52). In 1975, Mr. Deibig did not recognize that there was more than one rate (Deibig 14616).

In 1973, respondent reduced the number of standard codes from seven to five and in so doing, respondent took what previously had been designated as Code 02 offices and suboffices and included these offices within the standard Code 04. Former Code 04 and former Code 02 offices were both given the 04 designation (Deibig 14616-17, Brown 14379-81).

[172] The calculation on RX 566 IV-25 was based on the assumption as was the original RX 566 IV-24 that there was only one rate (price per report) for Code 04 offices in effect during 1973. Once it was determined that assumption was erroneous, the calculation on IV-25 was no longer viable. The introduction of a variable in the rate created additional variables with respect to factors such as salaries and expenses making it impossible to come up with "reasonable numbers." It was impossible, furthermore, to recalculate RX 566 IV-25 as was done in the case of IV-24 because it was impossible to compute an average salary for the entire company (Brown 14412-13). And, there was no average rate to correspond to the average salary (Woodham 14671).

in Code 04 branch offices in 1973, which branch offices had been assigned a Code 02 [161]designation in 1971–72 (RX 566 H).[173]

450. Andersen's monthly bonus contribution calculations per type of report were made on the assumption for the purposes of the computation that the field representative does one type of case everyday and completes the same number of cases everyday (RX 566 IV–7–8).

451. The Andersen analysis of bonus contribution, based on the average effort and mileage for all field representative length-of-service groups, rests on the assumption that any differences in the averages among length-of-service groups as to those factors are so small that they can be ignored (RX 566 IV–23; Brown 14253–54).

452. Respondent's branch offices were given different classification codes to reflect differences in the difficulty factor and costs in different areas, as well as differences in prices charged to customers for reports. The number of codes and the classification of given offices within the codes have varied over the years as conditions change (Case 5317, 5326–30). Between 1971 and 1976, the number of codes varied from five to ten (Case 5462–63). The difficulty factor in preparing reports is a primary consideration in designating a branch office's classification code (Case 5329).

453. Andersen's conclusions as to the reasonableness of the reporting standard is based on several factors including the assumption that Code 04 offices are [162]representative of respondent's organization[174] (Woodham 14673). Andersen's conclusion also relies on the assumption that an analysis of field representatives in the 1 to 5-year length-of-service group is appropriate to the evaluation of bonus contribution (Woodham 14673–74).

454. Andersen only wanted to give one example and not one for each code (Deibig 13748).

455. Andersen performed no calculations with respect to monthly

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[173] RX 566 F, G, and H each reflect computations based on a different report rate (Brown 14405–06). The report rates were obtained from RX 715. *E.g.*, the life rates of $4.85, $4.95 and $5.35 are found on RX 715D. Field representative revenue was also obtained from RX 715. For example, the field representative revenue credit of $4.85, $4.95 and $5.35 is found in RX 715M (Brown 14406–07).

[174] Andersen's computations in RX 566 IV–24 and RX 566 F-H were based on the assumption that respondent's Code 04 office was the branch office that most typically represented respondent's corporate averages of branch offices. Andersen consulted Mr. Deibig concerning the conclusion on RX 566 IV–24, which demonstrates a bonus contribution for the 1 to 5-year length-of-service group in a Code 04 office (Deibig 13747). Andersen asked Mr. Deibig to determine, based on his knowledge of respondent or of records of respondent, what the most representative code office would be. "Based on documents already submitted, primarily RX 754, we suggested to them that they use the Code 04 offices that most represented the averages of the company." (Tr. 13478). However, with the inclusion of the old Code 02 office, the 1973 Code 04 office, taken as a separate group, was not as close to being a representative branch as was the former Code 04 office in 1971 and 1972 (Deibig 14617).

bonus contribution in connection with the 1969 study results (Brown 14262).[175] **[163]**

456. With the repudiation of the chart on RX 566 IV-25, there is no calculation in the record showing bonus contribution for field representatives for all lengths of service for all offices.

(5) The Representativeness and Relevance of Respondent's Product Cost and Effort Studies and the Andersen Bonus Contribution Analysis

457. A representative sample is one that reflects the characteristics of the population being studied (Goldstein 15427).

458. The representativeness of the sample in a study is related to the question of how one can generalize survey results to the particular population under consideration (Goldstein 15341-42). Making a sample representative is a goal, and there are procedures which make it more likely that the goal will be achieved (Goldstein 15343).[176] One of the best procedures for achieving representativeness in the sample studied is to use random sampling procedures (Goldstein 15348, 15352):[177] **[164]**

459. Respondent did not utilize random sampling procedures in its time studies (Finding 422).

460. There are many variables bearing on the time required to prepare a report.[178] "For example, one variable that may be a factor, more important than age [length of field representative's service] would be the geographic location. Are there differences in geography between big cities, small cities? Are there differences between the scheduling techniques? Some offices have different scheduling techniques than others. And to sort out all of those variables and do an analysis to find out why is a very large undertaking." (Prince 14578).

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[175] An Andersen witness testified that, in his opinion, the conclusion would have been the same (Brown 14262). In fact, there are no calculations in this record on which findings on this point can be made.

[176] If it is desired to ensure the inclusion of a particular factor in a study, the variable may be stratified (*e.g.*, a particular type of organization) and a random sample taken within the variable (Goldstein 15348-50).

[177] Complaint counsel request a finding, based on a test for skewness by one of their experts, that the figures in the histogram at RX 566 IV-17 pertaining to effort for the life reports have less than one chance in a million of constituting a random sample from a normally distributed population (CPF 820). The finding is not adopted. To make the skewness test, one must assume that the figures tested are a random sample from a normally distributed population (Tr. 15678). Consideration has been given to Mr. Prince's testimony with respect to the histograms in RX 566 at Tr. 14508-09. This testimony does state the histograms contain a textbook distribution as complaint counsel contend (CPRF 1283). However, it is not clear whether this also means that the general population of life reports from which the sample is taken is normally distributed. Dr. Bartlett's comments at Tr. 15707 with respect to Mr. Prince's testimony are too general to permit a finding on this question. The witness was unable to state that life reports constitute a normally distributed population (Tr. 15707, 15717).

[178] " . . . One of the things that intrigued me is that there are so many variables in this whole task of preparing a report, the characteristics of the report, scheduling techniques that are used, there is a possibility of geographic location affecting it, the time of year, the mix of business, whether it is high volume or low volume, there are just a whole series of things here." (Prince 14548-49).

There was no analysis made of the impact of these variables (Tr. 14578–79).

461. The failure to analyze such factors was one of the primary areas where Andersen suggested improvement in respondent's time study procedures (Prince 14548–49).

462. Respondent's time studies did not follow generally accepted procedures in the sense that they left too much opportunity for bias in the selection of the offices timed and should have been more mechanical (Goldstein 15385).

463. The one manager testifying on this point stated that his selection of field representatives to be timed was based on considerations of volume, availability of the field representative, types of reports desired and field representative ability to do the reports. By availability, he meant selecting field representatives from units in which the work was light (Monarch 8567, 8579–81). This manager also selected one field [165]representative, because the stopwatch might demonstrate to this employee, one of the slower workers, where his time was going (Monarch 8580–81).[179]

464. The selection of field representatives from units with a light workload, for the convenience of the office, was not a criterion for selection spelled out in the instructions (see RX 765). Utilizing selection criteria not within the variables set forth in the instructions is contrary to standard procedure, and it is not possible to determine the effect of such a variable on the study results (Goldstein 15475).[180]

465. Respondent's selection procedures for choosing field representatives to be timed were not in accord with generally accepted procedures, since choices could be influenced by the manager's individual bias (Goldstein 15387).[181] [166]

466. The test by Andersen showing no bias as to selection in terms of length of service would not permit conclusions regarding the existence or lack of bias with respect to other variables such as

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[179] Field representatives were selected by this manager from those units which may have been light in volume because that would make it convenient for such persons to work with the timer (Tr. 8567). The record does not show why field representatives from a unit with a heavy volume would have been less available.

[180] Procedures should not be changed because of the study. This is basic to any kind of research. "You just don't do that. You don't want to be measuring the effects of your study. You want to be measuring the organization." (Goldstein 15482).

[181] ". . . [S]ince the manager can make the choices, he could make it according to any set of biases he might have. And certainly it is not a random selection procedure and the manager could, for example, select the best employees or the worst employees or a particular employee that he wanted timed for his or her own purposes or whatever." (Goldstein 15387; see also Tr. 15594–96).

This criticism by the Commission's expert, Dr. Goldstein, is confirmed by the testimony of the one manager testifying on this point that he selected one of his slower employees so you could show him where his time was going (Finding 463). In short, the testimony of this witness tends to confirm the position of Dr. Goldstein that the sample may have been influenced by the manager's bias in making the selections (Goldstein 15427).

ability of the workers, speed of workers or representativeness of the tasks timed (Goldstein 15424–25, Bartlett 15650–52).

467. In asking for types of reports, the timers concentrated on lines of reports for which they did not have an adequate number of timings (Bruns 13961). And, near the end of the 1969 study when certain cases were hard to find, the timers emphasized the need for those cases to the branch managers (Tr. 12964).

468. A timer in the 1969 study in three or four offices "just took the normal run of cases that an individual [field representative] had. . . ." When informed by the home office that a sufficient number of certain types of reports had been timed but others were lacking, the timer would "ask the manager [in other offices] to save those cases. . .the type of cases [he] would like to work on when [he] arrived at the office." (Healy 14028–29).

469. As a result, the selection of the cases to be timed in different offices was made on an inconsistent basis (Findings 467–68).

470. The holding of cases for the timing run means that such a run would not be the person's normal work and to that extent, it would be unusual. It is not possible to determine the effect of such practices on performance in the timing runs (Goldstein 15404).

471. Instructions to branch managers in 1969 and 1973 indicated that double runs or long circuits should be avoided (RX 765, 766; Tr. 13613).[182] Circuit runs and double runs constituted an important part of the work of [167]many field representatives (see Findings 395–96). The attempt in the instructions to branch managers (RX 765, 767) to exclude double and circuit runs tended to exclude from the sample variables significantly influencing the conditions under which a field representative works.

472. If normal performance is sought, it is important to ensure that the worker being timed knows that he is not being evaluated (Goldstein 15346, 15355–56).

473. Certain of the managers asked timers questions concerning the performance of field representatives in their office being timed (Bruns 13926, Healy 13998). Managers who asked such questions may have misconstrued the purpose of the study as permitting evaluation of individual field representatives (see Finding 463).

474. A timer in the 1969 study was occasionally asked by field representatives he had timed how they had done. He replied "Nebulously. We would tell them they did well but we have no

[182] The actual practice in 1969 may have been contrary to the instruction (Tr. 13970). To the extent that there was a departure from the instructions, there is a possibility that inconsistent selection procedures may have been applied.

worked up figures so we can't really tell them how they compared to anybody" (Deibig 13880).

475. One field representative, after the timing, asked the timer how she had done:

Q Did Mr. Deibig, or anyone else ask you what your reactions were to the timings after you were completed?
A I was curious to know how I stood insofar as how my time was spent. I did ask him.
Q What was his response to you?
A He said I was very average. I said I'm sorry.
Q Why were you interested in how you stood?
A I just wanted to know how I did.

(Jerome 9684.)

[168]Such testimony indicates that the field representative may have been under the impression that she was being evaluated (Goldstein 15441-43).

476. Use of the production stamp, which indicated which field representative had prepared a report, may have given field representatives the impression that they were being evaluated (Goldstein 15574-75).

477. Debriefing of the subjects being timed is a procedure which may be used to determine whether a normal day's work was performed. It can cover topics such as whether the individual timed felt that he performed differently because of the study (Goldstein 15367-68). Absent a debriefing procedure, it is difficult to make a finding as to whether field representatives' subjective reactions to the fact that they were being timed affected the results.

478. Andersen's bonus contribution calculations are confined to Code 04 offices (Findings 445-49). The recomputation of RX 566 IV-24 set forth in RX 566 F, G and H demonstrates that there is significant disparity among subcategories of respondent's offices in the Code 04 classification with respect to the bonus contribution factor.[183] Thus (on the basis of Andersen's reasoning), [169]there is variation in ability of field representatives located in different

[183] For example, in the case of life and auto reports, the Andersen study showed the following variations with respect to bonus contribution:

	Life Reports	*Auto Reports*
Code 04 Offices which were Code 04 Offices in 1971-1972, RX 566F	120	93
Code 04 Offices Suboffice Rates, RX 566G	59	36
Code 04 Offices which were Code 02 Offices in 1971-1972, RX 566H	40	18

subcategories of the Code 04 offices to meet production requirements with respect to the same reports.

479. Andersen determined that Code 04 offices most typically represented respondent's corporate averages. In this connection, Andersen relied primarily on information received from respondent's employee James Deibig and RX 754 (Finding 453; Deibig 13748, Brown 14311). Andersen took no steps to test respondent's continuing assumption that Code 04 offices represented the Company's average office (Brown 14311).

480. RX 754, entitled "Production and Earnings of U.S. Inspectors," gives for 1971 and 1972 average production, revenue, reporting allowance, earnings (salary, overtime, gain-loss on standards) and expenses for field representatives by class of office. In 1971 and 1972, respondent had offices classified as Code 01, 02, 03, 04, 05, 06 and 07 (RX 754). See the following charts: [170]

PRODUCTION AND EARNINGS OF U. S. INSPECTORS

JAN-DEC '71	LOCAL INSPECTORS U.S. 1971							Total Local	Sub-Office	Grand Total
	01	02	03	04	05	06	07			
Productions:										
Reports	428	400	348	393	353	363	362	395	410	394
Revenue	1952	1840	1814	1886	1755	1832	1853	1871	1934	1884
Reporting Allow:										
Std. Per $	.435	.516	.541	.514	.534	.551	.544	.520	.491	.510
Amount	947	949	981	969	954	1009	997	972	950	963
Earnings:										
Salary	663	665	687	651	685	726	681	684	654	674
Overtime	14	15	14	14	12	13	13	13	15	14
G-I. On Stds.	62	67	65	63	63	71	79	67	64	65
Total	739	747	766	728	760	809	778	764	733	753
Expenses:										
✓ Carfare	181	114	121	120	111	106	127	118	134	122
✓ Steno	87	88	94	91	83	94	92	90	83	88
Other										
Total	208	202	215	211	194	200	219	208	217	210
Total Earnings and Expenses	947	949	981	969	954	1009	997	972	950	963

1972

PRODUCTION AND EARNINGS OF U. S. INSPECTORS January - December

JAN-DEC '72	LOCAL INSPECTORS U.S. 1972							Total Local	Sub-Office	Grand Total
	01	02	03	04	05	06	07			
Productions:										
Reports	437	402	396	374	354	385	386	394	409	398
Revenue	1990	1843	1847	1837	1825	1903	1890	1904	1947	1917
Reporting Allow:										
Std. Per $	499	549	555	518	548	526	557	534	505	525
Amount	993	990	1021	1019	1001	1014	1053	1017	993	1011
Earnings:										
Salary	691	694	719	714	717	757	726	714	681	705
Overtime	16	16	14	15	12	13	15	15	17	16
G-I. On Stds.	73	78	73	75	71	72	84	76	75	75
Total	780	788	806	804	800	842	825	805	773	796
Expenses:										
✓ Carfare	125	110	130	123	114	109	134	119	137	126
✓ Steno	88	88	91	93	87	94	94	91	85	89
Other	—	—	—	—	—	—	—	—	—	—
Total	213	198	221	216	201	203	228	210	222	215
Total Earnings and Expenses	993	990	1027	1019	1001	1045	1053	1015	995	1011

RX 754

[171]481. RX 754 demonstrates considerable disparity between the figures for certain classes of offices and both the Company averages and the Code 04 figures, with respect to the foregoing factors; *e.g.*, consider the Code 01 offices.

482. The variations shown on RX 754 with respect to the averages for factors such as production, earnings and expenses among various classes of branch offices also suggests that reliance on RX 566 F–H for generalizing to all of respondent's offices ignores significant differences from corporate averages with respect to such variables in the case of certain offices not in the Code 04 category.[184]

483. Andersen's bonus contribution calculations for Code 04 offices utilize an average salary of $610 and a reporting standard of .505[185] (RX 566 F–H). The reporting standard, however, varies sharply in different branch offices and for field representatives in different length-of-service groups (see RX 754, 715Z–3). The interaction of the per dollar standard or reporting allowance with salary is a critical element in the computation of bonus contribution (RX 566 IV–4, IV–5; [172]see also Tr. 14318–19).[186]

484. The Andersen study made no calculations as to the impact on bonus contribution of the interaction of reporting standards and salaries at ranges different from those shown in RX 566 either in connection with the computation for Code 04 offices, RX 566 IV–24, or for the composite of all offices, RX IV–25[187] (RX 566; see Tr. 14318–20).

485. Nor was there any attempt to determine how many field representatives might be required to meet expenses at a higher salary than shown on RX 566 (Tr. 14318).

486. As to these characteristics, therefore, there is insufficient evidence to show that the averages in RX 566 are applicable throughout the Company. [173]

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[184] In this connection, see respondent's statement, "With the inclusion of the Old Code 02 office, the 1973 Code 04 office, taken as a separate group, was not as close to being a representative branch as was the former Code 04 office in 1971 and 1972." (RPF 634). Mr. Deibig stated with respect to the consolidation of the Code 02 and Code 04 offices into one group, "it would have been my opinion that it would not have been as close—*if at all*—to the most representative in 1973, with the inclusion of the old 02 offices." (Tr. 14617; emphasis supplied). Moreover, a prime consideration in assigning a code designation to a branch office is the difficulty factor in preparing reports (Finding 452).

[185] The reporting standard for 1 to 5-year field representatives in Code 04 offices in 1973 (RX 715Z–3).

[186] Earnings credit is computed by multiplying the reporting standard by the field representative's revenue credit. Earnings credit is then matched against salary and other expenses to determine bonus contribution (RX 566 IV–4–IV–5).

[187] For example, if salary goes up and per dollar standard remains constant and assuming the same mix of cases, the field representative would have to complete more cases to achieve a given level of bonus (Tr. 14319). Conversely, if salary remains constant and per dollar standard goes up, the field representative would have to produce fewer cases to maintain constant bonus contribution (Tr. 14319). If both rise, it is clear that the relative rise in each would have an impact on bonus contribution.

(6) Significance of the Andersen Study and the Underlying Product Cost and Effort Study

487. The need to abandon one of the two basic calculations pertaining to monthly bonus contribution on which Andersen rested its conclusion as to the reasonableness of the reporting standard and the need to recompute the other, detracts from the confidence to be placed in RX 566 and the conclusions expressed therein.

488. Andersen's evaluation concerning the reasonableness of the reporting standard and the underlying time studies failed to take into consideration numerous factors bearing on the ability of the field representatives to complete their tasks in a given time (Finding 460). As a result, Andersen's studies fail to take into consideration that different groups of field representatives, because of variables such as geography, scheduling, etc., may differ significantly in their ability to complete a certain number of reports in a normal workday or in their ability to show a gain in any specific period.

489. The failure to analyze the impact of these variables makes it difficult to determine whether the conclusions of RX 566 are attributable to the entire organization or whether there are offices or groupings of offices to which they would not apply.

490. Andersen's conclusion, based on its bonus contribution calculation, that respondent's reporting standard is reasonable rests on the assumption that Code 04 offices are representative of the entire organization. That assumption has not been persuasively documented. For example, see disparity for bonus contribution within the Code 04 category for the various reports as calculated by Andersen for subcategories of the 1973 Code 04 offices as shown on RX 566 F-H (Finding 478). In addition, the Code 04 offices were selected as the most representative because averages for offices in this classification pertaining to such figures as production revenue and reporting standards were closest to companywide averages. [174] However, the pertinent averages for offices in certain other code classifications differ significantly from both the companywide averages and from those of the Code 04 offices (Findings 480-81).

491. Also, the bonus contribution computations failed to analyze the interaction of salaries and reporting standards at levels different from those shown on the computations in RX 566 (Finding 484). There is, therefore, in the case of these characteristics, insufficient evidence to support a finding that respondent's field representatives as a group were sufficiently homogenous so that the averages in RX 566 could be applied generally to them throughout the organization.

492. The purpose of the cost and effort studies was not to

determine the quality of the reports but to determine how much it actually cost to do the reports the way they were being done (Deibig 13764, 13781).[188] They were, accordingly, not designed to evaluate the effect of respondent's compensation system and other policies on the manner in which field representatives conducted their investigations. Since the time studies were not designed to study the quality of the reports, they have little relevance to the issue of whether respondent's procedures were designed to assure maximum possible accuracy of the information concerning the individuals to whom the report relates. [175]

493. The foregoing factors are relevant to weighing the conflict between the conclusions in RX 566 and other evidence. Under the circumstances, the testimony of certain ex-employees that they could not complete their workload in accord with Company procedures in a normal workday or week is entitled to more weight.

D. Production Credit for Reinvestigations

494. Respondent conducts reinvestigations on its reports when the accuracy or the completeness is in question (R. Jones 5177, Curtis 7150). There are three distinct categories of reopen cases: customer reopens, consumer reopens and office reopens (RX 107Z–170).

495. Reinvestigations are usually requested to clarify points of disputed information. As a result, it may not be necessary to rework the entire report (J. Moore 8850, 10038; Ross 9352; Curtis 7149; Zack 8894). Reopens do not deal solely with unfavorable information but they also deal with items such as birthdates and addresses (R. Jones 5176).

496. Respondent's policy in assigning reports for reinvestigation is the following:

> Generally, if the point in question is factual, and can be definitely resolved, age, duties, identities, marital status, etc., the original Field Representative should rehandle. *If the point is subjective and/or a difference of opinion is possible as to severity, degree of importance, health habits, reputation, an alternate Field Representative should be used.* In either instance, file copies should be withheld (original sources may be shown on Form 640) to assure objectivity.

(RX 107Z–170; emphasis supplied.) [176]

497. When a reopened case is assigned to an alternate field

[188] "We [the timers] were not interested in what he [the field representative being timed] was saying or in the way he was asking his questions, therefore, the only requirement placed on us as timers were that we had continuous line of sight with the man up to the point he might enter a private residence. . ." (Deibig 13520). Since the timers did not hear the interviews, it would have been difficult for them to determine whether a field representative, in his questioning of sources, was more thorough than field representatives generally (Deibig 13765). And, normally, the timers could not determine whether the field representative being timed had asked a full range of questions (Deibig 13527; see also Healy 14020).

representative, he does not see the original report and he handles it as a new case (A. Brown 7774–75, 7888).

498. Branch managers are given discretion in the assignment of cases for reinvestigation on the ground that it is not possible to cover every contingency that may arise (Jenkins 5702). Exercise of such discretion varied, *e.g.,* in the suboffices, it was not, according to respondent's officials, always possible to assign a reinvestigation to an alternate field representative (Paladino 8738–39). However, if the circumstances were sufficiently serious, the branch manager might send in an alternate field representative from another office (Tilden 11780). And, in the Boston and Hartford offices, 99 percent of the cases were given to the field representative who handled the original report (Hakey 1658, 1730–31).

499. The rules for giving field representatives production credit for reinvestigations vary depending upon whether such reinvestigation is assigned to an alternate field representative or to the original field representative and whether or not the customer is charged for the new report. Respondent's customer is charged for a report when it reopens a case and the original information is confirmed (Hakey 1658–59, Laudumiey 1848–49, Silar 4029–30, Wallace 3014).

500. When the reinvestigation is assigned to a field representative who did the original investigation, he receives production credit for a customer reopen if the customer is charged for the reinvestigation; *i.e.,* if the original report is confirmed as correct (Lieber 9012–13, Curtis 7173, Moore 8850). If the reinvestigation shows an error in the original report so that the customer is not charged, then the manager has discretion as to whether to give production credit to the original field representative for rehandling the case (Lieber 9012–13, Paladino 8754, Moore 8849). [177]

501. The manner in which branch office managers exercise their discretion in compensating the original field representative for a reinvestigation when the first report was in error varies from manager to manager. Certain managers do not give production credit to original field representatives when the first report was in error on the ground that this would reward respondent's employees for improperly doing their job (Curtis 7293–94, Brothers 7439). Other managers give the credit as a matter of course (Larsen 12503–04, 12525–26). Some managers give production credit to such field representative if the error in the original report was not his fault (*e.g.,* J. Moore 8849–50, Paladino 8753–54).

502. In the event that an alternate field representative handles the reinvestigation, then that field representative receives produc-

tion credit whether or not the customer is charged (*e.g.*, Curtis 7173, Case 5414).

503. Normally, when a field representative receives credit for a reinvestigation, he receives the same credit provided for the original report (Zack 8895, Ross 9387–88, Larsen 12527). Where the reinvestigation requires more effort than usually required for the particular type of report, the field representative may, at the discretion of the branch manager, be given additional credit for such work (Zack 8895, Larsen 12506).

504. When field representatives are compensated for a reinvestigation and the customer is not charged, the equivalent revenue is deducted from the branch office revenue (Case 5413–14).

505. Respondent's failure to give production credit if the original report was incorrect, has the following effect in the case of some field representatives:

> Oh, in some instances where you would reinvestigate, you may find that the customer is partially right and you are partially right and in writing up this case, you would be inclined to more emphasize, put more emphasis on the [178]information showing you were correct so you could recharge the customer.

(Silar 4030.)

506. Another field representative was influenced as follows by the method of compensation for reinvestigations:

> Well, on reinvestigations, I would really—on those cases I would really try to really dig into it and I would try to prove that I was right the first time so I'd get my $5 but if it turned out that all wasn't true, I wouldn't lie about it. I would still tell the truth, that, well, I was wrong.

(Wallace 3015.)

507. The failure to give production credit for reinvestigations where the original field representative could not substantiate his original report clearly has potential to give field representatives an incentive to try to prove that they were right the first time (Findings 500–05). There is a danger that, in those areas involving subjective judgment on the part of the field representative and where differences of opinion are possible, there would be a tendency to deny the consumer the benefit of the doubt (Findings 496, 505). This point is tacitly recognized by respondent's Branch Manager's Manual (RX 107Z–170). However, no definitive finding can be made on the point. The record does not show the extent to which matters involving subjective points and/or where difference of opinion was possible were assigned to field representatives preparing the original report (see Finding 498). Nor does the record show with any degree of specificity any breakdown on how managerial discretion with

respect to granting production credit was exercised in such cases. The potential for inaccurate reporting is evident where the question in issue is subjective, and the reinvestigation is assigned to the original field representative, and where the manager, as a matter of policy, will not give production credit if the reinvestigation turns up [179]error in the original report. There is insufficient detail, however, in this record to determine that a pattern of inaccurate reporting has taken place by virtue of such compensation policies.[189]

E. Health and Arrest Information

(1) Health Information

508. Respondent obtained health information concerning an individual from sources other than licensed physicians, medical practitioners, hospitals, clinics or other facilities. Certain of respondent's reports require that the field representatives obtain such information from lay sources (Stansbury 6751–52, Jenkins 5793, Maust 8289, Hakey 1632, Wines 406, Monson 3274–75, Laudumiey 1838, Wallace 3005; *e.g.*, see CX 422A & B; RX 343A & B; Getz 12387–88).

509. Health information is to be confirmed either by the applicant or by two outside sources (Getz 12388, Hakey 1632–33, Laudumiey 1838, Moxham 3525, Pollard 328). The information in the reports is identified as coming from lay sources or the applicant (Moxham 3526–27, Muth 9954, Monson 3309).

510. Respondent considers the applicant to be a prime source of health information (Coleman 7954, Farra 755–57).

511. Although a neighbor cannot provide the doctor's diagnosis of a specific ailment, a neighbor may provide information which is generally known or derived from his observation of the applicant (Muth 9949). [180]

512. Field representatives were not required to confirm health information secured from lay sources through medical records (Wines 406–09, 411; see also Pollard 328, Buckley 1260, Monson 3275).

513. Underwriters do not take action based solely on health information obtained from lay sources in a report from respondent (Moller 13056, Jenkins 5793–94, Nietzold 13012, Paine 13396–97, Taylor 10841), but use such health information as a lead to request further information from medical sources, the agent or the applicant (Nietzold 13010–11, Moller 13055–56, Paine 13397).

[189] Complaint counsel cites one specific example where this may have occurred (CPF 965). However, that evidence was not allocated to these allegations of the complaint and must, therefore, be rejected on that score.

514. The record does not support a finding that health information secured from lay sources is inherently unreliable (Grossman 4199–4200; see also Elmendorf 4264). The testimony bearing on the issue is equivocal.[190] [181]

(2) Arrest Information

515. Respondent's field representatives, to complete certain reports, obtain information concerning applicants' arrest records (CX 422A & B; Jenkins 5794–95, Hakey 1633).

516. Field representatives are encouraged to check police records where available or where there is reason to believe that an arrest record on an applicant exists (RX 102Z–16–17).

517. Where it is not possible to confirm arrest information through police records, respondent's employees are instructed as follows:

> It is also pertinent to mention at this time the reporting of 'unconfirmed adverse information.' Example: If we develop information that there have been arrests, indictments, or convictions, but local police records are not available for confirmation, *WE SHOULD STILL REPORT THE INFORMATION.* But, when reporting the information, put it in the same language as we developed it, such as, 'there is talk in the community that your subject has had police difficulties, but police records are not available locally to verify this information.' It is important, however, that the approximate date of the difficulty be estimated and recorded because of the seven year requirement imposed on reporting adverse information.
> (CX 1351I.) [182]

518. In certain jurisdictions, police records are not generally available (Curtis 3279, Jenkins 5795). In such instances, an attempt will be made to confirm the information concerning arrest through newspaper clippings or by interview with the applicant or a member

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[190] Dr. Grossman, one of complaint counsel's medical experts, testified that a "yes" or "no" answer could not be given as to whether neighborhood sources are likely to have accurate information as to the existence of certain medical conditions (Tr. 4199–4200). When asked whether it was reasonable for a field representative to obtain information concerning an illness from a lay source, he stated:

> A. I don't know how he would ask, but I mean the thing is in some situations the neighbors do discuss with each other conditions that they have and in other situations they do not; and neighbors often imagine things and, in turn, have gotten things in the record sometimes out of malice, so you have a mixed bag there. I mean you can't give one general answer for the whole thing.
>
> In some situations, I mean the neighbor might have, and in others it might suggest things that you may not want, and so *you really have a mixed bag there. I don't think you can give one answer to that whole situation.* The thing is the investigator can't differentiate what situation he is stepping into.

(Tr. 4199; emphasis supplied.)

Similarly, the testimony of Dr. Elmendorf, who stated there were better ways of getting information than from lay sources (Tr. 4261), did not give conclusive evidence on this point. He also testified that it was conceivable that it may be necessary to get information from neighborhood sources or other sources in connection with an insurance transaction (Tr. 4264).

Even accepting CPF 979–80, the one incident cited would not support a finding that securing medical information from lay sources without further confirmation is inherently unreasonable.

of his family (Curtis 7238-39, Hakey 1633) or through additional outside sources (Hakey 1633, Laudumiey 1840, Monson 3277). If lay sources such as neighbors or the applicant are used as sources for arrest information, the report will so indicate (Laudumiey 1839-40).

519. Some field representatives, if they were unable to confirm arrest information through police records, would not report it (Pollard 330-31).

520. The record contains no evidence pertaining to the use or accuracy of arrest information obtained through lay sources in specific instances. Nor is there other evidence bearing on the question of the reliability of such information. No finding can be made on the state of this record that respondent's practice of securing information of this nature through lay sources is unreasonable. [183]

XIV. RESPONDENT'S DISCLOSURE OF REPORTS UNDER FCRA (PARAGRAPHS 22-23 OF THE COMPLAINT)

A. Training

521. After passage of the FCRA, respondent conducted extensive orientation sessions for its employees to acquaint them with new procedures to be instituted upon the Act's effective date in April 1971.

522. After the Home Office had determined the procedures to be instituted and trained the home office staff, training meetings were held for the Regional Vice Presidents in January 1971 (Jenkins 5656-58; RX 551A-D). Each Regional Vice President then met with the branch managers in his region to train them. Home office personnel attended these meetings (Jenkins 5659-60).

523. Branch office managers subsequently conducted training sessions with the personnel in each branch (Jenkins 5660). Follow-up educational branch meetings were held in April 1971 (Jenkins 5680-81; RX 558A-K). Extensive instructional material was disseminated to the branch office managers to aid them in understanding and teaching the new procedures (Jenkins 5660-61, 5669-70, 5675-78; RX 556B-LL, 564A-YY, 120A-Z102). Additional material was sent to branch managers subsequently to direct them regarding modifications and revisions in respondent's procedures related to FCRA (Jenkins 5669, 5678).

524. A home office staff group—the FCRA unit—was established to provide expertise on FCRA problems. Telephones were manned by this team to handle questions from field personnel when FCRA problems arose (Jenkins 5692-93). [184]

B. Disclosure in Branch Offices

525. In April 1971, branch managers were instructed to "choose those Field Representatives you feel are in the best position to handle Inquiring Consumers" and train them to make consumer disclosures (RX 558C). The importance of having "trained personnel" conduct disclosures was stressed, and the branch offices were provided with training materials (including specimen reports with instructions on how they should be disclosed) to be reviewed by the selected personnel as part of their training (Jenkins 5666–68; RX 556N–Z). Respondent continued to emphasize to branch managers that consumer inquiries "require the best ability in the office." (RX 107Z–187).

526. Respondent's instructions stated that when a consumer visited the office for disclosure regarding a report or investigation on him, he was to be given a brochure explaining the disclosure procedure (RX 547B–E, 303A–F; J. Curtis 7192). A consumer contacting an office in connection with disclosure was to receive disclosure of all reports in his file (other than those respondent felt were not covered by the Act) (RX 556DD). In addition, branch managers were instructed that there should be " 'trained personnel' in the *office at all times*" to give disclosure. "It is *not* satisfactory to refuse to discuss a situation or ask the consumer to come back when the Manager returns, except under the most extreme circumstances." (RX 564T, emphasis in original).

527. Respondent's policy regarding charges for disclosure and reinvestigation paralleled Section 612 of FCRA, with no charge authorized for disclosure if the consumer had, within 30 days, received notice of adverse action in connection with a report filed by Retail Credit (RX 120Z–50). In other instances, where the Act permitted charges, respondent's instructions provided for a $5.00 disclosure fee and a reasonable fee for reinvestigation (both fees to be refunded if, upon reinvestigation, the original report information were disproved or not verified) (RX 120Z–51). However, respondent's instructions gave discretion as to whether these charges were imposed at all and gave particular instances in which it was suggested that they not be made (RX 120Z–51–52). [185]

528. Contact by inquiring consumers was to be noted on a monthly log maintained by the branch office (CX 1473). In addition, a file memorandum was to be prepared after the disclosure. This document was to set forth a brief description of the consumer contact and information disclosed (RX 556M; Jenkins 5771–72, Jegley 7038).

Copies of the memoranda were sent to the home office (Jenkins 5771-72).

529. Respondent's instructions, however, were not followed in all instances. Consumer Phares visited Retail's Pittsburgh office in 1972, stated to the receptionist his request "to see someone in regards to information on file." He was told that the information "was not given out" (Tr. 773, 783). Only after Mr. Phares had his attorney call the Retail branch office did he receive disclosure (Tr. 774-76).[191]

530. Consumer Humble visited Retail's Lincoln, Nebraska office in February 1973, after she received a notice from her automobile insurance company rejecting an amendment to her policy to add her husband as an insured (Tr. 3479-82). She was told that the file information was "on" her husband and would not be disclosed to her (Tr. 3484-85). She received no disclosure even though the report was in her name and contained information on her, as well as on her husband (CX 133A-B).[192] [186]

531. Consumer Baker, after having been incorrectly advised by the Wichita branch's assistant manager as to his rights to disclosure (Finding 537, *infra*), took with him to his disclosure appointment Mr. Dickey, a representative of the Consumer Division of his state's Attorney General's Office (Tr. 3113-14). After Mr. Baker indicated that he did not intend to sign a waiver form (CX 337) presented to him (Tr. 3115, 3119), Mr. Smith, the branch manager,[193] inquired regarding Mr. Dickey's identity. After learning Mr. Dickey's identity, Mr. Smith stated, "I'll tell you this much. If I read this report to Mr. Baker, you are not going to be present when it's read." (Tr. 3119). Mr. Dickey advised Mr. Smith of Mr. Baker's right under the FCRA to have a third person present during disclosure, at which point Mr. Smith terminated the interview without making any disclosure (Tr. 3119-20).

532. In 1972, after learning that his daughter had been visited and questioned regarding his wife, consumer McCune called the Wichita branch office to ascertain whether the interviewer was a Retail employee and if a report was being prepared (Tr. 4361-63). The assistant branch manager told him that he had no record of an

[191] In rebuttal of consumer Phares' testimony that he was told his file information could not be revealed, Mr. Peck, the branch manager, testified with regard to the usual procedure when a consumer visited the office for disclosure (Tr. 8360-67). This testimony did not discredit Mr. Phares' testimony based on his clear recollection of what took place at the particular event in question. In addition, the unrebutted fact that Mr. Phares contacted his attorney regarding Retail tends to corroborate his testimony that he had been rebuffed by Retail when he first attempted to obtain disclosure.

[192] Respondent's instructions provided that if information on one spouse was sensitive and likely to be unknown to the other, the discloser might wish to talk with the parties separately regarding information in the file on them as individuals (RX 564V).

[193] CX 1492 indicates that Mr. Smith was the manager of the Wichita branch.

investigation being conducted on the McCunes (Tr. 4363). Mrs. McCune also called Retail and spoke to the branch manager, who told her they had nothing in their files (Tr. 4384). When the McCunes received a notification that Mrs. McCune's insurance application had been denied on the basis of a Retail Credit report, it became apparent that a Retail report had been prepared (Tr. 4363–64). Mr. McCune again contacted Retail and after asking the branch manager where the information was obtained, was told that all Retail's information was confidential and that "they couldn't tell me a thing, and at that time they didn't tell me whether they even had any record of it." (Tr. 4365). Only after Mr. McCune became aware of the right to disclosure and so informed the branch manager, was he told disclosure could be obtained (Tr. 4366). [187]

533. Respondent violated Section 609 of FCRA by denying disclosure to consumers (Findings 529–32). In addition, the failure of Retail to advise the McCunes upon their first contacts that a report was being prepared or an investigation conducted, discouraged disclosure in a manner tantamount to refusal to disclose (Finding 532).

534. In other instances, respondent's field personnel, while not actually refusing disclosure, imposed certain conditions on or prerequisites to disclosure, which were not permitted by FCRA.

535. It was respondent's practice to request that a consumer seeking disclosure sign a completed Consumer Interview Form (RX 556L). This form had blanks for the consumer's name, address and other identifying information, and for the signature of the consumer to certify that he was who he purported to be (CX 1457). Respondent's stated purpose of this procedure was to provide information adequate to ascertain that disclosure was being made to the proper person (McLaughlin 8346; Dukes 12735, 12741; Jenkins 5689–90; see also CX 675Z–62–63). However, the form, above the signature line, contained the following paragraph:

> I hereby certify that I am the above described consumer and request that Retail Credit Company disclose to me the nature and substance of information which it has in its file concerning me. I authorize Retail Credit Company to make necessary investigation of any item which I may dispute and to transmit the results of such investigation to any person to whom it has previously reported such disputed information. I authorize any business, organization, professional person or anyone else to give full information and records about me.

(CX 1457, CX 337.) [188]

Thus, as noted by respondent, the form "when properly signed"

could serve as an authorization for ascertaining medical information (RX 108E).[194]

536. Such a waiver was not necessary for identification purposes and was not a proper condition to place on disclosure. Respondent did not impose the condition of this waiver on all disclosures (*e.g.*, telephone disclosure, when given, did not involve the waiver), and did make disclosures when confronted with consumers who refused to sign the waiver (Luster 3172–73, 3180; Bendelow 3459–62). However, its use of the form implied a condition to persons unaware of their right to disclosure without signing a waiver.[195]

537. Another condition imposed on disclosure occurred in the case of consumer Baker. Mr. Baker requested disclosure in 1973, after receiving a cancellation of his automobile insurance (Tr. 3108–10). The assistant manager told him there would be a $5.00 charge for disclosure. Mr. Baker stated that he would not pay a $5.00 fee and showed the assistant manager his cancellation notice (Tr. 3110[196]). The assistant manager then told him, contrary to any corporate policy or instruction, that he would have to have a written authorization from the insurance company involved before he could receive disclosure (Tr. 3110–11). After learning of his rights under FCRA, Mr. Baker again contacted the assistant manager who insisted that a written authorization was prerequisite to disclosure (Tr. 3112–13). Mr. Baker then returned to the branch [139]office with a state consumer representative, well versed on the FCRA. At this meeting, the branch manager gave him the Consumer Interview form to sign for disclosure and the insurance company authorization was not demanded (Tr. 3114–15).[197]

538. Respondent imposed conditions on consumer disclosure which were not authorized by the FCRA (Findings 535–37). Imposition of such conditions is another way to avoid the disclosures required by Section 609 of FCRA and is constructive refusal to give disclosure. Such practices violate Section 609 of the Act.

539. Respondent's instructions stated that disclosure of the nature and substance of the information in the file was to be given, "not necessarily verbatim" (RX 556L). Under no circumstances was the discloser to permit the consumer to see, read or handle the report

[194] In 1974 or 1975, respondent redesigned its Consumer Interview Form and omitted the waiver clause (McLaughlin 8347–48; RX 492C).

[195] The field personnel were instructed that if the consumer refused to sign the form, they were to ask for other identification and not to insist that the consumer sign the form (RX 556I).

[196] No finding of violation is based on the attempted imposition of a fee. Mr. Baker's testimony indicates that when the assistant manager mentioned the fee, he had not been advised that Mr. Baker sought disclosure because of an insurance denial (Tr. 3110).

[197] Disclosure in this case did not occur. After the branch manager learned the state representative's identity and that Mr. Baker intended he be present throughout the interview, he terminated the meeting (Finding 531).

himself (RX 556F, 556L). "Nature and substance" was defined to include "*ALL* file information," favorable and unfavorable. Summarizing and paraphrasing were permitted "so long as we are complete, accurate, and the consumer understands." (RX 564W, emphasis in original). The instructions further provided that, in disclosing a report, the discloser cover all the questions and answers on the report and then take the narrative sections "feature by feature." (RX 564X).[198] **[190]**

540. "As a matter of established procedure or usual and customary practice, respondent [did] not disclose the recipient of a consumer report on the consumer which it [had] furnished for employment purposes within the two-year period preceding the request, or, for any other purpose within the six-month period preceding the request, unless specifically requested to do so by the consumer." (CX 1445E). Likewise, respondent did not disclose non-investigative sources of information without a specific request (RPF 935).

541. Implementation of respondent's instructions in the field was not uniform. In some branch offices, reports were read verbatim (Burge 5088–89, Jegley 7027). In others, a summary or paraphrase of the report was disclosed (Coulter 8202–03). In still another, only the part of the report which the discloser "assumed was the factor" that had caused the consumer to be rated or denied insurance (Hakey 1664–65) was disclosed.

542. In practice, some field personnel, while purporting to give the nature and substance of reports, failed to give adequate or complete disclosure.

543. In November 1971, a consumer went to the Wichita branch office for disclosure to ascertain what information had been the basis for denial of two insurance applications (Tr. 3377–81). He received disclosure and was told that his life insurance was probably denied because he had had pneumonia and that the basis for his automobile cancellation was probably his six traffic violations in 6 years (Tr. 3383–89). When the consumer asked for the exact reasons he had

[198] Ex-employee Shelley testified at length regarding instructions he allegedly was given by Mr. Browning, the Regional Vice President in Mr. Shelley's area. These alleged instructions were contrary to respondent's written instructions, *e.g.*, in making disclosures, personnel should tone down the reports (Tr. 15115), not disclose the question and answer portions of the reports (Tr. 15116), "highlight" the body of the report (Tr. 15116–17), and if a report contained several adverse items, disclose the item of "least conflict" first because the discloser would often "not have to go the remainder of the report." (Tr. 15117). Mr. Browning specifically denied giving these instructions (Tr. 16098–104). His denial was supported by other Retail employees in Mr. Browning's area who testified regarding instructions he had given them which were inconsistent with those Mr. Shelley allegedly received (Lindsey 16182–85, Beckman 16312, Taylor 16218, Klueh 16274–76). After considering this testimony and the fact that it is highly unlikely that a vice president would issue directives so widely divergent from the instructions he was given by the Home Office (which he knew were given to the branch offices by the Home Office), it is found that Mr. Shelley's testimony was effectively rebutted on this critical issue. His testimony is, therefore, not relied on.

been refused, he was referred to the insurance companies (Tr. 3389). He contacted the insurance companies and was told he would have to receive the information from Retail (Tr. 3390-91). The consumer returned to Retail and had a second disclosure similar to the first (Tr. 3391-92). He again contacted one of the insurance companies about his refusal. The insurance representative finally told him that the Retail report indicated that he had a drinking problem (Tr. 3392-93). Since no information regarding drinking had been disclosed to him by Retail, he returned for a third disclosure, in which the drinking information was again not mentioned (Tr. 3393-94). The consumer asked about any drinking information, and the branch manager stated, " 'I didn't feel that it was important' " (Tr. 3394).[199] Among other items not disclosed to the consumer were that he was "said to be a fast and careless driver;"[200] that he was "said to be an unstable type of person, not regarded well;" that his mother had been in a mental institution and was poorly regarded, and that he had a girlfriend who drove his car (Tr. 3397-3401, 3384-85; CX 343H-I). **[192]**

544. Consumer Grabher contacted the Denver branch office after she received an insurance cancellation (Tr. 3410). She received disclosure but was not told the report's statement of her estimated income and net worth (Tr. 3412-13; CX 113A).[201]

545. In 1972, two consumers, father and son, visited the Dayton branch office for disclosure after an insurance company had refused the addition of the son to the father's automobile insurance policy (Tr. 960-62). Information suggesting the son had been involved with drugs and unfavorable details of his having been terminated from a teaching position were not revealed (Tr. 964, 967). The remaining information, which was disclosed, was basically favorable (Tr. 978, 982-84). Afterwards, the father wrote the insurance company involved, asking whether the denial was based on additional information since the Retail report was favorable. The son thereafter received a telephone call from the Dayton branch manager, who stated that the employee who had conducted the disclosure, had overlooked one page of the report. He then disclosed to the son the

[199] The information which the Retail representative did not consider important was: the consumer had been seen "drunk several times since he was discharged from the military. One source stated that prior to service, the subject was arrested for driving his car with some of the tires on the sidewalk down the middle of the town." (CX 343I).

[200] This item appears to have been disclosed in the second disclosure session (Tr. 3400).

[201] Ms. Grabher's testimony was more persuasive than that of the rebuttal witness who testified regarding the disclosure procedure he generally followed.

drug information and unfavorable details of his dismissal from the teaching position(Tr. 965-67, 979-81; CX 98).[202] [193]

546. Consumer Smith twice received disclosure in 1973 from the Manchester branch office of a report which was the basis of his failure to receive an insurance agency appointment (Tr. 927-32; CX 258). These disclosures did not include unfavorable information in the report concerning previous employment (Tr. 930-32). While the information in question was later deleted from the report and a notice of the deletion sent to the company who had received the report (CX 255A-C, 257; Tr. 952-53, 8461-62), this action was taken without Mr. Smith's knowing the information was in the report.[203] [194]

547. Another consumer received disclosure in 1972 from the Oxon Hill, Maryland office after she received an insurance cancellation (Tr. 1792-94). Items from a report dated December 15, 1971 (CX 151) were revealed, but the disclosure did not include information in another report, dated December 27, 1971 (CX 152), that the consumer had run off with a truck driver; that her morals were questioned; and that she was regarded as "trying to take [her husband] for his money." (Tr. 1794-96; CX 151A-B, 152A-B).[204]

548. Consumer Dayton contacted Retail's Phoenix office in 1973, after her automobile insurance was cancelled (Tr. 3531-32; CX 1469B). She received disclosure of some information, including information that she was living with a man to whom she was not married (Tr. 3533-34). She was not told, however, that the man living with her had caused trouble in the neighborhood (Tr. 3534). Also, her estimated income and worth were not revealed (Tr. 3534-

[202] The son's testimony that, following his disclosure, he received a call from Retail and was told that during the disclosure, one page of the file had not been disclosed to him, was unrebutted. This fact, together with the branch manager's testimony that the employee who made the disclosure "was not sure" he had disclosed the items in question (Tr. 14899), gives credence to the consumers' testimony, despite the testimony of rebuttal witnesses.

[203] Consumer Smith's testimony that unfavorable employment information was not disclosed to him is found credible, despite rebuttal testimony of the Retail employee who gave the disclosure. The rebuttal witness testified that the items were disclosed and disputed (Tr. 10890), and that a reinvestigation was conducted (Tr. 10891-92, 10897). However, Mr. Smith appeared to have a clear recollection of what was disclosed to him. His recollection was particularly convincing because he had discussed with Retail in 1968, the subject information and was under the impression the material had, at that time, been deleted from his records (Tr. 918-27). That Mr. Smith would have remembered if this information was mentioned seems certain. Furthermore, the visit of Mr. Yox, the branch manager, to Mr. Smith's office to give another disclosure (Tr. 942-45, 8457-60) tends to corroborate Mr. Smith's testimony that the first disclosures were incomplete. During disclosure by Yox, the then-deleted information was disclosed to Mr. Smith. Mr. Yox told Mr. Smith that the information had been included in the report because the wrong report had been sent to the customer and that during the previous disclosures, the wrong report was read (Tr. 945-46).

[204] Respondent's suggestion that there need be evidence that the second report, a prior address report, was actually in respondent's file at the time the consumer received disclosure, is without merit (RPF 817). Respondent had a duty to give disclosure of all reports in a consumer's file. When all reports were not disclosed, it was incumbent upon respondent to show that the reports not disclosed were not in the file. Here, no such showing was attempted.

35; CX 78A-B). Ms. Dayton would have disputed these items if they had been disclosed (Tr. 3534-35).[205]

549. In 1972, a consumer was given disclosure by Retail's San Francisco office of reports prepared in connection with his application for life insurance made at the request of the bank from which he and his partner in business had a loan (Tr. 3711-13, 3725). [195]One item was withheld. He was not told that his file contained a statement that he used "his hands in an effeminate manner, also talks in an effeminate manner." (Tr. 3720; CX 218).[206]

550. When consumer Phares (Finding 529) received disclosure of his report, he asked what companies had recently received the information disclosed. He was told this information would not be divulged (Tr. 777, 787-88).[207]

551. In other instances, while not completely omitting items from the reports, Retail representatives "paraphrased" or "summarized" the items in such a way that the full meaning, and in some cases, the derogatory tone of the report, was not conveyed to the consumer.

552. Another consumer contacted Retail's Canton, Ohio office in 1972, and asked why her policy had been cancelled. She was told that her report indicated she had an unstable marriage (Tr. 3593-94). The report actually stated she had been separated several times from her husband and that two sources "indicated that [her husband] had a desire for other women and they also stated that . . . your insured had a desire for other men and between the two this caused friction in the marriage. Stated were fighting constantly." (CX 169B).[208] [196]

553. Another consumer was told that her report indicated she "had recently had a run-in with [her] former husband, a severe one." (Tr. 1794). The report actually stated that she had been assaulted by her husband and incurred 22 stab wounds as a result (CX 151A).

554. When consumer Stanley received disclosure from the Wilmington, North Carolina branch office after having his insurance cancelled (Tr. 220-26), the file information was presented in a far less inflammatory manner than in the report. *E.g.*, Mr. Stanley was told the report indicated he made it a point to be well aware of the

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[205] Ms. Dayton's testimony was more convincing than that of the rebuttal witness who testified regarding only the usual procedures followed.

[206] The consumer's testimony was not rebutted. It is respondent's position that disclosure to the consumer was not required under FCRA because the report prepared was not a consumer report (RPF 818). However, Section 609 of FCRA requires disclosure of all file information on a consumer (except medical information), not just consumer reports (see Finding 559, *infra*, pertaining to claim files).

[207] Mr. Phares' testimony that he was told the recent recipients of his report would not be divulged to him was unrebutted. Confusion in peripheral areas of his testimony does not detract from the weight to be given to this unrebutted testimony.

[208] This consumer's disclosure was also incomplete in that she was told information only in response to specific questions she asked. After being told the reason for the cancellation, she asked whether the report showed she was married, and where it indicated she worked (Tr. 3594). She was given this information, but only after she asked specifically (Tr. 3594-95). No witness was called to rebut the witness' testimony.

benefits to which he was entitled under insurance policies (Coulter 8198–99), whereas the report actually stated:

> . . . Special attention has been given to past losses due to subject being well-known in this area, as being extremely "claim conscious" and has submitted several minor claims with several different insurance companies. We did develop through outside sources that the subject has had his insurance cancelled on several occasions due to excessive claims. Subject is known to be the type person that will submit any claim and usually has a full knowledge of what is covered and what is not. This information was verified through outside sources as well as the local claims adjuster who has worked with the subject in settling several claims.
> (CX 271A–B.)

In addition, the report stated:

> . . . The subject himself is favorably regarded but his general financial reputation is not good, sources report that he has the ability to pay but general nature is to be slow making payments. We developed a past-due account with the local hardware store over two years past-due and also a past-due account with a local carpet-laying firm over a year past-due with no attempt made to pay.
> (CX 271B.) [197]

On this subject, Mr. Stanley was told only of the specific past due accounts and that his reputation for bill paying suffered because of them (Coulter 8200–01).[209]

555. Respondent's field personnel failed to give the nature and substance of the information in its files in a substantial number of disclosures, by either omitting pertinent information or summarizing and paraphrasing to the extent that the information disclosed did not reflect the full import of the information in the reports (Findings 543–54).

556. In June 1974, respondent instituted "visual disclosure" for consumers visiting an office for disclosure (RX 576A–E). This procedure was developed because "it became apparent over the years that no matter whether or not our manager, or when our manager read a case verbatim across the desk, some of our consumers did not feel that he was doing so." (Jenkins 5763–94). Under the new procedure, the consumer could actually see his report and review i with the Retail representative.

557. In 1976, Retail again revised its disclosure procedure. As c October 1, 1976, a consumer who visits the office for disclosure is t be given a copy of his report after visual disclosure is given (or in th case of telephone disclosure, on a subsequent visit to the office) (R 122A, C–E).

[209] Mr. Coulter, who made the disclosure, testified in connection with Mr. Stanley. Mr. Coulter's statem themselves form the basis of this finding.

C. Disclosure of Claim Reports

558. It is respondent's position that claim reports are not consumer reports under the Act and therefore not subject to its disclosure requirements. However, on some occasions, in order to accommodate consumers, claim [198]reports have been disclosed." (RPF 810(a)).[210] This policy was communicated to the field. As one of respondent's officials explained, he felt no "corporate obligation" to disclose claim reports. "The company policy was that claims versions were not part of the Fair Credit Reporting Act but on each and everyone you had to handle it individually on how you saw—how—if you wanted to disclose part of it. If you saw it feasible to do so then you could do so but it is a matter of convenience to the consumer more so than company policy in that particular aspect." (Piercey 8323).

559. Respondent's position that claim reports need not be disclosed and the ad hoc position with respect to disclosure taken in the field[211] compels the inference that many claim reports were not disclosed. Such failure to disclose claim reports violated Section 609 of FCRA requiring disclosure as to "all information (except medical information)" on the consumer in the files of a consumer reporting agency at the time of the request. [199]

XV. TELEPHONE AND SUBOFFICE DISCLOSURE (PARAGRAPHS 24-25 OF THE COMPLAINT)

A. Telephone Disclosure

560. Respondent's instructions regarding telephone disclosure stated that even though the FCRA authorized Retail to require a written request prior to telephone disclosure, no such requirement was imposed by the Company (Burge 5006-07). Rather, the Retail epresentative was required to make certain he was speaking with he proper person (CX 675W). Telephone disclosure was encouraged, t least indirectly, by respondent's statement to branch management iat as many routine situations as possible should be handled by

[210] The record indicates that, as of June 18, 1971, respondent did recognize that Section 609 covered not solely sumer reports, but "all of the information about the consumer" (except medical information) in the files (CX Z-21). However, to the extent of any conflict between this document and respondent's proposed finding, ondent's finding is relied on as to the procedure actually followed.

[211] *E.g.*, when consumer McCreary requested disclosure of his claim report from the Miami branch office, he ived disclosure only of the portion of the report called the "claimant interview" rather than of the entire report h included information from other sources (Tr. 8317; RX 449B-C). Consumer Beresh received disclosure of n information a week after he originally requested it (Tr. 11094). The disclosure occurred only after Mr. Beresh d the branch office numerous times and Retail's legal department (whom the branch manager had contacted he felt claim reports were not covered by FCRA), told the branch manager to "go ahead and disclose" man 11086-87, 11092-94).

telephone (RX 564S). In addition, branch managers were urged to "make every effort to make good" with a consumer on the first contact and told that "delay irritates." (RX 107Z-187).

561. Field personnel were instructed that if a consumer telephoned for disclosure, properly identified himself and the pertinent file contained no protective or decline information that was subjective or highly critical, the written request was to be waived (CX 675Z-31). Otherwise, the branch management was to suggest the consumer come by the office for disclosure or send a written request for telephone disclosure (CX 675Z-32). If a consumer wrote to Retail requesting disclosure, he was to be advised by mail that he could telephone for disclosure, but if the report was highly sensitive, it was suggested that the letter "be pitched toward a private, face-to-face disclosure" (CX 675T). It was felt by respondent that while telephone disclosure saved time for all parties involved and even sensitive material could be handled by telephone, there was "no substitute for a face-to-face discussion"(RX 108B). Similarly, Mr. Hakey testified that if the information in a consumer's file were not "minor," he wanted the person to visit the office to ascertain identity (Tr. 1661-62).

562. Respondent's instructions regarding telephone disclosure were not followed in all the branch offices. [200]

563. It was the policy in the Denver branch office for the receptionist, Ms. Dukes,[212] to advise consumers who telephoned in for disclosure that the information requested was confidential and could not be disclosed by telephone. Callers were advised of their right under FCRA to in-person disclosure, but no mention was made of their right to telephone disclosure if a written request were filed. On the "rare" occasion when a consumer stated he was unable to come to the office, Ms. Dukes referred the call to the branch manager or assistant manager (Tr. 12739). Ms. Dukes received her instructions on what to say to consumers from the branch manager (Tr. 12740, 12739, 12741).[213] Consumers Bendelow (Tr. 3452-53), Coons (Tr. 3578), Comerata (Tr. 3218), Goddard (Tr. 3156-57), Moser (Tr. 3561-62) and Van Sickle (Tr. 3823-24) were refused telephone disclosure by the Denver office through implementation of this policy. Consumer Grabher, who asked to and did speak with the manager when she called, was asked by him to come in person in order to obtain

[212] Ms. Dukes was receptionist in the Denver office from 1970 until January 1976 (Tr. 12733, 12738).

[213] Mr. Hendon, the branch manager, testified and did not directly dispute Ms. Dukes' testimony regarding her instructions or the procedure she described. He testified that telephone disclosure was given by the Denver office when a consumer sent a written request (Tr. 11899-900) and that, on occasion, when he felt identification had been properly demonstrated, he gave disclosure when there was no written request (Tr. 11900). In addition, RX 519, 520A-B, 521, 522, 524, 525A-C, 526A-B, 530-543 indicate that some telephone disclosures were made by the Denver office.

disclosure. Only after telling the manager she was at work, could not come in and wanted to know immediately why her insurance was cancelled, was she given disclosure by telephone from the Denver office (Tr. 3410-11). [201]

564. The manager of the Wichita branch office told consumer McCune that the only way disclosure could be given was in person (C. McCune 4366). Consumer Mumford was told by respondent's Rocky Mount, North Carolina office representative that disclosure could not be given by telephone (Tr. 1146).[214]

565. Respondent has told consumers that disclosure could not be given by telephone without mentioning that, with a written request, consumers have a right to telephone disclosure (Findings 563-64). Thus, as to these consumers, respondent eliminated, as a practical matter, the option for telephone disclosure which the FCRA sets forth and have violated Section 610 of FCRA.

566. In the Brockton, Massachusetts and Lincoln, Nebraska branch offices, respondent advised consumers who contacted Retail requesting copies of their reports that, while no copies could be sent to them, they could receive disclosure of their files at the branch offices [202](Humble 3481-82,[215] Reinhardt; RX 468J; CX 243J[216]). No mention was made of the consumers' rights to have disclosures by telephone.

567. Thus, respondent advised consumers obviously interested in learning what was in their files that disclosure was available in a Retail office without mentioning the possibility of telephone disclosure (Finding 566). Even though telephone disclosure was not specifically requested in these instances, respondent, by undertaking to advise consumers of their rights regarding disclosure and only partially advising them as to their rights has, in a practical sense, made telephone disclosure unavailable to them in violation of Section 610 of FCRA.

B. Suboffice Disclosure

[214] While Mr. Mumford's testimony on the actual disclosure given him and the subsequent reinvestigation was too confused to ascertain precisely what disclosure was given, his unrebutted testimony was clear that he called the Rocky Mount office and was told that disclosure could not be given by telephone. As respondent pointed out (RPF 949f), Mr. Mumford was told that the reason telephone disclosure couldn't be given related to inadequate identification by telephone (Tr. 1159-60). Nevertheless, he was apparently not told that he could receive disclosure with proper identification or a written request (see Tr. 1146). Mr. Mumford was given some information from his file by telephone regarding marital discord (Tr. 1146, 1160), but he received no disclosure of the specifics of the report until he later visited the Rocky Mount office (Tr. 1147-50) located 40 miles from his home (Tr. 1145).

[215] Ms. Humble's testimony was not discredited by the rebuttal witnesses' general testimony to the effect that 75 to 85 percent of the disclosures from that office were by telephone (Tr. 8345).

[216] In the case of consumer Reinhardt, it should be noted that the response she received from Retail was less informative than that given by Retail to a friend of hers in response to a similar request. Her friend had indicated in his request for a copy of his report, that he had some knowledge of the FCRA. (Compare RX 468I and CX 244 with RX 468J and CX 243).

568. When respondent established its disclosure procedures after passage of FCRA, a corporate policy decision was made that there would be no "systematic disclosure" from the suboffices because the suboffices were not adequately staffed for this function (Burge 5008–09).[217] [203]

569. A suboffice is generally removed from the metropolitan area, located in a small city or town (Case 5362). It is staffed by one or more field representatives, and, in the case of those having more than one field representative, one of them is designated as the supervisor. There may or may not be part-time or full-time clerical personnel (*e.g.*, Jegley 7057–58). In some cases, the suboffice is located in the field representative's home, and the Company pays him for his telephone expense and rent on the space used (Brothers 7358). The number of suboffices also varies from time to time (R. Jones 5218). No files are maintained in suboffices (Burge 5010).

570. The suboffice personnel were instructed that when they were visited by inquiring consumers, they were to secure information on consumer forms and advise the consumers that either the branch manager or the suboffice representative would be in touch with them (RX 564T).

571. After a consumer's visit to a suboffice, a memorandum relating the contact and information obtained was to be sent to the branch manager for his handling (RX 564T). Some suboffice disclosure was apparently anticipated as instructions stated that the branch manager would decide whether to contact the consumer or send the consumer's file to the suboffice with instructions regarding disclosure to the suboffice personnel (RX 564U; CX 675Z–64). If a consumer telephoned a suboffice for disclosure, the Retail employee was to suggest he phone or write the branch office manager and to supply information facilitating such contact (CX 675Z–63, 64). The branch office manager had discretion regarding whether to have disclosures given in the suboffices (Jenkins 5771).

572. In accordance with this policy, respondent admitted that, on occasion, it did not make disclosures at suboffices (Answer, Par 24).[218] [204]

573. Respondent's failure to provide disclosure at suboffices does not violate Section 610 of FCRA.

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[217] The reason for this decision was stated to be that "there is not personnel present in the sub-office, certainly not in the smaller sub-offices, at all times or even in the working hours, because they may well be gone from office during the working hours. More likely, they would be there in off-hours rather than in working hours. So decided at the outset we would not disclose in sub-office points." (Burge 5009).

[218] When consumer Roberts requested disclosure from the Idaho Falls suboffice, he was referred to the B branch office (Tr. 3358–61, 12661–62).

XVI. REINVESTIGATIONS (PARAGRAPHS 26-27 OF THE COMPLAINT)

574. Field management was instructed that during disclosure, the Retail representative was to note the items the consumer disputed (RX 556L). If the dispute was of a minor point, such as a street address, exact amount of income, dates, or numbers of children, and the item had "no adverse effect on the transaction," the report was to be corrected accordingly, and if the consumer requested, a copy of the correction was to be sent to the recipient company (RX 556F-G). In all other cases of dispute, the Retail representative was to take down the "consumer's side of the situation" on a Consumer's Statement form (CX 675Z-22), and there was to be a reinvestigation (CX 675X). If the consumer disputed information in his file but stated that he did not want a reinvestigation, he was to be told that the law required there be a reinvestigation. If he remained adamant in his position, the Retail representative was to get a written statement of his dispute and a written statement from the consumer that he requested there be no reinvestigation (CX 675Z-36).

575. When a reinvestigation was conducted and the original report information confirmed, the Consumer's Statement was to be sent to the recipient company upon the consumer's request (and the Retail representative was required to advise the consumer of his right to so request). The Consumer's Statement was made a part of the consumer's file (RX 556M).

576. If the reinvestigation did not verify the original report, the information was to be deleted or corrected, and the amendments sent to the recipient company. This procedure was not to be followed, however, if respondent felt that the consumer had exerted pressure on sources and, as a result, they would no longer discuss the matter with Retail, thus precluding verification. [205]In that case, the customer would be advised of the dispute, the circumstances of why the information could not be verified, and a copy of the Consumer's statement would be sent to the consumer (RX 564EE).

577. These explicit instructions, when implemented by respondent's field personnel, resulted in situations where no reinvestigations were conducted though consumers clearly disputed information given them during disclosure.

578. One consumer received disclosure from the Baltimore branch office in 1972, after she was denied automobile insurance (Tr. 96). She disputed much of the information contained in the report, , that her house had constant traffic of people and was thought to a "house of ill repute;" and that her babysitter had taken drugs as

a result of the consumer's influence (CX 280B; Tr. 1530). The consumer's statements of dispute were recorded in a memorandum prepared by Retail after the disclosure (RX 477A-B), and she was told there would be a reinvestigation (Tr. 1505-06). There is no evidence in the record that a reinvestigation was conducted or that the insurance company involved was ever notified that the consumer disputed anything in the report. The fact that the consumer was invited by the insurance company some 3 years later to reapply for insurance is not relevant.[219]

579. Another consumer visited the Boise office and received disclosure of a report prepared on him which was the basis of a health insurance denial (Tr. 4284-87). The report contained many items of an adverse nature, *e.g.,* that his restaurant was closed because he put dog food in his tacos; that he and his wife were arrested in a drug raid and "continued to have illegal drug habits;" that he had been charged with several other crimes; and that he grew marijuana in his backyard **[206]**(CX 1484A-B). During and after the disclosure, the consumer indicated that the report was inaccurate (Tr. 4289-96). He was told that he could dispute specific items and that a reinvestigation of the information he disputed would be conducted (Tr. 4296). While he declined to go over the report stating exactly which items were inaccurate, he stated that everything below his name and address was incorrect (Tr. 4296), and made it known that he strongly disagreed with the report.[220] At one point, he suggested that the discloser ascertain that his restaurant had never been closed on a dog food charge by simply calling the county health department (Tr. 4316-17). In addition, the consumer mentioned suing Retail (Tr. 4310). The next day, the consumer brought his lawyer with him to Retail, received another disclosure (Tr. 4287, 4312) and was again told he could have a reinvestigation conducted if he would specify the items with which he disagreed (Tr. 4313-15). The consumer later wrote a letter to Retail requesting a copy of his report (CX 1485). He received a letter in reply, stating that a copy could not be sent but a reinvestigation would be conducted "[i]f you consider any of the information which has been disclosed to you to be incorrect." (CX 1486). The consumer did not respond to the letter, but turned the matter over to his lawyer (Tr. 4298-99). Mr. Miley, who gave the disclosure, did not order a

[219] The branch manager of the Baltimore branch office testified in rebuttal to this consumer. However, he did not dispute the evidence relied on in this finding regarding reinvestigation.

[220] Typical of the consumer's statements of dispute during the disclosure were: "I told him it was incorrect" (Tr. 4289); "I told him it was completely wrong" (Tr. 4290); "I told him it was a blatant lie" (Tr. 4291); "I said again those were blatant lies" (Tr. 4293); "I told him it was the most ridiculous thing I had ever heard of" (Tr. 4294). While the discloser stated that Retail would reinvestigate if the consumer would state specifically what he objected to, the consumer felt "he wasn't listening to what I was saying. If I call something a lie, I'm disputing it" (Tr. 4314).

reinvestigation (Tr. 11142). It was his practice that when a consumer simply stated an item was inaccurate and refused to go further, he did not order a reinvestigation (Tr. 11143). Mr. Miley referred the matter to [207]respondent's legal department (RX 807C–D) in compliance with respondent's instructions to do so when a consumer threatened suit (Tr. 11142). Failure to order a reinvestigation after the consumer disputed information in his report violated Section 611 of the Act.[221]

580. After consumer Kasdorf received disclosure from the Albuquerque branch office, a consumer statement was written showing that he disputed certain items disclosed to him: that he was a slow payer of bills and had left a former residence owing rent (Tr. 12254–55; CX 138A; RX 440E). Mr. Kasdorf assumed the information would be corrected (Tr. 3144). No reinvestigation was conducted (Tr. 11860–62), and there is no evidence that the consumer's statement was sent to the requesting company.

581. Consumer Wisniewski received disclosure from the Cleveland branch office of information in his report prepared for an automobile insurer that he made fast stops and starts, peeled rubber on his tires, and, therefore, his driving reputation was poor (Tr. 1454; CX 332A–C). Mr. Wisniewski denied that he "peeled rubber," although he explained that fast stops were appropriate in some circumstances (Tr. 1454, 1459–60). He filled out a consumer statement denying the peeling of rubber and the fast stops and starts (RX 494C). He provided the names of three people who he said could speak regarding his driving. No reinvestigation was conducted. Retail advised the insurance company involved that Mr. Wisniewski had received disclosure, [208]had "admitted that our report was correct," but had stated that the information regarding his driving did not constitute bad driving (CX 334).[222]

582. After consumer Bitney's automobile insurance was cancelled, she contacted the Seattle office and received disclosure (Tr. 3791). She disputed the accuracy or basis of several adverse items in

[221] The record is ambiguous regarding whether a reinvestigation was later conducted and what it included. Respondent does not allege there was a reinvestigation (RPF 969d), but a letter to the insurance company 2 months after the consumer's visits states there was a reinvestigation and mentions two of the items the consumer disputed (CX 1488). Even if a complete reinvestigation was conducted, it was not timely made and did not cover all the items disputed or adequately set forth the extent of the dispute (see CX 1488).

[222] The discloser, Mr. Crawford, testified that the consumer statement and names of references were submitted at a subsequent visit of Mr. Wisniewski after he had consulted with his insurance agent (Tr. 9534). Even if this fact is true, respondent failed to adequately advise the insurance company of Mr. Wisniewski's initial dispute of the peeling rubber item and the obvious dispute of a poor driving reputation. The letter to the insurance company states that Mr. Wisniewski agreed with everything in the report (CX 334). While the existence of a dispute may not have been clear at the first meeting, the consumer statement which Mr. Wisniewski later brought to the office and the bringing of references clearly demonstrated that Mr. Wisniewski disputed his report and desired a reinvestigation. Thus, even if a reinvestigation was not clearly called for after the first meeting, the requirement for one was clear after the second meeting.

the report relating to her children's behavior and reputation and to her reputation and supervision of her children (Tr. 3792–96, 3806; CX 41A–B, 42A–B). She was told that nothing could be deleted from the report (Tr. 3796, 3807), but that she could file a statement adding to the information (Tr. 3796, 3807). She indicated that she felt the report contained assumptions with no verification and that she would follow up researching herself things that were mentioned in the report, *e.g.*, the police's having been called to her apartment, and that she would try to get a statement from the manager of the apartment, the scene of many of the adverse items (Tr. 3806–07).[223] She was not told that she could [209]have a reinvestigation (Tr. 3796; RX 404A–B).[224] While Retail advised the insurance company of the disclosure and clarified two points in the report (CX 43), no reinvestigation was conducted and no mention was made in the notice to the insurance company that she disputed many more of the items in the report.

583. After another consumer received an automobile insurance cancellation based on a Retail report, she contacted the Fresno branch office (Tr. 4126–27). She was told that "based on the information that was turned over by the investigator that they wouldn't insure us because my daughter had been involved in a bomb threat and I [had been] in a mental institution for a year." (Tr. 4128). The consumer disputed these two items and requested a reinvestigation (Tr. 4128–29). A reinvestigation was conducted and the item involving the daughter was found to be in error (RX 451H–I). The reinvestigation did not verify that the consumer had been in a mental institution; however, the sources interviewed for the reinvestigation indicated that she may have had some medical problems in the past (RX 451H–I). The summary of the reinvestigation states, "Unable to develop further health history on wife, however, if desired maybe should obtain release to obtain her physician's records." (RX 451I). Retail's handling of the reinvestigation regarding the consumer's health was not adequate. Either the reinvestigation summary should have stated that the information was not confirmed and, therefore, should be deleted or Retail should have attempted to obtain a medical authorization from the consumer to

[223] A letter was later received by Retail from personnel of the apartment (CX 44B).

[224] Mr. Best, the discloser, stated that when a consumer did not really dispute the information, but only added to it, he did not order a reinvestigation (Tr. 11672). While Mr. Best testified that Ms. Bitney did not dispute the information, it is unclear whether he actually refuted Ms. Bitney's recollection of the disclosure or merely had a different definition of "dispute." Mr. Best testified that Ms. Bitney visited Retail after her first disclosure to review the file again and expressed the desire to file a statement. This testimony is consistent with Ms. Bitney's testimony that she disputed the report. Her testimony is given more weight than Mr. Best's memorandum, after Ms. Bitney's first visit, which states that Ms. Bitney indicated that "the report was substantially correct." (RX 404A).

further investigate this matter. Under the circumstances, failure to delete the information violated Section 611 of the Act. [210]

584. Respondent has failed, in certain instances, to provide reinvestigations required by Section 611 of the FCRA when consumers disputed their reports (Findings 578–82). In certain instances, respondent compounded the effects of its failure to reinvestigate by providing notification to the recipient companies which inaccurately or incompletely set forth the disputes by the consumers (Findings 581, 582).

585. When consumer Mattos requested her reinvestigation, she was told by the Fresno office that there was a charge of $5.25 (Tr. 4129, 4132–33). The request for reinvestigation came within 30 days of the Mattoses' receipt of an insurance denial (RPF 971c). Imposing the condition of a charge on reinvestigation could discourage reinvestigation and is an unlawful condition, even though the money Mrs. Mattos paid was later returned to her (Tr. 4129).[225] By imposing a condition on reinvestigation, which was not authorized by the FCRA, respondent violated the Act.

586. In the case of another consumer, Retail prepared a report on her in January of 1973, in connection with automobile insurance (CX 114A–B), in which it stated that she lived with a man. Later in the month, Retail handled a reopen requested by the insurance company regarding this item. As a result of the reopen, Retail advised the insurance company that "We reinvestigated and confirmed that subject is living with this man . . . Information fully confirmed in both investigations." (CX 146). After the consumer's automobile insurance was cancelled, she received disclosure from Retail's Portland office (Tr. 4479–80). At that time, she disputed the fact that she lived with a man and gave the [211]names of several people who knew she was not living with a man (Tr. 4481). Retail reinvestigated this point and interviewed Mrs. Williams, the wife of the assistant manager of the apartments the consumer lived in, who stated that the consumer was not living with a man (Tr. 4497–98). Retail prepared a new report which eliminated the reference to her living with a man and sent it to the insurance company (CX 148A–B). Accompanying the report, however, was a letter to the insurance company which stated:

[The consumer] disputed the fact that she had a man residing with her, admitted to us

[225] See Finding 527 for respondent's policy regarding reinvestigation charges. Apparently, respondent has interpreted the language of Section 612 of FCRA, which specifically authorizes charges for disclosure and identification, as including reinvestigation charges under the same conditions. Such an interpretation has not been alleged in this proceeding and is not here decided, as respondent admits that the charge imposed in the case of Mrs. Mattos was a violation of Company procedure established to ensure compliance with the Act.

that he is a frequent visitor at her home, stays quite late in the evening and on occasion will have breakfast there, arriving sometimes as early as 6 a.m.
We have rehandled this case in its entirety, contacting original and alternate sources, and at this time we are unable to obtain any source who will even admit knowledge of any friends or acquaintances of [the consumer].
Therefore, would you please use the attached report to replace any previous reports on this individual and make any further evaluation of the risk you feel necessary.
(CX 147.)

No mention was made of Mrs. Williams' statement. By sending this letter with the notice of deletion, respondent effectively negated the deletion, particularly in light of the fact that a confirmation had recently been sent to the company on the item in question. In so doing, respondent constructively failed to delete the item in question and violated Section 611 of FCRA, which requires deletion of items which are not verified on reinvestigation.[226] [212]

587. Respondent has failed to delete information that was disputed by consumers and which was not verified on reinvestigation (Findings 583, 586).

XVII. INTERCHANGE OF INFORMATION BETWEEN CLAIM AND CONSUMER REPORTS (PARAGRAPHS 28–29 OF THE COMPLAINT)

588. Prior to May 1974, respondent's claim reports were filed in the same reference files as its underwriting reports (Burge 5041, Jenkins 5798). When an investigator received a request for a current report, he also received a reference file showing previous reports on the consumer. "He should peruse the file, garnering out of the file what would be pertinent to the thrust of his upcoming investigation." (Bresnahan 601).

589. If an underwriting report was requested on someone on whom a claim report had previously been prepared, the claim report was provided to the field representative along with consumer reports previously prepared on the same person (Trotochaud 6437, Burge 5097–98). It was permissible for the field representative to state in the consumer report that a prior claim report had been prepared (and the customer and date) and to state the doctor, hospital dates of confinement, and the cause (Finding 241). In addition, the field representative could use the medical information in the claim report as a tip or lead in conducting his investigation for the consumer report (Finding 241).

590. Actual use of claim report information went beyond respon-

[226] Respondent stated that the record is unclear as to whether Mrs. Williams was interviewed in connection with this reinvestigation or at the time of the reopen (RPF 971b). In either event, however, notice to the insurance company following contact with Mrs. Williams was inadequate.

dent's instructions. One field representative testified that when he had recently prepared a claim report on someone he was currently preparing a consumer report on, he quoted freely from the claim report (Tr. 4032). Two other field representatives testified that they asked leading questions to confirm medical information obtained from claim reports, *e.g.*, "Has he recovered from his heart attack?" (Tr. 379) or "I understand he had a heart attack last summer." (Tr. 2888). [213]

591. Respondent used information from its claim reports in consumer reports (Findings 588–90). Respondent did not consider claim reports to be subject to FCRA and did not observe certain provisions of FCRA with respect to them (Respondent's Response to Complaint Counsel's Request for Admissions of Fact, dated May 10, 1974, No. 66).

592. Similarly, information in previous consumer reports was referred to in connection with the preparation of current claim reports. Prior to October 12, 1972, it was permissible to use record information from a previously prepared consumer report in a current claim report. Other information from a consumer report was to be reconfirmed before it could be used in a claim report (Trotochaud 6416). After the fall of 1972, field representatives were prohibited from directly quoting in claim reports, information from consumer reports, but the information could be used as a tip (see RX 658, 659; Trotochaud 6415–18).

593. Respondent used consumer report information in its claim reports (Finding 592). Such use violated Section 604 of FCRA, which specifies the permissible purposes for which consumer reports may be furnished.

594. In May 1974, respondent directed all branch offices to change their filing systems and to immediately begin filing claim reports in separate files from those of underwriting reports (see Finding 243). A directive setting forth a program to separate all existing claim files from the underwriting files was sent to the branches in June (RX 660A–H; Trotochaud 6428–29). It was anticipated that completion of the process would take a year (RX 660A, 637A). In fact, by July 30, 1975, all offices had completed the separation process (Tr. 6598).

595. Since separation of the claim and underwriting reports, claim reports have not been available to field representatives preparing consumer reports for tips or any other use (Cooke 10006–07, Baranek 9700–01).

596. With the initiation of the file separation in May 1974, field representatives were instructed that "no use should be made of non-

claim files on current claim reports or vice versa." (RX 637A, see also 637B-C; Trotochaud 6425-28). [214]

Discussion

This is a proceeding brought under the Federal Trade Commission (FTCA) and Fair Credit Reporting Acts (FCRA). The allegations of the complaint have been summarized above and that summary need not be repeated here (see pp. 2-6, *supra*). A discussion of the more significant factual and legal issues follows. It may be noted that there have been numerous court decisions construing FCRA in the course of ruling on disputes between individual members of the public and consumer or credit reporting companies. This case, however, is the first case raising important questions concerning administrative enforcement of compliance of FCRA by the Federal Trade Commission and the interrelation of enforcement between FCRA and the FTCA.

Allegations that Respondent's Employees Have Misrepresented Their Identity (Paragraphs 5-6 of the Complaint)

Paragraphs 5 and 6 of the complaint allege essentially that respondent's investigative personnel have, in certain instances, misrepresented to consumers that they are agents or employees of the companies to which the consumers have applied for benefits such as an insurance company and/or that the information furnished by consumers or others during the course of interviews will be used exclusively by the companies to which the consumers have applied for benefits. It is further alleged that certain consumers interviewed would have chosen to provide the information directly to the company from which benefits were sought rather than to respondent had they known the true identity of respondent's employees or had they known that such data would be added to respondent's files for future reference. [215]

The record shows that certain field representatives, who did not identify themselves as employees of respondent, used introductions such as that they were "from", "with" or calling "for" the company to which the consumer was applying for a benefit. Such introductions had the capacity and tendency to mislead consumers into the belief that the field representatives in question were employees or agents of the company to which application had been made for a benefit or an insurance policy (Findings 162, 163). Such misrepresentations are material to consumers contacted by respondent's investigators (Finding 164).

The record fails to show that respondent affirmatively misrepresented that it did not keep file copies of the reports or that information furnished during an interview would be used exclusively by the company to which the consumer had applied for a benefit such as insurance. However, where the introduction misled consumers into believing that they were talking to an employee or agent of an insurance company, it also had the capacity to mislead consumers to the belief that the information obtained would be used exclusively by the requesting company. In that context, the failure to disclose that a third party would retain files which might be used in connection with other transactions constituted the failure to state a material fact and was misleading (Finding 165).

A simple prohibition against the direct or indirect representation that respondent's investigative personnel are agents or employees of the company to which the consumer has applied for a benefit will adequately prevent recurrence of the violations demonstrated in the record. The evidence in this record permits no findings as to consumer beliefs with respect to the retention and use of information secured by consumer reporting agencies in those instances where proper identification was made. Accordingly, the record will not support the imposition of an order requiring affirmative disclosure that a copy of the information will be retained in respondent's files for future reference. [216]

Complaint counsel propose requiring a written disclosure which the consumer may keep, stating the field representative's name, that he is an employee of respondent, the purpose of the investigation, the person ordering the investigation and that a copy of the information will be retained in respondent's files for future reference (CB App. C, pp. 2–3). The law violations demonstrated by the record with respect to introductions on the part of certain of respondent's employees do not demonstrate so flagrant or engrained a pattern of deception as to justify this provision. It will not be adopted.[227]

Respondent argues that the procedures employed by consumer reporting agencies have been sanctioned by FCRA and that, as a result, absent affirmative misrepresentation, no order can issue (RB 10–11). Affirmative misrepresentation is not prerequisite to an order directed to these practices. FCRA does not sanction interview practices which have the capacity to deceive.

In determining the meaning of advertisements or other represen-

[227] To a considerable degree, the failure by respondent's personnel to identify themselves was occasioned by the confusion engendered by the name Retail Credit when the interview was in connection with an insurance investigation not involving credit, *e.g.*, insurance. To avoid the requisite explanations, respondent's field representatives would omit the name of their employer. The incentive to engage in such practices has been reduced by respondent's name change to Equifax (Findings 160–61).

tations, the important criterion is the net impression that is likely to be created on the general populace. *National Bakers Services, Inc.* v. *FTC,* 329 F.2d 365, 367 (7th Cir. 1964). In ascertaining the impression created, the Commission need not look to the technical interpretation of each phrase; it may look to the overall impression likely to be made. *Murray Space Shoe Corporation* v. *FTC,* 304 F.2d 270, 272 (2nd Cir. 1962). A statement may be deceptive even if the constituent words may be literally or technically [217]construed so as not to constitute a misrepresentation. *FTC* v. *Sterling Drug Inc.,* 317 F.2d 669, 674-75 (2nd Cir. 1963). And, representations capable of two meanings, one of which is false, are misleading. *Rhodes Pharmacal Co.,* v. *FTC,* 208 F.2d 382, 387 (7th Cir. 1953), *modified on other grounds,* 348 U.S. 940 (1955).

The identification by a field representative such as that he appears "from" or "for" an insurance company may be literally true in the sense that the interview is made at the request of respondent's customers. However, such an identification coupled with the failure of the field representative to identify himself as one of respondent's employees had the capacity to create the misleading impression that he was an agent or employee of the insurer. Under those circumstances, there is no need to find that there has been affirmative misrepresentation concerning respondent's retention and use of the information obtained. The Commission may, where ambiguous introductions have the capacity to mislead, ban such practices. Misleading and confusing interview techniques are not authorized by FCRA.

Requiring respondent to cease using misleading or ambiguous introductions will in no way preclude respondent from engaging in any of the activities permitted by FCRA. Such a prohibition will not preclude respondent from maintaining files as authorized by the Act. Nor will it impede the free flow of commercial information. It will merely ensure that consumers giving information do so with knowledge that they are dealing with a third party consumer reporting agency.

Applicability of the McCarran-Ferguson Act Exemption to the Practices Challenged Under Paragraphs 7-8 and 11-13 of the Complaint

Paragraphs 7 and 8 of the complaint allege essentially that respondent's investigative personnel have misrepresented the purpose of interviews by representations such as that a credit check was being conducted when, in fact, in certain instances, the purpose was to evaluate a consumer's claim for loss [218]or injury under an

insurance policy and the primary object of the interview was to observe the consumer's appearance and his mental or physical capacity in connection with such claim.

Paragraphs 11, 12 and 13 of the complaint allege essentially that respondent, through the use of certain medical authorizations obtained from insurance companies, represented directly or by implication to medical personnel that the data sought pursuant to such authorizations was for the exclusive use of such insurance companies. The complaint also alleges that consumers executed such authorizations on the basis of that belief. The complaint further alleges that, in truth and in fact, the information was not obtained for the exclusive use of the insurance companies to which the authorizations were executed but that it was also retained by respondent and, in certain instances, utilized in the preparation of subsequent reports for different customers of respondent. The complaint alleges that some customers would not have authorized the release of such confidential information had they known it would be utilized by a third party.

Respondent's claim interview procedures and utilization of authorizations to secure medical information violated Section 5, FTCA (Findings 180, 252–55). Respondent's decisions to eliminate the retention of its underwriting medical history reports in November 1973, and to eliminate the retention of claim medical reports in December 1975 (Findings 239, 244, 256) appear to give effective assurance of cessation of the acts charged under paragraphs 11–13 of the complaint. The threshhold question, however, is whether the Commission has jurisdiction to challenge such practices.

Respondent asserts the Commission has no jurisdiction to issue an order in the case of these practices because of the provisions of the McCarran-Ferguson Act (15 U.S.C. 102(b)) exempting insurers from regulation under the Federal Trade Commission Act. [219]

For the exemption to become operative, there must be findings (1) that the business is that of insurance, namely, that the industry acts as a risk-bearer for a premium; (2) that the challenged activities relate to the act of risk-bearing; (3) that the states have regulatory authority to govern the challenged activity; and (4) that state regulation is adequate. *American General Insurance Company,* 81 F.T.C. 1052, 1056 (1972). The primary question in determining the applicability of the exemption is whether the particular practice concerns the business of insurance. *Proctor* v. *State Farm Mutual Auto Insurance Co.,* 406 F. Supp. 27, 29 (D.D.C. 1975), *affirmed,* 5 CCH Trade Reg. Rep. ¶61,481 (D.C. Cir. 1977).

The prime issue in this case is whether respondent's claim

investigations and the introductions made pursuant thereto and its activities in securing medical information for insurance companies are the business of insurance. Complaint counsel strongly contend that these activities are not the business of insurance but apparently do not put in issue respondent's contention that there is state regulatory authority to govern the challenged practices and that such state regulation is adequate. The discussion herein is, therefore, confined to the question of whether respondent's activities are the business of insurance.

It is clear that respondent's claim investigations are part of the business of insurance. The determination of whether a claim under an insurance policy should be paid is central to the insurance business, directly affecting the contractual relationship between the insurance company and its policyholder even in those instances where the claimant is a third party. As a result, respondent's activities are subject to state regulation when it conducts claim investigations. This includes the introduction utilized by respondent in claim investigations; namely, the so-called indirect interview. See *Proctor* v. *State Farm Mutual Auto Insurance Company, supra,* holding that the adjustment and settlement of insurance claims is the business of insurance. Claim investigations are an integral part of that process. [220]

Respondent's acquisition of medical information through the presentation of authorizations secured from insurance companies also constitutes the business of insurance. Obtaining information by insurance companies to investigate the risk of loss prior to deciding whether to accept the risk is a part of the business of insurance. *Schwartz* v. *Commonwealth Land Title Insurance Company,* 374 F. Supp. 564, 574 (E.D. Pa. 1974).

It is immaterial that respondent itself is not an insurer as long as its activities constitute the business of insurance. The McCarran-Ferguson exemption is "not strictly limited to insurance companies . . . it is the 'business of insurance' with which the Act is concerned." *Royal Drug Co.* v. *Group Life and Health Ins. Co.,* 415 F. Supp. 343, 350 (W.D. Texas 1976). In performing this service, respondent has become an integral part of the overall scheme of insurance coverage which is regulated by state law. Cf. *Royal Drug Co., supra.* Under the circumstances, it is immaterial that respondent is selling the information under consideration to insurers.

Complaint counsel also argue that respondent's retention of the medical information and use thereof as leads or otherwise in the preparation of other reports cannot be considered the business of insurance. There is no precedent directly in point. However, it is

apparent that securing such information initially is part of the business of insurance. In many instances, insurance companies perform such functions themselves. Respondent's practices in connection with the retention of medical information and the uses thereof which might otherwise violate the Federal Trade Commission Act arise directly out of transactions subject to state regulation as the business of insurance. As best, it may be said that the activities here complained of are abuses by respondent in participating in the business of insurance. Such activities being subject to state regulation are exempt from the jurisdiction of the Federal Trade Commission to the extent regulated by state law. [221]

Allegations as to Misrepresentations of the Manner in Which Reports Were Prepared (Paragraphs 9–10 of the Complaint)

The complaint alleges that respondent has represented that its interviews were conducted in person rather than on the telephone, that direct observation of the consumers' environment was conducted, and that all sources of information listed were seen. The complaint charges that, in certain instances, interviews were conducted on the telephone rather than in person, that consumers' environments were not directly observed, and that the sources listed on the consumer report were not interviewed in person or on the telephone. The complaint alleges that users of respondent's reports would not have given as much weight to the information in such reports had the manner in which they were prepared been truthfully and factually represented.

Respondent, through its brochures, has represented that its reports, as a matter of standard or normal procedure, are compiled through face-to-face interviews of the sources listed and upon the basis of the direct observation of the field representative making the report (Findings 199–200).[228] The record further demonstrates that such representations are also apparent on the face of respondent's reports (Finding 201).

The telephone was used to some extent in the majority of respondent's reports including life and health reports, regular automobile reports and most personnel reports (Finding 185). Normally, use of the telephone was not noted on the copies of underwriting reports going to customers (Finding 194). [222]

In certain instances, reports concerning a consumer's appearance and physical environment or home surroundings were submitted, although no direct observation had been undertaken by the field

[228] Certain of respondent's reports are sold as exclusively a telephone service (Finding 183). No violation is found in connection with such reports.

representative making the report (Finding 211). The record further shows that, in certain instances, reports were submitted listing sources not seen or interviewed by the field representative preparing that report (Finding 405).

Respondent urges that no finding of deception should be made and no order entered in view of the sophistication of the audience to which the representations were directed; namely, the insurance company underwriters. Insurance company underwriters were aware of the fact that sometimes the telephone was utilized in the preparation of such reports (Finding 198; see also Finding 208).

The Commission, in evaluating promotional literature, may draw its own inferences from a reading of the advertisement. In making such findings, it need not depend on testimony or exhibits aside from the advertisements themselves. *Carter Products, Inc.* v. *FTC,* 323 F.2d 523, 528 (5th Cir. 1963); *FTC* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 391–92 (1965); *Royal Oil Corp.* v. *FTC,* 262 F.2d 741, 745 (4th Cir. 1959). Respondent's brochures present no unusual problems of construction. The meaning of statements such as "You see your applicants even though you aren't able to visit each one yourself" (CX 384B) can be determined solely from the exhibits.

Insurance company underwriters may be a sophisticated audience in terms of understanding the nature of respondent's operation; namely, the telephone is sometimes used in the preparation of reports. They would not know, however, absent a disclosure on the report, whether, in a particular case, a face-to-face interview had been conducted or whether the interview had been conducted by telephone. Whether or not a face-to-face interview had been conducted or direct observation made was a significant factor in the weight to be accorded to the information in such reports, particularly where items such as physical appearance were concerned (Finding 213). [223]In view of the fact that respondent represented that face-to-face interviews and direct observation were the standard or normal procedure, the failure to give notification that they were not used in the case of individual reports, was misleading. Such disclosure will be required.

Cases such as *Waltham Precision Instrument Company, Inc.,* 61 F.T.C. 1027, 1049 (1962, *aff'd.,* 327 F.2d 427 (7th Cir. 1964) and *Sheffield Silver Co.* v. *FTC,* 98 F.2d 676, 678 (2nd Cir. 1938), indicating that advertisements are to be considered in light of the sophistication of the audience to whom the representations are addressed do not dictate a different result. The issue is not whether insurance companies or other report users have been misled into buying the service. Rather, the question is whether the failure to

note telephone use or lack of direct observation is a material fact which should be disclosed because of its potential for affecting the evaluation of individual reports. As a result, the sophistication of the underwriting industry as to how reports are prepared is not a bar to the entry of an order. In fairness to consumers, the material facts pertaining to how the individual reports were prepared or interviews conducted should be disclosed.

Allegations That Respondent Has Furnished Consumer Reports to Persons Which It Has No Reason to Believe Intend To Use Such Data for One of the Permissible Purposes Set Forth in Section 604, FCRA (Paragraphs 16–17 of the Complaint).

The complaint in paragraphs 16 and 17 alleges that respondent has furnished consumer reports to persons it had no reason to believe intended to use such data for one of the permissible purposes set out in Section 604 of FCRA. The proof pertaining to these allegations is concerned with respondent's Voluntary Follow-up Service and its Monetary Savings Program. [224]

In the case of the Voluntary Follow-up Service respondent transmitted to certain customers to whom a prior consumer report had been furnished, additional adverse information on the individual who was the subject of the report. Voluntary information generally consisted of public information found in newspapers or public records; it could also include information secured by the field representatives in subsequent investigations and during the course of preparing different reports (Findings 258–59, 261).

Under the Monetary Savings Program, respondent also, in certain instances, transmitted to its sales force information about subjects of previously prepared reports. This was done if it was discovered that an event had occurred which would cause an insurance company a loss, if such insurance company had earlier been furnished with one of respondent's reports which would have allowed it to identify such risk and to rate or decline the application of the subject of the report (Finding 264).

The Monetary Savings Program and the Voluntary Follow-up Service differed in that the initial report preceding the voluntary follow-up did not identify a risk or hazard (Finding 264 n. 87). Information under the Monetary Savings Program consisted primarily of information of a public nature such as newspaper clippings as well as police and court records; it could also be derived from subsequent investigations conducted by respondent (Finding 266).

The record further shows that respondent knew or should have known that information furnished under the Voluntary Follow-up

Service and Monetary Savings Program was sometimes furnished to insurance companies who had no insurance policy on the individual involved and who were not at that time considering an insurance application on the individual (Finding 268).

1. The Voluntary Follow-up Service

Respondent contends that the Voluntary Follow-up Service was part of the same package as the original investigation and that it is unrealistic to contend that the follow-up portion of the service served an impermissible purpose (RB 57–58). [225]

Respondent further contends that the Voluntary Follow-up Service has been held valid by judicial precedent citing *Middlebrooks* v. *Retail Credit Co.,* 416 F. Supp. 1013 (N.D. Georgia 1976). In that decision, the court expressly noted that there was an ongoing relationship between the subject of the Voluntary Follow-up Service and the insurance company to which this information was transmitted. This case is not controlling here.

Respondent contends that there is no violation of the statute in the instance of the Voluntary Follow-up Service, because Section 604 does not require absolute certainty on the part of the consumer reporting agency that the person to whom the information is transmitted has a permissible purpose for such data. The statutory standard is that before such data is transmitted, the person transmitting it must have "reason to believe" that the information will be used in accordance with the criteria set forth therein.

The record shows that insurance companies to whom voluntary information was transmitted sometimes had a policy in force in connection with the individual who was the subject of the service and at other times did not (Finding 263). Under the circumstances, the transmittal of such information without a specific request, therefore, does not meet the requirement that respondent had reason to believe that it would be used for a permissible purpose.

Finally, respondent argues that the Voluntary Follow-up Service was discontinued as of April 29, 1974, and, as a result, no order should issue. The argument is rejected. Discontinuance does not necessarily preclude the issuance of a cease and desist order. An order to desist from an abandoned practice is in the nature of a safeguard for the future. *Clinton Watch Company* v. *FTC,* 291 F.2d 838, 841 (7th Cir. 1961), *cert. denied,* 368 U.S. 952 (1962). See also *Spencer Gifts, Inc.* v. *FTC,* 302 F.2d 267 (3rd Cir. 1962). An order prohibiting this practice will issue. [226]

2. Monetary Savings Program

Respondent argues that its Monetary Savings Program is not within the scope of Section 604 since the information furnished to its customers thereunder is transmitted solely as a promotional device to illustrate the value of respondent's services. Respondent contends that the information furnished under the Monetary Savings Program cannot be considered a consumer report because it is not transmitted in connection with a determination of a consumer's eligibility for benefits. It argues that FCRA does not forbid a consumer reporting agency to disseminate information which does not constitute a consumer report.

It should be noted at the outset that the information submitted under the Monetary Savings Program is furnished only on consumers with respect to whom a report has previously been submitted. Where respondent submitted additional information to show that its first consumer report had been of value, the second submittal is necessarily relevant to the first transaction. Accordingly, respondent's promotional purpose in disseminating such material is not inconsistent with the finding that they are consumer reports although submitted for impermissible purposes.[229] In this connection, it is significant that neither the Voluntary Follow-up Service nor the Monetary Savings Program are confined to newsclippings or information from the public records. Information developed in subsequent investigations and consumer reports can also be used for such purposes (Findings 261, 266).

In the case of the Monetary Savings Program, prior to submitting such data, respondent had already submitted an unfavorable report on the individual. As a result, it was on notice that the subject of the report may already have been denied the policy applied for. It was, therefore, also on notice that the insurance companies to which the monetary savings information was submitted may not have had a permissible use for the information volunteered as a promotional device. [227]

Respondent urges that complaint counsel have failed to show both in the case of the Voluntary Follow-up Service and the Monetary Savings Program that harm to the consumer has resulted from operation of the service. The contention is not relevant. The statute unconditionally prohibits the transmission of consumer reports except for the purposes specified in Section 604. There is a presumption of harm if the statute is violated.

Respondent also urges that the information transmitted under the Monetary Savings Program is commercial speech protected by the

[229] Dissemination of consumer report information for promotional purposes is not one of the purposes sanctioned by Section 604.

First Amendment and that an order may not be issued for that reason. The First Amendment argument, to a considerable degree, rests on the assertion that respondent, under the Monetary Savings Program, does no more than transmit public record information. This is not necessarily the case. As already noted, information secured during subsequent investigations on the subject of the original report and set forth in additional consumer reports are also within the scope of the program. The argument that respondent does no more than transmit information in the public domain is, therefore, not dispositive of the issue.

The Act's Statement of Finding and Purpose expressly notes that there is a need to ensure a respect by consumer reporting agencies for the consumer's right to privacy (Section 602(a)(4)).[230] Clearly, Section 604's limitations on the dissemination of consumer report information are designed to protect that right. [228]

As respondent states, commercial speech, like other speech, is protected by the First Amendment. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 770–72 (1976). However, this does not mean that commercial speech can never be regulated (ibid).[231] "[B]ecause of the 'commonsense differences' between commercial speech and other varieties, even commercial speech subject to First Amendment protections may nonetheless enjoy a 'different degree of protection' than that normally accorded under the First Amendment." *Warner-Lambert Co.* v. *FTC,* Slip Op. p. 2 (D.C. Cir. Sept. 14, 1977) [11 C.D. 601; 562 F.2nd 749 (1977); *cert. denied,* Apr. 3, 1978].

FCRA "supports and protects a significant personal right, the right to privacy." *Millstone* v. *O'Hanlon Reports, Inc.,* 528 F.2d 829, 833 (8th Cir. 1976). In enacting Section 604's requirement that consumer reports be furnished for a permissible purpose, Congress struck a balance between the individual's right to privacy and the consumer reporting agency's freedom to disseminate information. Congress had the power to strike that balance. As the 8th Circuit noted, "consumer credit reports are not protected speech for which under the First Amendment 'Congress shall make no law.' " The First Amendment does not bar the issuance of an order in connection with respondent's challenged practices under the Monetary Saving Program.

The Order will prohibit respondent from submitting consume

[230] See also Senate Report No. 91-517 (91st Cong. 1969, p. 1), stating "[t]he bill also seeks to prevent an und invasion of the individual's right of privacy in the collection and dissemination of credit information."

[231] The court, in *Virginia State Board of Pharmacy,* noted that the attributes of commercial speech, includ such characteristics as greater hardiness and objectivity may also make inapplicable the prohibition against pr restraints (425 U.S. *supra* at 771 n. 24).

reports to persons who it has no reason to believe intend to use the information for a permissible purpose as set forth in Section 604 of the Act. The Order will further prohibit respondent from disseminating consumer report information unless there is a specific request therefor. [229]

Allegations That Respondent Has Reported the Existence of Adverse Information in Violation of Section 605, FCRA (Paragraphs 18-19 of the Complaint)

The allegations that respondent has reported obsolete information violative of Section 605 pertain to respondent's employment and motor vehicle reports.

In connection with the employment reports, the parties have stipulated as follows:

> When respondent is requested to prepare employment reports covering employment experience for more than seven years and when respondent obtains adverse information more than seven years old from a former employer, as a matter of established procedure or usual and customary practice, respondent states in the reports "In compliance with the FCRA, no additional information can be reported from this former employer covering employment experience prior to seven years ago" or otherwise indicates that the Fair Credit Reporting Act does not permit the reporting of such information.
> (CX 1445D.)

The sentence "In compliance with the FCRA, no additional information can be reported from this former employer covering employment experience prior to seven years ago" is used *only* in connection with reports containing adverse information. This compels the inference that it is used to signal the existence of adverse information in violation of Section 605, FCRA (Finding 272).

Respondent attempts to justify the use of the stock sentence in question. It asserts that "[r]espondent cannot be expected to lie by advising the customer that all the information developed was favorable, nor to write artfully ambiguous reports that seek to conceal the existence of unfavorable data", in the case of those [230] reports where employers have requested a report exceeding 7 years (RB 68). A prohibition on this practice, however, would not, as respondent asserts, require it to issue deceptive or misleading reports. To prevent misunderstanding, respondent could simply notify the users of such reports of the limitations imposed by the Act on the reporting of obsolete information. The record demonstrates no need to disclose those limitations only in the case of those reports where adverse information over 7 years old has been developed.

The use of the stock sentence does disclose an item of adverse

information although the details are not set forth. The subject of a report where such a stock sentence is included, moreover, might well be in a worse position than a consumer with respect to whom a report spells out the details of the adverse information reported. In that case, at least the consumer is in a position to take advantage of the disclosure requirements of the Act and to dispute the items in question where appropriate. Such remedies are not available to the consumer when boilerplate language is used to signal the existence of adverse information, but the details are not disclosed.

The fact that complaint counsel has failed to introduce evidence of injury to consumers in specific instances is irrelevant. The practices under consideration violate the statute. Congress, in enacting Section 605, determined that reporting of obsolete information is harmful to the consumer. There is no need to duplicate the legislative finding on that score in an adjudicative proceeding.

Respondent objects that there has been a failure of proof. It asserts complaint counsel failed to show that any single employment report forwarded by respondent containing the stock sentence in question was transmitted in connection with an individual considered for a job at [231]an annual salary below $20,000.[232]

The argument is without merit. The parties have stipulated that the stock sentence in question is used as a matter of established procedure. It would have made no sense for respondent to establish the procedure; namely, to issue such warnings to users of reports, in connection with employment reports for jobs involving salaries at or greater than the $20,000 level. In the case of those reports, respondent is at liberty to report adverse information more than

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[232] Employment reports concerning prospects for jobs for $20,000 or more a year are exempt from the requirements of Section 605(b) prohibiting the reporting of certain items of obsolete information. The section provides in relevant part:

(a) Except as authorized under subsection (b), no consumer reporting agency may make any consumer report containing any of the following items of information.

(1) Bankruptcies which, from date of adjudication of the most recent bankruptcy, antedate the report by more than fourteen years.

(2) Suits and judgments which, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, which ever is the longer period.

(3) Paid tax liens which, from date of payment, antedate the report by more than seven years.

(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

(5) Records of arrest, indictment, or conviction of crime which, from date of disposition, release, or parole, antedate the report by more than seven years.

(6) Any other adverse item of information which antedates the report by more than seven years.

(b) The provisions of subsection (a) are not applicable in the case of any consumer credit report to be used in connection with—

* * * * * * *

(3) The employment of any individual at an annual salary which equals, or which may reasonably be expected to equal $20,000, or more.

seven years old. Under the circumstances, the inference is inescapable that the procedure was intended to apply in the case of employment reports not within the exemption of Section 605(b)3. Complaint counsel were not required to prove such occurrences in specific instances. It is the function of stipulations between the parties to eliminate the need for such proof.

The Order will prohibit the practice. [232]

Complaint counsel's allegations that by masking out obsolete information on motor vehicle reports, respondent has reported obsolete information contrary to the provisions of Section 605 has not been sustained. The evidence indicates that to the extent that this practice occurred, it was because certain State Motor Vehicle Departments continued to report such information despite the provisions of FCRA. The evidence further indicates that respondent attempted to persuade the state authorities to modify their practices in this respect (Findings 274–79).

The record demonstrates that with respect to the motor vehicle reports, there was no reasonable alternative to the practices followed by respondent in masking out the old information (Finding 279). Under the circumstances, respondent's practices in connection with motor vehicle reports are not considered violations of the statute justifying the issuance of an order. [233]

The Reasonable Procedures Allegations (Paragraphs 20–21 of the Complaint)

The allegations that respondent has failed to conform to the requirements of Section 607(b) of FCRA, providing that a consumer agency, whenever it prepares a report, shall follow reasonable procedures to assure maximum possible accuracy are central to this proceeding. A major part of the effort of litigating the case has been devoted to those charges.[233]

Complaint counsel has attempted to prove these allegations by showing that the interaction of production requirements, compensation system, time pressures on field representatives, the requirements for production of adverse (protective/declinable) information and financial pressures on branch offices may result in the production of inaccurate reports. This phase of the Commission's case relies primarily on the testimony of a number of ex-employees and internal Company documents. The proof on the reasonable procedures issue relies essentially on evidence pertaining to respondent's

[233] Section 607(b) provides "[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."

general procedures. It is, therefore, necessary to look at respondent's system as a whole.

The record shows that a substantial number of respondent's employees were unable to meet their production requirements of completed cases within a normal day or workweek in compliance with Company procedures. As a result, some resorted to shortcutting techniques with the result that inaccurate reports were produced. Such practices were principally the listing in reports of sources not actually contacted by respondent's field representatives, falsification of the time coverage,[234] the failure to see logical sources, that is, sources that are in a logical position to give the information desired, and failing to ask a full range [234]of questions. Other field representatives have found it necessary to put in large amounts of overtime.

The record also shows that many and perhaps the majority of respondent's field representatives are able to produce the number of cases required in accord with Company procedures. That, however, does not demonstrate the reasonableness of the system where it is apparent that a substantial minority cannot cope.

In some instances, respondent has attempted to demonstrate that the field representatives testifying in the Commission's case were too disorganized or for other reasons were unsuitable to do the work. Even if this were the case, that would constitute no defense to the charges. If such persons are employed, then the system is simply not designed to produce maximum possible accuracy. If, as the record indicates, respondent employs substantial numbers of field representatives who cannot cope with the system as it exists, then such procedures are unreasonable for that reason alone.

The second major aspect of the Commission's case on reasonable procedures is the allegation that respondent imposed quotas for the production of adverse or protective/declinable information.[235]

Respondent urges that its system of home office audits measuring the development of adverse information by branch offices was an educational or training tool to improve report quality and was not used for policing purposes (RRB 69). The quality audits were used as a departure point for determining whether field representatives in a particular unit were employing proper investigative techniques such as asking the proper range of questions, getting a sufficient number of direct interviews with the subjects of reports, and seeing appropriate sources. It is also true that if a field representative consistently failed to develop any adverse information, [235]there could be a

[234] The time that a source has known the subject of the report.

[235] For definition of protective/declinable information, see Findings 281-82.

legitimate question as to his performance on the job. Nevertheless, in practice, the system of home office audits was not a reasonable procedure designed to assure maximum possible accuracy. Scoring well in the audits became an end, in and of itself, as is made evident by respondent's internal memoranda.

Respondent's employees have been told, in connection with such audits, that it is the production of protective/declinable data which keeps respondent in business (Finding 309) and respondent's employees in the field are extremely sensitive to the analysis results, good or bad, which "have a definite effect on the Manager's morale, the Manager's individual bonus, and the morale of the [employees]." (CX 766; Finding 310). And officials sought the right wording to get the decline across when such audits were made (CX 775). Moreover, offices and regions competed with each other with respect to the ranking in such audits (Finding 311).

The fact that review of branch office performance with respect to production of adverse information was not quality control unalloyed is evidenced by the following:

> . . . the service is quite marketable that you are producing although *we want to consistently look for ways and means of getting more and more declinable information into our reports* and you are well aware of this. (Regional Vice President to manager, Miami office, February 17, 1972, subsequent to review of cases in an office visit, CX 494A).

The record shows that in the relevant period, respondent's branch offices were under systematic scrutiny concerning their performance in the production of adverse, *i.e.*, protective/declinable information through the home office audit procedure. The record shows that branch offices were ranked in thirds against companywide averages for the preceding year relating to the production of such information and that branch management was under considerable pressure to score well in [236]those rankings. Field representatives were also pressured to produce protective/declinable information so that their offices would score well.[236]

The quality audit system ranking a branch office's performance in the production of protective/declinable information against all other offices in terms of upper, middle and lower thirds computed on the basis of organizationwide figures for the preceding year, impliedly set quotas for the production of such information (Finding 343).

Pressure on field representatives to produce protective/declinable

[236] *E.g.*, a field representative with a poor showing in producing adverse information was told that with such a performance in the next audit, he "would actually pull the office down instead of helping it." (CX 1199, Finding 319). And, branch offices with a lower third ranking have been told that they were pulling the region's percentages down considerably (CX 1222A; Finding 318).

information took diverse forms, respondent's branch managers having considerable discretion in running their offices. For example, one branch manager threatened to withhold raises; in two offices, charts of individual field representatives' production of protective/declinable information were kept. In another office, field representatives received monthly sheets from the branch manager indicating whether their production of protective/declinable information was at an appropriate level (Findings 319, 321).

There is persuasive evidence of significant pressure on field representatives to meet certain minimums in the production of protective/declinable information (see generally, Finding 319). Consider the following communications: [237]

DECLINES: Some of our folks were on the lower 'rung' and are improving. We have no one below 6.6% in Decline in Life or 6.7% in Auto. Congratulations to Coble, Cundey, Landwehr, and Ursish for over 10% decline Life and to the majority of our people for over 10% decline in Auto. Attached are the statistics for your review.

(Manager, Dayton branch office in Monthly Newsletter to suboffices, February 1974, CX 742B).

* * *

Phil, our objective on protective is 21% and our objective on declinable is 5% . . .

(Manager, St. Paul office to field representative, April 4, 1973, CX 1200).

* * *

. . . It is very gratifying to see the increase of your declinable cases and I am extremely pleased with the Special Life feature of 9% declinable. The Narrative declinable of 4% has just met company objectives and I would like to see this increased, if at all possible in the coming months.

(Supervisor, San Mateo office to field representative, May 9, 1973, CX 1246A).

Communications of this nature make clear the percentage constituting acceptable objectives or levels of performance. Moreover, such memoranda within a year of each other from separate and geographically dispersed offices compel the inference that the practice was substantial.

Such evidence is not vitiated by general testimony that no quotas were in effect. It may be that some field representatives were or told they should obtain "some", and not specific percentages, of such information. However, the contemporaneous documents show that instances did occur where specific percentages were directly

impliedly set. The fact that such pressure may not have [238]been put on all field representatives does not insulate the practice from remedial action.

The record does not demonstrate an overall pattern of overt sanctions such as firings or the withholding of salary increases or promotions as penalties for the failure to achieve specific levels of protective/declinable information.[237] The pressures as far as can be determined from this record, were generally more subtle: for example, achievement in production of protective/declinable information as measured by the audits was one factor considered in connection with managerial incentive bonuses and field representatives put down the objective of achieving particular percentages of protective/declinable information on their personal appraisal forms (Findings 310, 320, n. 106). And, field representatives' performance on the quality audits was one factor among several to be considered in salary recommendations by the branch manager (Finding 313).

The following statement by one of respondent's ex-employees appears to give a fair summary of what frequently occurred: [239]

> At the end of every month, I was reminded that I didn't have the office objective of percentage of protective information by the supervisor and that I really ought to try a little harder to get it. There was always implication that there would be some consequences, but there were never any consequences. I have no idea what the consequences would have been.

(Farra 754.)[238]

Although the pressure on many individual field representatives may have been informal, such procedures are not reasonably designed to achieve maximum possible accuracy.

Branch offices were scored on audit samplings too small to be a fair test of their performance, and they were competitively ranked against companywide averages for the preceding year with no showing that such yardsticks could be validly applied to all the offices measured, and praise and blame accurately apportioned on the basis of such audits. Such practices have the potential for inaccurate reporting (Findings 340–41).

The potential of the quality audit system to adversely influence

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[237] The record is mixed. There is evidence that one supervisor was demoted when his unit did not pass an audit (Repeau 1765–66), that another was put on probation for similar reasons (RX 446) and that in the Newark office, field representatives were told that salary increases would be withheld until declinable objectives were met (CX 3A). On the other hand, the supervisor who was put on probation, RX 446, *supra*, was given a bonus to which he was not mathematically entitled although his unit did not meet the corporate average of 4 percent of such information on a consistent basis (Eldred 11261–62, 11327). And, managers whose offices were ranked in the lower third on home office quality audits have, nevertheless, been promoted (*e.g.*, Foley 11510).

[238] This field representative testified that such pressure had no effect on the manner in which he prepared reports (Tr. 755).

report writing is perhaps best set forth in some of respondent's internal memoranda:

> We did have cases in the analysis which would have been graded decline, except for a slight change in the terminology the field representative used.

(CX 775.) [240]

Another memorandum noted, "We notice a continued tendency to use the phrases, 'it is believed', or 'sources believe.' Try to eliminate this and just give the specific information without these comments, which tend to disturb the confidence of the underwriter in our report." (CX 1565A). In another memorandum, a branch manager was disturbed because field representatives stopped short of answering the final question or glossed over detrimental information with comments such as that a "man was a good driver or had no personal criticism" or "some good pat on the back or fine recommendation which overshadowed good decline information." (CX 1340).

The pressure to withhold information from reports which could put into perspective detrimental information because of the desire to score well in audits has the clear potential for harm to the consumer. Similarly, the injunction to eliminate phrases such as "it is believed" has the potential to increase the impact of adverse information to the detriment of the consumer. There is a distinction between knowledge and belief. If phrases such as "it is believed" or "sources believe" affect the confidence which underwriters place in reports, they should be kept in the reports for precisely that reason.

It makes no difference that the elimination of such phraseology might not lead to literal misstatements. It must be recognized in this connection that much of the information which respondent reports is not purely factual in the sense that it can be definitely resolved as, for example, age, duty, identity, marital status, etc. (RX 107Z–170). Rather, a great deal of the information reported by respondent in areas such as health, habits, and reputation is subjective where judgment must be exercised and which may be matters of opinion (RX 107Z–170, 102Z–17; see also Tilden 11854). In fact, respondent expressly recognizes that differences of opinion are possible in these areas (RX 107Z–170). The degree of a source's confidence in such information is clearly a crucial consideration as are any factors which may mitigate unfavorable information. The potential harm to consumers from injunctions to delete qualifying phrases such as "it is believed" or statements like "a man was a good driver or had no personal criticism" is patent in areas such as habits or reputation where subjective judgment must be exercised. [241]

Respondent contends that complaint counsel have not made the threshold showing necessary to demonstrate a violation under Section 607(b). They assert that complaint counsel have not introduced one report with respect to which there has been shown any inaccuracy caused in whole or in part by respondent's salary and production system. In short, respondent urges that the question of reasonable procedures is not reached unless there is a showing of specific inaccurate reports resulting from the procedures under consideration. Respondent, in this connection, relies upon a number of judicial precedents refusing to strike down a procedure as unreasonable under Section 607(b) if the reports under consideration were not found to be inaccurate, *e.g., Peller* v. *Retail Credit Co.,* 359 F.Supp. 1235 (N.D. Ga. 1973), *aff'd. mem,* 505 F.2d 733 (5th Cir. 1974). Those cases are not controlling here. They involve attempts to vindicate private rights in suits for damages under the Act. Clearly, there can be no damages to an individual if no inaccuracy has been shown in the particular report.

The Federal Trade Commission, in its role of administratively enforcing the Act, has a broader function. It need not rely on inaccuracy in specific reports. It may scrutinize respondent's procedures generally to determine whether they are reasonably designed to assure the maximum possible accuracy of information concerning the individuals with respect to whom the agency's reports relate. Here, the record shows that production requirements, time pressures and respondent's quality audit system have the potential for resulting in inaccurate reporting.

To the extent that reports are prepared listing sources not seen with unqualified sources contacted, time coverage misstated, or insufficient time taken to ask the applicable questions, such methods are likely to result in inaccurate reporting. Pressure as to report wording to facilitate good audit scores may have similar results. As already noted, respondent's quality audit system, when it was in effect, implicitly set quotas for the production of adverse information. The Commission may evaluate respondent's procedures as a whole to determine whether a consumer agency is following reasonable procedures to assure maximum possible accuracy without a case-by-case analysis of a myriad of reports. [242]

Respondent, in urging that the key test is reasonableness, seems to equate that concept with the Rule of Reason. Moreover, the

argument apparently implies that the required showing must be one of actual adverse effect on consumers (RB 72-73).[239] There is, however, no requirement in Section 607(b) that the Commission must permit procedures to continue until, in fact, adverse results have occurred. In this connection, Section 621 of the Act defines the Commission's enforcement role. It states, "[f]or the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this title [FCRA] shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act." The term "reasonable procedures" under Section 607(b) is one that requires interpretation in light of the surrounding circumstances. In Section 621, Congress accordingly linked such interpretation with the concept "of an unfair or deceptive act or practice" as set forth in Section 5 of FTCA. The Commission, in determining practices to be unfair or deceptive, need not make a finding that actual deception or injury has occurred, *e.g., United States Retail Credit Association, Inc.* v. *FTC,* 300 F.2d 212, 221 (4th Cir. 1962); *Sears, Roebuck & Co.* v. *FTC,* 258 F. 307, 311 (7th Cir. 1919). The Federal Trade Commission, moreover, is to [243]stop unfair acts and practices in their incipiency. See *FTC* v. *Brown Shoe Co.,* 384 U.S. 316, 322 (1966).[240] Under the circumstances, the Commission has the power to prohibit practices under Section 607(b) of FCRA applying the same standards as are applied under Section 5 of FTCA in declaring certain methods of competition unfair. The Commission, in this case, need find no more than that the procedures, in effect, have the potential and capacity to result in inaccurate reporting.

As a general rule, when field representatives resorted to shortcuts such as the listing of sources not seen, they did not falsify adverse information, and there is no evidence in the record of a report where adverse information has been falsified. In fact, the record shows that where sources were faked, reports were generally favorable to the consumer. This, however, does not preclude a finding that such practices violate the requirements of Section 607(b).

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[239] Respondent links the assertion that judicial precedent requires a showing of inaccuracy in specific cases with the contention that the Supreme Court, while construing Section 5 of the FTC Act, in *FTC* v. *Sperry Hutchinson Co.,* 405 U.S. 233 (1972), "stressed once again the need to show the effect of a practice on consumers before the Commission could prescribe the practice as being unreasonable under Section 5." (RB 73).

[240] In *Brown Shoe,* it may be noted, that the court held that, in a case dealing with restrictive franchising, the Commission was not required to show the element in Section 3 of the Clayton Act that the effect of the franchise program "may be to substantially lessen competition or tend to create a monopoly." The court held rather that the Commission had the power under Section 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of Section 3 or other provisions of the antitrust laws. In this connection, it may be noted that Section 3 itself did not require proof of actual injury to competition and is itself a statute designed to stop certain practices in their incipiency.

Respondent contends that the benefits of FCRA extend only to the consumer and not the report user. The primary emphasis in the statute is on the protection of consumers with respect to whom reports are prepared. Nevertheless, the statement of findings and purpose in Section 602, makes it clear that inaccurate credit reports impair the efficiency of the banking system. In short, the Act recognizes that the public as a whole has a stake in accurate consumer reporting. Section 607(b) requiring procedures to assure maximum possible accuracy, draws no distinction between adverse and favorable reports. [244]

Finally, there is the question of remedy for the Section 607(b) violations. Complaint counsel seek essentially an order prohibiting respondents from requiring its employees to complete or prepare an unreasonable number of consumer reports.[241] or to prepare a certain proportion of consumer reports containing adverse information about the subjects of the reports (CB App. C, p. 8, par. 4(a)–(b)). Complaint counsel also request a prohibition on various sanctions with respect to compensation, promotions, or job status to compel respondent's employees to prepare an unreasonable number of reports or a certain proportion of reports containing adverse information (CB App. C, p. 10, par. 5). [245]Complaint counsel further recommend the adoption of a prohibition against emphasizing the development of adverse information in the preparation of consumer reports and failing to train its personnel to complete consumer reports "in a manner which is fair and equitable to the consumer with equal emphasis on the development of and reporting of favorable and adverse information." (CB App. C, p. 11, par. 6).

The recommended provisions will not be adopted in the form proposed. They would be difficult, if not impossible, to enforce. The prohibition against requiring production of an unreasonable number of reports would compel the Commission and its compliance staff to become involved with the details of supervising several thousand field representatives, a task for which it does not have the resources.

The variables determining what is a reasonable workload for one

[241] Complaint counsel's order defines an unreasonable number of reports as follows:

For purposes of subparagraph 4(a) above, an unreasonable number of consumer reports shall be that number of reports which an investigator cannot, with due diligence, complete or prepare accurately while conforming to the following procedures:

(1) interviewing all the sources or other third parties listed on said reports;
(2) conducting all interviews directly and in person, unless it is clearly indicated on the report that the telephone was used;
(3) making all observations of the homes, neighborhoods, or other physical surroundings of the consumers who are the subjects of the reports directly and in person;
(4) confirming all adverse information through interviews with independent sources, unless it is clearly indicated on the report that the information was obtained from one source only.

of respondent's field representatives are numerous. They include the requirements of the preparation of particular reports, the mix of such reports assigned to the individual representative, the areas where the investigations are to be made, the ability of the individual field representative, and the production climate in a particular branch office. In addition, new types of reports placing different demands on field representatives may be instituted by respondent either on its own initiative or at the request of its customers. Accepting the definition of an unreasonable number of reports in complaint counsel's proposed order would not simplify the task. The Commission would still be required in each compliance proceeding essentially to relitigate the instant case.

The requirement of Section 607(b) mandating reasonable procedures would be more effectively enforced by requiring respondent to institute performance reviews of its field representatives on a systematic basis. The Order will require respondent, on a random sampling basis acceptable to the Federal Trade Commission, to semi-annually conduct unannounced performance reviews of its field representatives to determine whether the sources listed have been interviewed, whether the sources contacted were logical sources and whether the information was accurately recorded. The Order will further require that the results of such performance checks be submitted to the Federal Trade Commission. [246]

The results of such performance checks should disclose a pattern from which a determination can be made as to whether respondent is imposing a reasonable workload on its field representatives and where corrections may be needed. Such a provision would be essentially self-enforcing. Inaccurate reporting is in the interest of neither respondent nor its customers. Accordingly, if the required performance reviews were to show a pattern of inaccurate reporting, such as the faking of sources, respondent would have a strong incentive to change its procedures to achieve more accurate results.[242]

Complaint counsel propose that respondent be required to complete a "Source Information Analysis" for each source of adverse information contained in an investigative consumer report (CB App. C., pp. 5–6). Under this provision, respondent would be required to disclose whether the source in question gained his information through personal knowledge, personal observation or hearsay, and whether the investigator obtained such information through personal interview, telephone interview, direct personal observation or file

[242] In the event that necessary remedial action is not taken, and if the need therefor is demonstrated by the required performance reviews, then the Commission may seek modification of the Order.

information. This provision will be entered; it is related to shortcuts such as listing sources not seen and contacting unqualified sources. It is also designed to prevent deception as to whether information has been obtained by the investigator's personal observation. The disclosure required by this provision concerning the provenance of the data will facilitate the evaluation of the report by respondent's customers. Complaint counsel has, however, not made a persuasive showing that such disclosure should be coupled with further information about the number of other reports prepared that day by the field representative in question. As already noted, there are a multiplicity of variables involved in determining a reasonable workload for a particular field representative. It is unlikely that such information would facilitate customer evaluation of the report. This part of the proposed order will not be adopted. [247]

Complaint counsel's provisions with respect to the imposition of adverse information quotas will not be adopted in their entirety. The record shows that, through the home office quality audits, respondent, in the relevant period, in effect, set up a quota system for the production of adverse (protective/declinable) information, and that practice should be banned. The unreasonable pressure on branch offices and field representatives for the production of adverse information was rooted in respondent's system of home office quality audits. The prohibitions in the Order should, therefore, focus on that procedure. It was the institutionalized competition for high ranking in the quality audits which gave rise to unreasonable pressures on respondent's personnel in the field to produce certain percentages of adverse information. Prohibiting these practices should adequately bar the violations documented here.

That portion of complaint counsel's proposed order defining a prohibited system, plan or procedure will not be adopted. The provision is unduly prolix. The record does not support the inclusion of all the elements of complaint counsel's definition in the order. For example, there is insufficient evidence in the record supporting a specific prohibition against sanctions related to a field representative's compensation, job status, promotions, etc. to compel the production of such information (see CB App. C, pp. 9–11 and n. 237).

Respondent will be prohibited from compelling or inducing its investigative personnel to complete or prepare a certain proportion of consumer or consumer investigative reports containing adverse information with respect to the subject of the report by utilizing the quality audits or any similar plan or procedure.

Respondent's practice of measuring the audit results of individual branch offices against companywide averages for ranking by lower,

upper or middle thirds in the production of protective/declinable information had the potential for inaccurate comparisons because of the disparity of results to be expected among different offices because of differing economic and geographic factors. The system, therefore, had the potential for generating pressure for increased production of adverse [248]information on the basis of invalid comparisons and, therefore, was unreasonable on that score (Finding 340). In addition, the audit results for individual branch offices with respect to the production of such information were based on small samples precluding the assurance that such results were representative for the office measured. The system, therefore, had the potential for generating pressure to increase protective/declinable information on the basis of unrepresentative data and was unreasonable for that reason (Finding 341).

The Order will prohibit the utilization of any system of quality audits or any similar system, plan or procedure ranking the performance of branch offices or other organizational units with respect to the production of adverse information against company-wide or regional averages (1) unless respondent can demonstrate such averages provide a valid standard of comparison for all the branch offices or units measured, and (2) unless respondent can demonstrate that the particular audit or survey utilized includes a representative or statistically valid sample of the branch office or other unit surveyed.

Complaint counsel also seek a prohibition against emphasizing the development of adverse information in the preparation of consumer reports and failing in training, supervisory, and review procedures to inform its personnel to complete or prepare consumer reports in a manner fair and equitable to consumers with equal emphasis on the development and reporting of favorable and adverse information (CB App. C, p. 11, par. 6).

This provision will not be adopted. The proposed injunction that respondent's employees be instructed to prepare reports in a "fair and equitable manner" with "equal emphasis" on favorable and unfavorable information is too general and vague for practical enforcement. Respondent's manuals already enjoin field representatives from using words emphasizing unfavorable information out of proportion and instruct that "Rumors, gossip, and scandal must be sifted." (RX 102Z-17). Inevitably, if this provision were entered, the Commission would have to engage in the time-consuming task of analyzing numerous [249]informal contacts between respondent's management and employees involving verbal exchanges. The FTC in the past has refused to enter broad prohibitions against practices

capable of only imprecise definition (*e.g.,* excessive or unfair pressure) for similar reasons. See *Arthur Murray Studio of Washington, Inc.,* 78 F.T.C. 401, 441 (1971), *aff'd* 458 F.2d 622 (5th Cir. 1972). The Order provisions directed to respondent's quality audit procedures should remedy the violations found without the disadvantages inherent in the proposed provision.

Respondent states that regulatory action making continuation of the regular life and health reports impossible would have adverse effects on the consumer (RB 78). It states in this connection:

> if an agency were required to prepare every report using the standard of care that is appropriate to the most detailed service it furnishes, the result would be to preclude agencies from selling more than one kind of report, a result not contemplated by the FCRA.
> (RB 78.)

Apparently, respondent contends that, in the case of the lower-priced reports, a lesser standard of care is permissible. There is, however, nothing in the Act which supports an argument that those consumers only able to afford or purchasing insurance with lower limits should have less protection than those buying higher-priced policies. Certainly, the harm to the consumer is the same if erroneous information is reported concerning, for example, his habits and reputation regardless of the benefit applied for or the type of report made. Reports may differ in the depth of their coverage and the amount of detail reported depending on the price of the report. And procedures may vary to get the requisite detail depending on the depth of coverage desired. However, the standard of care with respect to the accuracy of the information actually reported should be the same for all reports. It would be anomalous to interpret this statute which expresses broad concern for all consumers as permitting a lesser standard of care for those consumers who are the subjects of lower-priced reports. [250]

In any event, the provisions to be entered here impose no burdens jeopardizing the continuation of respondent's regular reports.

Respondent's Product Cost and Effort Studies

Respondent relies on the Arthur Andersen & Co. evaluation of its product cost and effort studies and the bonus contribution computations (RX 566) to demonstrate that the field representatives' compensation and the related production requirements are reasonable. That study has been considered in weighing the conflicts in the evidence on this issue.

Andersen, to test the reasonableness of respondent's reporting

standards, reviewed the data from respondent's product cost and effort study to determine whether a field representative could work enough cases in an 8-hour workday and correspondingly in a period of three 21-day months to make his standard or quota (RX 566 IV-6).

In this connection, it further determined the evaluation should be made by applying a measure of reporting standard reasonableness that could be applied to each of the seven basic reports it had selected for this purpose on an individual basis. It selected as the criterion, "Monthly Bonus Contribution, defined as the excess of earnings credit over salary and expenses that would be earned by a field representative with a given set of reporting standards and a workload consisting solely of a given type of report." (RX 566 IV-7).

Andersen's conclusions that respondent's reporting standard is reasonable is based on its calculations of a positive bonus contribution for seven basic reports in 1973 for Code 04 offices (RX 566 F-H). In this connection, Andersen's conclusion that respondent's reporting standard is reasonable is based on the assumption that Code 04 offices are representative of respondent's entire organization (Findings 453, 490). The Code 04 offices were selected as the most representative for the organization because their averages for figures such as reporting standard, expenses, production, and earnings were closest to the Company averages (Finding 453, n. 174). Presumably, homogeneity on these points was considered essential to the determination that Code 04 offices were representative of the entire organization. [251]

There is a question, however, whether the conclusions to be drawn from the Andersen bonus contribution calculations confined to Code 04 offices validly apply to respondent's organization as a whole. The record shows that, while the Code 04 offices may be closest to the companywide averages in categories such as report production, revenue, etc., there are substantial variations in branch offices in other code classifications in this respect from both the Code 04 office averages and the organizational averages (see RX 754; Findings 480-81).

Significantly, respondent's branch offices were given different classification codes to reflect differences in cost and the difficulties of preparing reports in different areas as well as differences in prices charged to customers for the reports (Finding 452). And, respondent states, "[i]t has long been recognized, for example, that it requires more time to prepare reports in certain areas (such as a large metropolitan area) than in others (such as a small city). The number of codes, and the classification of given offices within these codes, have varied over the years as conditions change." (RPF 327). It is

evident from the very nature of respondent's code classification system for its offices that there are significant differences in the level of effort required in preparing reports among groups of branch offices in the different code classifications.

The record (in particular, RX 566 F–H) shows that there is considerable disparity among the monthly bonus contribution for reports in the three different categories of 1973 Code 04 offices for whom Andersen made computations. Although the bonus contribution for all three is positive, the differences are substantial (Finding 478, n. 183).[243] [252]

The Andersen bonus contribution calculations for the Code 04 offices utilize an average monthly salary of $610 and a reporting standard of .505 as two of the elements in the computation (RX 566 F–H; Finding 483). The interaction of those two elements is a critical factor in the computation of bonus contribution (Finding 483). The record shows no calculations as to the impact on bonus contribution of reporting standards and salaries at ranges other than those shown in RX 566 (Finding 484). On the basis of these characteristics, there is insufficient evidence to support a finding that respondent's field representatives were sufficiently homogenous so that the averages in RX 566 could be applied generally to them throughout the organization.

The Andersen evaluation concerning the reasonableness of the reporting standard and the underlying product cost and effort studies failed to take into consideration significant factors bearing on the ability of field representatives to complete their tasks in the given time. For example, no consideration was taken of the fact that different groups of field representatives, because of variables such as geography, scheduling, mix of business and the volume of business, may differ significantly in ability to accomplish their tasks (Findings 460, 488).

If averaging is employed in studies of this nature and conclusions drawn therefrom as to units in different classifications, then a showing is required that there is sufficient resemblance between the groups to whom the conclusions are applied on the essential points (in this case, level of difficulty, reporting standards, etc.). This is prerequisite to a showing that the Code 04 averages on bonus

[243] Respondent states that the salary on RX 566 G and H was overstated and that the actual salaries applicable to each group of offices with respect to which such computations pertain were less (RPF 640). Respondent contends further that had such lower salary been utilized, the bonus contribution on RX 566 G and H would have been greater and the differences between RX 566 G and H and RX 566 F, less. The fact remains respondent was unable to provide the information necessary to substantiate this point (see Deibig testimony quoted in RPF 640). This decision must draw its conclusions from the computations actually in the record. There is no way of determining from the evidence, the extent to which the computations were affected by respondent's inability to retrieve the appropriate figures.

contributions are meaningful for all of respondent's branch offices, including those offices not within the Code 04 category. [253]

Respondent's code classification system for putting different branch offices in specific codes presupposes that there are significant differences with respect to the level of effort required to prepare reports in offices in different categories. As a result, respondent had the burden of demonstrating that despite these differences, all offices were sufficiently homogenous with respect to these critical characteristics so that the Code 04 offices could be considered as representative of the organization as a whole. That burden has not been met. The mere fact that the Code 04 offices were closest to the Company averages in certain respects permits no conclusions as to the effects on the computation of the *differences* from the average in the case of branch offices in other classification codes.

The reasoning of the Supreme Court in *United States* v. *Borden Co.*, 370 U.S. 460, 468–69 (1962), a decision rejecting a cost justification study, is applicable here.

> *But this is not to say that price differentials can be justified on the basis of arbitrary classifications or even classifications which are representative of a numerical majority of the individual members.* At some point practical considerations shade into a circumvention of the proviso. A balance is struck by the use of classes for cost justification which are composed of members of such self-sameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member. *High on the list of "musts" in the use of the average cost of customer groupings* under the proviso of § 2(a) *is a close resemblance of the individual members of each group on the essential point or points which determine the costs considered.* (emphasis supplied).

No convincing showing on this point has been made. [254]

Also significantly detracting from the confidence to be placed in the study is the fact that, of the two basic calculations pertaining to monthly bonus contribution on which Andersen based its conclusion as to the reasonableness of the reporting standard, one, after cross-examination, had to be retracted and the other recomputed.

The product cost and effort studies on which the Andersen evaluation rests were designed to study simply how much it cost to do the reports the way they were being done as a prerequisite to setting prices. There was no attempt in the study to evaluate the quality of the work (Finding 492). The analysis has little relevance therefore, to the question of whether the procedures are such as t assure maximum possible accuracy.

In view of the foregoing considerations, RX 566 does not outweig the testimony of respondent's ex-employees in the Commission's cas to the effect that they were unable to comply with respondent

production requirements in accordance with Company policy within a normal workweek.

Allegations of Failure to Disclose Nature and Substance of Reports (Paragraphs 22–23 of the Complaint)

The complaint alleges in paragraphs 22 and 23 that respondent, in certain instances, has failed to clearly and accurately disclose the nature and substance of all its file information (except medical information) on consumers who have properly identified themselves and requested disclosure.

The record shows that, in anticipation of the FCRA's effective date, respondent promulgated extensive new procedures to implement compliance with those provisions of the Act requiring disclosure to consumers (Findings 524–28). Training sessions at all levels of the corporate structure were conducted to acquaint pertinent employees with the new policies and procedures (Findings 521–23). [255]Respondent's disclosure procedures, as set forth in its manuals and other instructional materials, in most instances, provided for compliance with the FCRA provisions.[244] However, the record also shows that respondent's employees did not follow the stated procedures in all instances. Departures at the local level from respondent's official procedures and, more important, from the FCRA requirements, justify the imposition of an order to prohibit such violations.

In respondent's Pittsburgh, Lincoln and Wichita branch offices, inquiring consumers were told they could not receive disclosure of their reports (Findings 529–32). One consumer received disclosure only after his lawyer contacted the Retail office (Finding 529); consumers should not have to retain an attorney as a prerequisite to disclosure. Consumer Humble was denied disclosure of a report prepared in her name because the information was "on" her husband (Finding 530).[245] In the instance of consumer Baker, after being told on two occasions that an insurance company authorization was necessary for disclosure, he was bluntly denied disclosure in the Wichita office when he indicated his desire that a third party be present during the disclosure (Finding 531). The same office advised the McCunes, after an investigation had been conducted on Mrs. McCune, that there was no record of an investigation and, later, that

[244] The procedures found to violate FCRA are discussed individually, *infra*.

[245] Respondent's procedures, however well intended, permitting denial of disclosure to one spouse when there adverse information on the other (Finding 530 n. 192) violated the FCRA to the extent that it was used to deny sumer information which was prepared and reported in connection with that consumer.
In the case of consumer Humble, it should be noted, that she was denied disclosure, not only of the information ding her husband, but also information about herself (Finding 530).

all file information was confidential (Finding 532). [256]The Wichita occurrences, particularly when viewed in light of other FCRA violations in that office (Findings 543, 564) indicate that this particular office (from which no rebuttal witness was presented) had little or no regard for the corporate procedures or compliance with FCRA.

Respondent's instructions pertaining to the disclosure of "nature and substance" of file information as specified by the Act appear to provide for compliance with the statute (Finding 539). However, actual implementation in the field resulted in instances of inadequate disclosure. The record shows that in the Wichita, Denver, Dayton, Manchester, Oxon Hill, Phoenix and San Francisco offices, disclosures were made which omitted certain portions of reports altogether (Findings 543–49). In several instances, highly inflammatory information was withheld. There were omissions of adverse drinking information (Finding 543), drug information (Finding 545), adverse employment information (Finding 546), information that a consumer had run off with a truck driver and was regarded as "trying to take" her husband for his money (Finding 547), and the statement that a consumer used his hands in an effeminate manner (Finding 549). Similarly, respondent appears to have paraphrased particular items disclosed to consumers in such a way as to reduce their impact on a listener (Findings 552–54). In the Canton office, a consumer was told her report indicated she had an unstable marriage. In fact, the information reported was that two sources indicated she had a desire for other men and her husband had a desire for other women (Finding 552). In Wilmington, North Carolina, a consumer was told by respondent that his report showed he made it a point to know the benefits to which he was entitled under insurance policies. The report stated the consumer was well-known in the area as being "claims conscious" and had had his insurance cancelled on several occasions due to excessive claims (Finding 554). Disclosure of this nature changed the tenor of the report and gave an entirely different impression from that given respondent's customer which had received the report. [257]The term "nature and substance" is one which inherently invites imprecise and varying definitions. However, it cannot be interpreted so as to permit respondent's field management to pick and choose among items in a report or, through summarization or paraphrasing, to dilute the thrust of a report during disclosure.

Respondent urges that "at most, complaint counsel have shown an insignificant number of isolated violations" where consumers did not receive full disclosure. (RRB 97). However, the violations found cover

a broad geographic area, and show that some of respondent's employees do not regard compliance with the Act or with the corporate procedures as a high priority. The occurrence of such violations of the Company procedures, without remedial action by respondent, demonstrates a lack of adequate supervision by respondent. Since the institution of visual disclosure in 1974, and the further liberalization of respondent's disclosure policies in 1976 (Findings 556–57), it appears that respondent has made changes to further ensure compliance with FCRA's disclosure provisions. However, in light of the past violations, an order prohibiting respondent from failing to comply with Section 609 is needed to assure future compliance with the Act.

In addition to direct refusals of disclosure and inadequate disclosures, respondent discouraged disclosure by imposing conditions. The procedure established by respondent whereby an inquiring consumer signed a consumer interview form which included a waiver clause regarding reinvestigation (Finding 535), violated Section 609 of the FCRA by putting a condition on disclosure not sanctioned by the Act. While the signing of the form was not an absolute prerequisite for disclosure, consumers would not have been aware that it was not mandatory unless they protested signing. The procedure, in effect, functioned as a condition. Consumers not acquainted with the specifics of the Act were, thus, required to meet more than the conditions specified by Section 610 of FCRA in order to obtain disclosure. Utilization of the waiver provision was a companywide procedure, not a local departure from the corporate instructions. Although discontinued in 1974 or 1975, this procedure was widespread, [258]and a prohibition on such practices is warranted.[246]

Complaint counsel contend, as alleged in the complaint, that respondent's practice of revealing the recipients of reports and non-investigative sources to consumers only on specific request (Finding 540), violates FCRA (CB, pp. 64–65). Respondent's implementation of Section 609, which provides that "upon request", various items are to be disclosed, does not clearly violate the statute. The statutory words "upon request" should not be used as a means to justify requiring words of art to warrant disclosure, but there is no evidence that respondent has so interpreted them. Absent evidence of bad faith on the part of respondent, the procedures relating to disclosure of

[246] By contrast, the imposition by the Wichita branch office of the condition that an insurance authorization be obtained prior to disclosure in connection with one consumer (Finding 537), is not sufficient to warrant a prohibition directed at this particular practice.

recipients and non-investigative sources on request is not found to violate Section 609.[247]

Respondent has stated its position that claim reports and other reports such as business and some property reports are not subject to the disclosure requirements of FCRA (Finding 558; RB 100–105, 111–113).[248] Respondent relies on the fact that such reports are not consumer reports as defined by the Act. However, the Act does not require disclosure of only consumer reports. Section 609 provides in pertinent part that: [259]

> Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:
>
> (1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

Respondent asserts that Section 609 of the statute must be read in connection with other provisions of the statute. Respondent states that Section 603(a) states that the definitions contained in that section are applicable for the purposes of the title and the "title" is Consumer Credit Reporting. It contends that, accordingly, the Act does not concern itself with business reports. Respondent further asserts that when the definition of "files" contained in Section 603(g) is read in the context of the above, it is apparent that business reports are not included. The argument is not persuasive. Section 603(g) defines "file, when used in connection with information on any consumer" as meaning "all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored." The language of Section 609 and Section 603 is clear. It does not limit the disclosure section to consumer reports. Had Congress so intended, it could easily have provided for such limitations. Thus, all information, including information in the reports other than consumer reports, in a consumer reporting agency's files (except medical information) is subject to the disclosure provisions.[249] Respondent's failure to comply

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[247] The record does show that a consumer was denied disclosure regarding recipients of his report after he so requested (Finding 550). This instance shows again departure at the local level from respondent's procedures.

[248] It should be noted that, while there are examples in the record of respondent's not disclosing claim reports (see Finding 559 n. 211), evidence of specific instances is not necessary or relied upon in light of respondent's stated position and policy, which is that such reports need not be disclosed. This clearly demonstrates the violation.

[249] This decision does not reach the situation not presently in issue, of whether claim reports or other non-consumer reports would be subject to the disclosure provisions if a consumer reporting agency were to establish a completely separate organization to prepare and handle these reports. There is evidence that, as of May 1977, respondent's claims operation was established as an "autonomous profit center" (Tr. 16121). However, the record does not contain sufficient evidence to define that term. *E.g.*, it is not clear whether claim and consumer reports are still handled in some instances by the same people or whether the claim operation is entirely separate from the consumer reporting conducted by respondent.

with such provisions in connection with non-consumer reports violates the Act. [260]

Allegations of Failure To Disclose by Telephone and at Suboffices (Paragraphs 24–25 of the Complaint)

Paragraphs 24 and 25 of the complaint allege, essentially that respondent violated Section 610 of FCRA by failing to give disclosure when requested to do so by telephone and by discouraging telephone disclosure.

Section 610 of FCRA states that a consumer reporting agency is required to give telephone disclosure if a consumer has made a written request, with proper identification and the telephone costs are covered by the consumer. Respondent's procedures regarding telephone disclosure, however, did not require, as permitted by FCRA, that a written request be received before telephone disclosure was given. The corporate policy required only that prior to telephone disclosure, the consumer should be properly identified (Finding 560). The instructions, while clearly permitting telephone disclosure, did imply that, in sensitive cases, in-person disclosure was to be encouraged (Finding 561). There is no indication in the instructions that respondent encouraged or condoned its employees telling consumers that telephone disclosure was not available. As in the case of other corporate policies, however, there were departures from such instructions violative of the FCRA. [261]

The record shows that the Denver office, in particular, had the practice of telling consumers who telephoned for disclosure, that disclosure was available only in respondent's office (Finding 563).[250] In addition, in the Rocky Mount, North Carolina and Wichita offices consumers were told to come to the office for disclosure (Finding 564). Also, respondent, through its Brockton, Massachusetts and Lincoln, Nebraska branch offices, advised consumers who requested copies of their reports that copies were not available but that disclosure could be obtained if the consumers came to the office (Finding 566).

Respondent notes that none of the consumer witnesses presented by complaint counsel had filed a written request for telephone disclosure (RPF 945). Respondent further asserts that the FCRA does not place on respondent the obligation to affirmatively advise consumers of their rights under the FCRA (RB, pp. 100, 109). Respondent is under no obligation to affirmatively advise consumers of their rights in order to comply with the Act. However, once

[250] This finding is not vitiated by evidence in the record which shows that some telephone disclosure was given by the Denver office.

respondent undertook to explain the availability of disclosure, there was an obligation to advise correctly and completely. Similarly, when respondent stated to consumers that disclosure could only be obtained by coming to the office, it implied that telephone disclosure was not available and effectively denied consumers the option of seeking and receiving telephone disclosure. The fact that such consumers had not filed a written request does not affect the determination that these practices violated the Act. Respondent could have stated to such consumers that they could not obtain telephone disclosure because they had not filed a written request or until they filed such a request, leaving with the consumer the option of seeking telephone disclosure. [262]It did not choose to do so. Rather, respondent foreclosed the option of telephone disclosure by stating or implying that telephone disclosure was unavailable. To so foreclose telephone disclosure is tantamount to refusing it and violates Section 610 of FCRA.

The complaint alleges that respondent's failure to provide disclosure from suboffices (Finding 568) violates FCRA's disclosure provisions. However, as respondent argues, the suboffices are not staffed to the same extent as branch offices, do not retain file copies of the reports, and are not equipped to handle disclosure. Respondent's decision to provide disclosure primarily from the branch offices appears reasonable in light of the manpower available in suboffices and the filing system maintained. Respondent established procedures to assure that consumers inquiring at suboffices were properly directed to the appropriate branch offices. There is no evidence that respondent, by establishing these procedures, in any way attempted to escape its disclosure responsibilities. If respondent were required to make disclosure from suboffices, either the branch office files would have to be divided with some files dispersed among the suboffices, or duplicate filing systems would have to be established. Additional manpower in the suboffices would also be needed. The FCRA does not put such a burden on consumer reporting agencies. Complaint counsel asserts that respondent should provide disclosure at some seven suboffices which appear to be better staffed than others (CB 68). To require respondent to establish different procedures for different suboffices would impose a burden not contemplated by the FCRA. Moreover, with telephone disclosure available, consumers will be in a position to avoid traveling great distances for disclosure. [263]

Allegations of Failure To Comply with Section 611 of FCRA (Paragraphs 26–27 of the Complaint)

Paragraphs 26 and 27 of the complaint allege essentially that respondent has violated Section 611 of FCRA by failing to reinvestigate disputed information, failing to record the current status of disputed information and to promptly delete information which can no longer be verified, failing to disclose to the consumer his right to request that respondent furnish notification that a previously reported item has been deleted or that respondent furnish a statement prepared by the consumer to recipients of previous reports, and failing to provide notification to recipients of previous reports when specifically requested to do so by the consumer.

Section 611 of FCRA provides basically that, if a consumer disputes the completeness or accuracy of his report, the consumer reporting agency must conduct a reinvestigation of the disputed information. If the reinvestigation does not confirm the original report, a deletion is to be made in the report. If the original information is confirmed by the reinvestigation, the consumer is entitled to submit a statement setting forth his position, which is to be included with the information in question in any subsequent reports. Notification of any deletions made or consumer statements submitted is to be sent at the consumer's request to parties who have received the report in question (within 2 years for employment reports and 6 months for other consumer reports). The consumer reporting agency has the duty to clearly and conspicuously disclose to the consumer his right to make such a request.

Respondent devised extensive procedures in connection with Section 611 and in good faith attempted to provide for compliance with that section of FCRA (see Findings 574–76). However, Section 611 has been violated at the local level. [264]

The record shows instances in respondent's Baltimore, Boise, Albuquerque, Cleveland and Seattle offices where reinvestigations were not conducted after consumers disputed their reports (Findings 578–82). One consumer disputed highly inflammatory information in her report, yet no reinvestigation was conducted (Finding 578). Respondent offered testimony from the branch office showing the usual procedure followed. However, no attempt to specifically rebut or explain this consumer's testimony was made (see RPF 971i)

In the case of another consumer, respondent implies that because the consumer would not go over his report item by item noting his disputes as to particular items, no reinvestigation was required (see RPF 969d; RB 109). However, the record shows clearly that the consumer disputed the report (Finding 579). The Act requires a reinvestigation when such a dispute is conveyed to the agency. In the case of this consumer, no item-by-item discussion was necessary to

make known the dispute. While it might have been helpful to respondent to know the consumer's exact position on each and every item in the report, his statements throughout the disclosure were adequate to convey a dispute to trigger the statute's requirement that there be a reinvestigation.

With regard to consumer Kasdorf (Finding 580), respondent contends that the consumer did not dispute any significant information in the report (RPF 969c). However, the branch manager of the office testified that dispute as to one's being a "slow payer" was significant but that in this case, the consumer agreed with information in the file (Tr. 11861).[251] The [265]statute requires a reinvestigation when a consumer disputes the "completeness or accuracy" of any item of information. The consumer need not assert there is no truth in an item as reported, but merely that it is incomplete in order to warrant a reinvestigation.

In the case of two consumers (Findings 581–82), respondent contends that there was statutory compliance though no reinvestigation was conducted (RPF 970). These consumers disputed information disclosed to them and indicated they desired further handling of their reports.[252] However, no reinvestigations were conducted. Respondent asserts that, by communicating the disputes to the recipient insurance companies, statutory compliance was obtained. This contention fails for two reasons: the communications sent to the insurance companies in both instances did not set forth completely and accurately the extent of the disputes (see Findings 581–82). More important, however, is the fact that the statute does not give a consumer reporting agency a choice of *either* reinvestigating, *or* sending a statement of dispute to the insurance company, even if such statement accurately describes the consumer's position. The statute clearly calls for a reinvestigation when items are disputed. This requirement could be carried to its logical, yet unworkable conclusion; *e.g.,* requiring a company to conduct a reinvestigation when a consumer disputes his birthdate by a few days. Respondent's procedures permit acceptance of a consumer's version on certain matters without a reinvestigation (Finding 574). In such cases, the statute is not violated; there is no longer any dispute between the consumer and the report. However, if such a procedure is followed, it is essential that the communication to the insurance company (or

[251] The consumer report had stated that Mr. Kasdorf was considered slow in paying bills in Peoria, that he left owing rent and was delinquent in paying an oil company bill (CX 138A). Mr. Kasdorf disputed that he was a slow payer, and that he had left owing rent. He did not dispute the oil company delinquency, but explained that it was paid after being owed for 1 1/2 months (RX 440E).

[252] One consumer gave respondent the names of three people to contact (Finding 581) and the other who was not told that reinvestigation was possible, told respondent she would follow up researching the information herself (Finding 582).

other recipient) set forth clearly that the new information [266]is accepted as true. Otherwise, the recipient company is left with the original information and a denial from the consumer. As a practical matter, the dispute is left unresolved.[253] Absent a full endorsement of the consumer's statement, a reinvestigation is warranted. If respondent chooses not to reinvestigate, and to accept the consumer's statement, then the consumer should be in at least as good a position as if a reinvestigation had confirmed his position.[254]

The record shows also that the Fresno office advised a consumer wrongfully that there was a $5.00 charge for a reinvestigation to be made (Finding 585). The consumer had disputed the report within 30 days of an insurance denial based on the report. Such charge was not authorized by FCRA. The record does not contain evidence sufficient to find that respondent had a practice of imposing unlawful charges as a prerequisite to reinvestigation. Therefore, no specific provision is included in the Order directed to this practice. However, this is another example of failure at the local level to adhere to the Company policies necessary to implement compliance with the Act.

There is evidence in the record showing that, in two instances, respondent failed or constructively failed to promptly delete the information which was not verified in a reinvestigation (Findings 583, 586). In the case of one consumer, the recipient company received from Retail a report stating that the consumer lived with a man, a confirmation of that information, and a letter stating [267] that the consumer disputed the statement and no one would "even admit knowledge of any friends or acquaintances of" the consumer (Finding 586). In fact, at least one person with whom respondent talked, had confirmed the consumer's denial. The communication from Retail, in effect, nullified the deletion of the information from the report. It was constructive failure to comply with Section 611. In the case of the other consumer, respondent's failure to delete health information which the consumer disputed after a reinvestigation in which respondent was "[u]nable to develop further health history" violated the Act (Finding 583). However, the two instances, without more, are insufficient to support an order on this point.

In addition, there is not sufficient evidence in the record to support the complaint allegations that respondent failed to disclose to consumers their right to have notifications sent to recipient compa-

[253] *E.g.*, if Retail chose to accept Mr. Wisniewski's consumer statement that he did not peel rubber, it should have advised the insurance company that it had been learned that Mr. Wisniewski did not peel rubber.

[254] In the case of consumer Van Sickle, respondent followed its procedure of sending a consumer statement rather than reinvestigating. While respondent did not expressly adopt the consumer's statement in the manner set forth above, considering the attendant circumstances, there is no indication that the recipient company would question the correction. All that was involved in the consumer's statement was an explanation and elaboration of the consumer's wife's prior statement regarding the date of an accident.

nies, or failed to provide notifications when requested by consumers to do so.

It should be noted in connection with consumer Spillane, whose experience does not form the basis for a finding of violation (pp. 297–98), that complaint counsel contend that consumers cannot waive their reinvestigation rights under the statute (CB, pp. 127–132).[255] [268]This contention is based on a line of cases dealing with the unavailability of waiver of private rights granted in the public interest. It appears, however, that while the FCRA generally seeks accuracy in reports in the public interest, Section 611 is designed particularly for the protection of individual consumers. Since the right to reinvestigation is designed to protect individuals, it appears to be one which the individuals intended to be so protected can waive. Section 602(a)4 states that there is a need for consumer reporting agencies to respect the consumer's right to privacy. To categorically state that a consumer cannot say to a consumer reporting agency, "I don't want further investigation" would completely negate the right to privacy. Congressional intent to do so is not present in the Act.

Complaint counsel further contend that were waivers found permissible, consumer reporting agencies would be allowed to adopt scare tactics to induce waivers, there would be a substantial number of uninformed waivers by consumers confused about their rights, and the issue of waiver would become an issue in every action to enforce Section 611 (CRB 130). However, these dire results do not appear inevitable. Respondent's instructions which contemplated waivers do not appear to be designed to even encourage waivers, much less to coerce them (Finding 574). Apparently, a waiver can only be exercised under respondent's procedures when a consumer states that he wants no reinvestigation and signs a statement to that effect after being told that the Act requires reinvestigation. The possibility of waivers arising out of confusion seems remote. Also, it is unlikely that waivers will become an issue in every proceeding to enforce Section 611; the exercise of a waiver requires affirmative action by the consumer to be effective. [269]

Allegations Concerning Interchange of Information between Claim and Consumer Reports (Paragraphs 28–29 of the Complaint)

Complaint counsel contend that respondent's claim reports should

[255] It should be noted that, in Mr. Spillane's case, even if waiver were not permitted, there would be no violation. Respondent had already reinvestigated Mr. Spillane's report at the time of the "waiver." Since the Act only requires one reinvestigation, respondent's failure to reinvestigate a second time, particularly when the consumer indicated he desired there be no further reinvestigation, would not have violated the Act.

be considered consumer reports for purposes of FCRA, and that respondent has violated FCRA by failing to adhere to its procedures applicable to consumer reports in the case of claim reports (CB 76–77). Complaint counsel bases this contention, not on an assertion that claim reports are consumer reports *per se,* but rather on respondent's use of its reports. The record shows that respondent has used information from its claim reports in subsequent preparation of consumer reports (Finding 591). In addition, the record demonstrates similar use of consumer reports in subsequent claim reports (Finding 593). Complaint counsel contend that such use transformed claim reports into consumer reports for two reasons: first, claim information could be, and was expected to be, later used in consumer reports. Complaint counsel contend that claim reports, therefore, were "used or expected to be used or collected in whole or in part" for the same purposes as the subsequent consumer reports. The second reason advanced by complaint counsel is that claim reports containing information derived from consumer reports are, in essence, consumer reports. Complaint counsel's argument is not persuasive.

Claim reports from which information is taken for use in consumer reports do not have to be transformed into consumer reports before the protection of the Act applies. Complaint counsel apparently concede, the Act does not regulate the preparation and use of claim reports as such. However, when respondent uses information from a claim report in a later consumer report, respondent must meet the requirements of FCRA in connection with that consumer report, as in the case of all other consumer reports. Information in a consumer report, including that acquired from a claim report, is subject to the disclosure and reinvestigation provisions. The prior status of such information as part of a claim report does not shield it from disclosure and reinvestigation when it [270] has been incorporated in a consumer report. Nor does its later status as consumer report information impose the FCRA requirements on the claim report from which it was taken. Subjects of consumer reports containing claim information should be afforded no less and no more protection than that given in the case of other consumer reports. Thus, no order prohibiting respondent from using claim information in consumer reports is appropriate.[256]

The statute does impose restrictions on respondent's use of consumer report information. Section 604 delineates the purposes for which consumer reports may be used. The statute does not list

[256] If complaint counsel's position were accepted, Section 604 of the statute would become meaningless. As respondent points out (RRB 117), if claim reports were considered consumer reports, respondent would violate Section 604 by furnishing these reports to its customers for use in connection with claims, since this is not a permissible purpose for furnishing consumer reports.

among the permissible uses, utilization of such information in claim reports. Respondent's use of consumer report information in subsequent claim reports violated the statute.

This practice was extensive and did not cease until the recent separation of files. An order prohibiting such use of consumer report information in claim reports is warranted and will issue.

Remedy (Paragraphs 22-29 of the Complaint)

The provisions of the proposed order pertaining to the allegations under paragraphs 22-29 have been modified. Certain provisions of the proposed order have been combined and consolidated to avoid confusion and repetition. The Order issued prohibits respondent from misrepresenting to consumers their rights to disclosure under the FCRA and requires that when a consumer makes an inquiry in connection with disclosure, respondent must advise the [271]consumer of his options regarding disclosure. The Act does not require affirmative disclosure. However, a requirement for affirmative disclosure to consumers is needed in light of respondent's past record of inaccurately and incompletely advising consumers regarding their rights. The Order further prohibits respondent from failing to give disclosure, in person or by telephone, when consumers meet the conditions under FCRA and from failing, while purporting to give disclosure, to disclose the nature and substance of the pertinent file. The words "including claims information" have been deleted from complaint counsel's proposed order. This deletion was made because specifying claim reports without mentioning all types of non-consumer reports could be confusing. The provision as written covers all file information other than medical information. No provision of the Order is specifically directed to the disclosure of recipients or sources of the reports because the record did not show a pattern of withholding such information.

In addition, no provision is included to prohibit respondent from "discouraging" telephone disclosure. The record shows that it is respondent's position that disclosure of certain reports can be handled more effectively by in-person contact (Finding 561). The record also shows that respondent has failed to advise consumers properly of the option of telephone disclosure. The Order requires that respondent advise consumers of their right to telephone disclosure. If respondent properly advises a consumer of the alternative of the telephone disclosure, respondent should be permitted to advise the consumer that respondent feels in-person disclosure is more effective.

Complaint counsel propose in its order, a requirement that

respondent provide inquiring consumers with copies of their reports. The Act does not make such a requirement. Further, respondent has voluntarily changed its disclosure procedures and now provides copies of reports to consumers. The requested provision is unnecessary. [272]

Provisions from the proposed order requiring suboffice disclosure have been deleted as have provisions requiring respondent to advise consumers of the location of their files. Failing to provide disclosure at suboffices does not violate the Act, and the record does not contain sufficient evidence to warrant a provision requiring notification of file location to consumers.

The provision of the proposed order requiring respondent to advise its customers of the address of the branch office preparing reports for the customer has been deleted. Complaint counsel offer no justification for this provision and there is not sufficient evidence demonstrating its necessity.

The provisions of the proposed order relevant to reinvestigation,[257] have also been modified. The time limitation for reinvestigations has been changed from "five working days" to "a reasonable period of time" in accordance with the statute's requirements. The record does not show a pattern on respondent's part of delaying reinvestigations. In addition, the Order does not contain complaint counsel's suggested provision requiring respondent to notify consumers that their reinvestigations have been completed. The provisions of the Order dealing with consumer disclosure apply to disclosure of reinvestigation results. The record does not contain evidence showing a pattern by respondent of singling out and withholding reinvestigation results, or indicating to consumers that disclosure of reinvestigation results cannot be obtained. To require respondent to contact each consumer after a reinvestigation would constitute a burden not warranted in light of the evidence and the assumption that consumers interested in the results of a reinvestigation will contact respondent to obtain this information. [273]

Other provisions in the proposed order pertaining to reinvestigation have been deleted. These relate to the alleged failure to delete information, note the consumer's dispute in subsequent reports, and advise consumers of their right to have report recipients notified of amendments in the reports. There is insufficient evidence to justify such provisions.

Scope of Order

[257] Paragraphs 26 and 27 of the complaint.

Respondent, objecting to introductory language in the proposed order at CB App. C, p. 1, urges the proposed order is too broad. The order, as recommended by complaint counsel, would cover "consumer reports, investigative consumer reports, claims reports or other reports containing information about consumers." Respondent contends that, if any order issues, its coverage should be limited to the type of reporting services formerly performed by Retail Credit Company and now performed by Equifax Services Inc. Respondent states there is no evidence in this record concerning its credit bureaus and no justification for including them in the order (RRB 10).

Commission orders need not be limited to the products involved in the violations demonstrated by the record. The Commission is not confined to prohibiting the identical practices which demonstrated a law violation. It has authority to prohibit acts of the same type or class as committed in the past. *Maryland Baking Co.* v. *FTC,* 243 F.2d 716, 718 (4th Cir. 1957); *Moog Industries, Inc.* v. *FTC,* 238 F.2d 43, 52 (8th Cir. 1956), *aff'd,* 355 U.S. 411 (1958); *Niresk Industries, Inc.* v. *FTC,* 278 F.2d 337, 342-43 (7th Cir. 1960); *Hershey Chocolate Corp.* v. *FTC,* 121 F.2d 968, 971 (3rd Cir. 1941). To be of value, the order must prescribe the method of unfair competition as well as the specific acts by which it has been manifested. *Hershey Chocolate Corp.* v. *FTC, supra.* The Commission, moreover, has wide discretion in determining the type of order necessary to eliminate the unfair or deceptive trade practices found to exist provided that the remedy selected is reasonably related to the violations of law shown. *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 612-13 (1946); *FTC* v. *National Lead Co.,* 352 U.S. 419, 428 (1957). [274]

The propriety of the product coverage in an order, however, depends on the facts and circumstances of the particular case. *Carter Products Inc.* v. *FTC,* 323 F.2d 523, 532 (5th Cir. 1963); *The Quaker Oats Co.,* 60 F.T.C. 798, 807-08 (1962); *Royal Crown Cola Co.,* 63 F.T.C. 1950, 1963 (1963); *United Biscuit Co. of America,* 64 F.T.C. 586, 625-26 (1964), *aff'd,* 350 F.2d 615 (7th Cir. 1965), *cert. denied,* 383 U.S. 926 (1966). As previously noted by this agency:

> The reason for the Commission's reference to the facts in each case is simple. The purpose of an order is to prevent statutory violations, the occurrence of which in the future appears likely on the basis of reasonable inference from events that have already taken place . . . .

Transogram Co. Inc., 61 F.T.C. 629, 701 (1962).

In this case, the violations demonstrated by the record must be considered in the context of such factors as respondent's organiza-

tion, structure, compensation system, the nature of the services offered, job demands on employees, etc. On points such as these, the record includes no evidence pertaining to respondent's credit bureaus. Accordingly, no finding can be made on the basis of this record that an order covering the practices of respondent's credit bureaus would be reasonably related to the law violations found herein. The introductory paragraph of the Order will be modified by excluding from coverage those credit reports prepared by Credit Bureau, Inc. of Georgia, Credit Bureau of Montreal and Credit Marketing Services (see RPF 6). [275]

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter in this proceeding and of the respondent Equifax Inc.
2. This proceeding is in the public interest.
3. The aforesaid acts and practices of respondent as herein found under Count I of the complaint, were and are to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.
4. The aforesaid acts and practices of respondent, as herein found under Count II of the complaint, were and are to the prejudice and injury of the public and constituted, and now constitute, violations of the Fair Credit Reporting Act. [276]

ORDER

I

It is ordered, That respondent, Equifax Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the preparation, offering for sale, sale or distribution of consumer reports, investigative consumer reports, claims reports, or other reports containing information about consumers (except credit reports prepared by Credit Bureau, Inc. of Georgia, Credit Bureau of Montreal and Credit Marketing Services), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, during the preparation of any report that its investigative personnel are agents or

employees of the company to which the consumer who is the subject of the report has applied for a benefit. [277]

B. Misrepresenting, directly or by implication, that its reports are compiled from information obtained through:

1. in-person interviews with the consumer who is the subject of the report, or the subject's friends, neighbors, or associates;
2. direct observation of the home, neighborhood or other physical surroundings of the consumer who is the subject of the report;

C. Failing to indicate on the copy of the consumer report or consumer investigative report going to respondent's customer that an interview has been conducted on the telephone if that is the fact, unless the service provided is sold exclusively as a telephone service. [278]

II

It is ordered, That respondent Equifax Inc., a corporation, its successor and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the preparation, offering for sale, sale or distribution of "consumer reports" or "investigative consumer reports," as defined in Section 603(d) and (e) of the Fair Credit Reporting Act, Pub. Law 91-508, 15 U.S.C. 1601, *et seq.,* ("the Act") (except credit reports prepared by Credit Bureau, Inc. of Georgia, Credit Bureau of Montreal and Credit Marketing Services) do forthwith cease and desist from:

A. Submitting consumer report information to persons who it has no reason to believe intend to use the information for a permissible purpose as set out in Section 604 of the Act.

B. Furnishing consumer report information to any person who has not specifically requested such information from respondent with respect to each consumer reported upon. [279]

C. Using consumer report information in any manner, including as reference information or as a lead, in the preparation of any report other than a consumer report.

D. Including any notice or other statement in a consumer report indicating directly or indirectly the existence of items of adverse information which antedate the report by more than the applicable period of time specified in Section 605 of the Act; or otherwise reporting, directly or indirectly, adverse consumer report information or the existence of such information which antedates the report

by more than the applicable period of time specified in Section 605 of the Act.

E. Compelling or inducing its investigative personnel to complete or prepare a certain proportion of consumer reports or investigative consumer reports containing adverse information about or relating to the consumers who are subjects of such reports by utilizing [280] quality audits or any similar system, plan, or procedures.

F. Utilizing any system of quality audits or any similar plan or procedure whereby the performance of branch offices, regions, or other organizational units, with respect to the production of adverse (protective/declinable) information is ranked against companywide or regional averages:

1. unless respondent can demonstrate that such averages constitute a valid standard of comparison for all of the units to which they are to be applied; and

2. unless respondent can demonstrate that the particular survey utilized includes a representative or statistically valid sampling of the branch office or other unit audited or surveyed. [281]

It is further ordered, That respondent shall:

G. Semi-annually conduct unannounced performance reviews of its field representatives, on a random sampling basis acceptable to the Federal Trade Commission, to check the accuracy of their reports, to determine whether the sources listed have been interviewed, whether the sources contacted are logical sources, and whether the information received has been accurately recorded.

H. Submit to the Federal Trade Commission, the results of such performance reviews.

I. Complete the following form for each source of adverse (protective/declinable) information contained in an investigative consumer report. The forms shall be initialed by the investigator preparing the report and forwarded with the report to the recipient. A copy of each form shall be retained in and become part of the consumer's file, as "file" is defined in Section 603(g) of the Fair Credit Reporting Act. [282]

SOURCE INFORMATION ANALYSIS

Adverse (protective/declinable) Information

Covering _____
[Identify adverse information]

was obtained from _____

[Identify source: Employer, neighbor, friend, observation of environment, etc.]

The source gained his [her] information from:

[ ] Personal knowledge;

[ ] Personal observation;

[ ] Hearsay.

The investigator obtained this information through:

[ ] Direct, personal interview;

[ ] Telephone interview;

[ ] Direct, personal observation;

[ ] File information.

It is further ordered, That respondent shall cease and desist from:

J. Misrepresenting to any consumer who requests information concerning himself in respondent's files, the consumer's rights under §609 and §610 of the Act. [283]

K. Failing to inform a consumer who makes a request within the scope of the preceding paragraph:

1. that such consumer has the right to disclosure of such information upon proper identification, by telephone if he pays any toll charge, or in person, at his option; and

2. what constitutes proper identification and to supply or mail, at the consumer's option, all forms which he must execute in connection with the requirements of Section 610 of the Act, to receive disclosure to which he is entitled under the Act and this Order.

L. Failing to give disclosure required by §609 of the Act to any consumer who has contacted respondent and has provided proper identification as required by respondent under §610 of the Act, and [284]has paid or accepted any charges which may be imposed upon him under §612 of the Act.

M. Failing, when giving consumers disclosure, to disclose the nature and substance of all information (excluding medical information) in its files on the consumer at the time of the request.

N. Requiring a consumer as a prerequisite to disclosing information from the consumer's file pursuant to §609 of the Act to fill out or sign a form which authorizes respondent to conduct a reinvestigation of any item the consumer may dispute or to transmit the results of

such reinvestigation to persons to whom it has previously reported the disputed information or which authorizes any business, organization, professional person or anyone else to give full information and records about said consumer to respondent; or interposing [285]any other similar condition or requirement which exceeds those specified in §610 of the Act.

O. Failing within a reasonable period of time to reinvestigate any item of information, the completeness or accuracy of which is disputed by the consumer unless it has reasonable grounds to believe the dispute is frivolous or irrelevant, as required by §611(a) of the Act.

It is further ordered, That respondent herein shall deliver a copy of this Order to cease and desist to all present and future personnel, including employees and representatives, engaged in the preparation of reports, including consumer reports, investigative consumer reports, and claims reports and engaged in the disclosure and reinvestigation of all information in said reports.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this Order to each of its operating divisions. [286]

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of which may affect compliance obligations arising out of the Order.

It is further ordered, That respondent herein shall within sixty (60) days after service upon it of this Order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this Order. [287]

APPENDIX A

Evidentiary Conflicts, Credibility and Related Problems

1. Ex-employee Witnesses

The parties' contentions as to the credibility of the Government's ex-employee witnesses have been reviewed. The testimony that certain ex-employees could not complete the workload assigned within a normal workday or workweek is found credible. The testimony of these witnesses with respect to the shortcuts they took to complete cases is persuasive. It is unlikely that they would give such testimony unless it were true. It is improbable that witnesses,

who did take shortcuts such as falsifying sources, would do so unless they could not cope with the workload, since such practices were a firing offense. Moreover, this testimony pertaining to a cross section of respondent's offices, located from coast to coast, is generally consistent on these points.

The testimony of these witnesses has also been weighed against the opinion testimony of rebuttal witnesses that such ex-employees should have been able to do the job without difficulty. The testimony of the Commission witnesses is accepted on this point. The ability to complete a certain number of reports in a given period of time is governed by many variables. These witnesses were in the best position to testify with respect to the specifics of their own situations and they best knew their own limitations.

Respondent contends that the testimony of three ex-employee witnesses is inherently incredible and that no findings whatsoever should be made on the basis of these witnesses. In the case of one witness, no findings will be made in view of his hostility to respondent expressed while testifying (Tr. 1124). In the case of a field representative who worked in the Newark office, respondent's contentions in RPF 97(d) have been considered. It is unlikely his testimony as to the shortcuts he took would be untrue, and findings are based thereon. Respondent adduced considerable evidence to cast doubt on the reliability of a third witness, a former supervisor [288] in the Wayne-Dearborn office. The most damaging appear to be those findings proposed implying he falsified mileage on his expense statements (RPF, pp. 105–106). Such conduct, if proven, is a firing offense (RX 102D). In fact, the witness was not fired but promoted to another office[258] (Tr. 10215–16). Under the circumstances, there are no grounds for ignoring his testimony in its entirety as respondent contends.

2. Documentary Evidence

Findings have been made on the basis of contemporaneous documents from respondent's files. There has been considerable testimony explaining such documents. In some instances, after weighing the inferences to be drawn from the documents against such testimony, findings at variance with the explanations have been made. The finder of fact is entitled to weigh such inferences from contemporaneous documents against subsequent explanations. Cf. *U.S.* v. *Gypsum,* 333 U.S. 364, 395–96 (1948).

[258] Respondent's rebuttal witness testifying on this point concurred with the Regional Vice President on the promotion (Tr. 10215–16).

3. Consumer Witnesses

Complaint counsel presented approximately 60 consumer witnesses who testified regarding alleged violations by Retail. In most cases, respondent offered rebuttal witnesses to the consumers' testimony; and, in many instances, the testimony of the rebuttal witnesses directly conflicted with that of the consumers as to what actually occurred in the various transactions. Thus, the issue of credibility was pervasive in considering the evidence presented by the consumer witnesses. The testimony of some witnesses was accepted as accurately portraying the events related, when rebutted by witnesses who could not recall the incidents in question and testified only [289]regarding the usual procedures in such instances. The recollections of other witnesses were accepted as accurate, even after direct rebuttal or despite inconsistencies not bearing on the particular violation under consideration. Explanation of such credibility findings accompany the findings of fact made in connection with these witnesses. In some instances, despite rebuttal testimony, the essential points involving the violation were not in dispute. Some consumers' testimony was found to be persuasively rebutted by testimony or documents, or not sufficiently clear to support a finding of violation. In other cases, the testimony did not set forth facts which would establish a violation or was offered under paragraphs of the complaint to which it did not relate. Below is set forth, by complaint paragraphs, explanation of the determinations made in connection with certain of these witnesses.

(a) Paragraphs 5-6 of the Complaint

The testimony of consumers Frazzano,[259] Stanley,[260] [290]Moss,[261] Harris,[262] and Baldwin[263] did not set forth facts showing a violation. The testimony of consumers Pierce,[264] Van Sickle,[265] [291]and J.

[259] L. Frazzano's testimony makes it clear that there was no misrepresentation of identity when he was contacted by a Retail employee. Mr. Frazzano testified that the field representative who called him refused to give the identity of her employer and, therefore, he refused to answer her questions (Tr. 3605).

[260] Mr. Stanley testified that the field representative, Mr. Nelson, who interviewed him, did not state that he worked for Retail Credit. However, he also testified that he had known Mr. Nelson for 15 years and knew where he worked (Tr. 217-18). Mr. Stanley had recently acquired an automobile insurance policy (Tr. 216-17). When Mr. Nelson visited him and asked questions regarding his automobiles and their usage, Mr. Stanley "assumed the possibility" that Mr. Nelson was preparing a report (Tr. 258).

[261] There was insufficient evidence to connect Retail to Mr. Moss' experiences with an investigator who visisted him. Thus, his testimony does not support a finding of violation (see RPF 135a).

[262] Mrs. Harris testified that the Retail representative who contacted her stated that he represented Retail Credit (Tr. 1137).

[263] Ms. Baldwin testified that a field representative who interviewed her "flipped a card at [her] and he fired off his name," and then proceeded to ask her questions (Tr. 4730). This testimony is insufficient to show the field representative misrepresented his identity. The fact that his introduction was given quickly and Ms. Baldwin failed to comprehend it, is not necessarily tantamount to a misrepresentation.

[264] Mr. Pierce's testimony contained several statements which tend to cast doubt on his recollections. He stated

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Sattler[266] also do not support findings of violation. Considering the direct rebuttal testimony, their testimony is not persuasive.

(b) Paragraphs 22-23 of the Complaint

The testimony of several of complaint counsel's witnesses did not make out a violation under paragraphs 22 and 23 (Parnell,[267] [292] Ptacek,[268] Vail,[269] Roberts,[270] Raber,[271] [293] and Van Sickle.[272]

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that the Retail field representative who visited him in connection with a property report stated that "the sidewalk wouldn't meet his approval" (Tr. 3568). This inherently unlikely statement was denied by the field representative (Tr. 12118-19). In addition, Mr. Pierce stated in connection with a later contact with Retail for disclosure, that Retail told him the computer had made a mistake and he had a bad credit rating (Tr. 3573). Since Retail did not use computers to store information in the pertinent office (Tr. 11898) and the report did not involve credit (CX 222A-B), Mr. Pierce's testimony under this paragraph is not persuasive.

[265] Mrs. Van Sickle's testimony that a Retail field representative who represented she was there in connection with a high school project she was doing (Tr. 3815-16), was effectively rebutted by the credible testimony of the field representative who, at the time of the occurrence would have been 22 years old, that she had never represented herself as a high school student while conducting investigations (Tr. 12277).

[266] Mrs. Sattler's testimony that a Retail field representative visited her after contacting her husband (see Findings 162, 164), and introduced himself as "an insurance inspector" (Tr. 4277) is not persuasive in light of the credible testimony of the rebuttal witness, the field representative. He testified that, after the "first incident" with Mr. Sattler, he made "exceptionally sure" that when he contacted Mrs. Sattler, he introduced himself as Mr. Newman with Retail Credit (Tr. 11745).

[267] Consumer Parnell contacted Retail after hearing from a neighbor that someone had called pursuant to an investigation of him and had made some "inappropriate" comments, *e.g.*, had asked the neighbor if it wasn't a little strange that Dr. Parnell lived with a single man named John. (John was Dr. Parnell's 5-year old son)(Tr. 4323-26). Dr. Parnell's testimony indicates, however, that when he contacted Retail, he was not interested in disclosure and did not request it. He called to advise Retail he would be sending a letter to register his displeasure regarding the manner in which the investigation was conducted, and to find out questions asked (Tr. 4325-27, 4345-46). Dr. Parnell followed up his telephone call with a letter to Retail in which he requested a copy of the questions asked and information obtained (CX 1489A-B). He did not recall having requested a copy in his telephone contact (Tr. 4327), and though he received a written apology from Retail which advised him of the procedure for in-person or telephone disclosure (CX 213), he did not follow up by requesting disclosure (Tr. 4328).

[268] Retail had reported on consumer Ptacek in CX 226A-B, dated January 25, 1972, a motor vehicle report showing traffic violations and in CX 225A-B, dated February 2, 1972, an automobile report which contained more personal information. When consumer Ptacek was told by his insurance agent that the cancellation of his automobile insurance was based on particular items of a personal nature reported by Retail Credit, he contacted Retail for disclosure (Tr. 3546-47). CX 226 was disclosed to him, but CX 225 (which contained the information mentioned by the insurance agent, was not)(Tr. 3547). However, Mr. Green, who conducted the disclosure credibly testified that the reason he did not disclose CX 225 was that it was not in Mr. Ptacek's file (Tr. 12163-64). In fact, CX 225 was never located in the office (Tr. 12173). He explained that about 1 to 2 percent of files are lost or misplaced due to human error (Tr. 12161-62, 12165). Since Mr. Ptacek did not advise Mr. Green that he expected other information, Mr. Green did not suspect the file was incomplete and thus, did not take the steps he would ordinarily take to locate a missing file (Tr. 3550, 3553, 12161-62, 12166-67). Under the circumstances, no violation is found.

[269] In the case of consumer Vail, there was no evidence supporting complaint counsel's allegation of failure to disclose (Tr. 2708-09). According to Mr. Vail himself, the disclosure was complete (Tr. 2695-97).

[270] Mr. Roberts' testimony that his disclosure was incomplete (Tr. 3362-64) was considered in conjunction with his testimony that when the disclosure began, he was read information on a "questionnaire basis" (Tr. 3362) which he said was "trivia" in his mind (Tr. 3372). Therefore, he hurried the disclosure, by such tactics as "butting in during his conversation." (Tr. 3372). According to Mr. Roberts, "I was trying to get him to hurry . . . I was still coming on pretty strong over the phone. So, I did get him to hurry." (Tr. 3362). Under these circumstances, no violation is found.

[271] While consumer B. Raber's testimony was offered under paragraphs 22 and 23, it did not set forth any allegations relating to failure to disclose (Tr. 1002-06).

[272] Mr. Van Sickle received a letter from his insurance company denying renewal of his automobile insurance (Tr. 3821). He contacted his agent and the company was advised that the action had been taken because a Retail report indicated he had had an automobile accident "a couple of weeks prior." Mr. Van Sickle contacted Retail to correct this inaccurate information (he had had an accident, but it had occurred 9 months prior (Tr. 3821-22)). The appropriate correction was made (CX 305, 306). Mr. Van Sickle testified that his "prime purpose" in contacting

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In the case of consumers Reinhardt and Robinson, the allegations under paragraphs 22 and 23 seem inextricably related to and dominated by those under paragraphs 24 and 25, relating to telephone disclosure. Their testimony did not pertain to allegations of failure to disclose separate from the allegations of failure to give telephone disclosure. Consideration of this testimony regarding disclosure is confined to the allegations under paragraphs 24 and 25.

Several of complaint counsel's witnesses were effectively rebutted by respondent's evidence. In the case of consumers Bitney, Spillane, Kasdorf and Suerth, the alleged omissions during disclosure concerned items of much less importance and of a far more neutral nature than other items in the reports which were disclosed.[273] [294] Considering together the absence of any motive on the part of Retail to withhold the more innocuous items, and the direct rebuttal of the testimony of these witnesses, it seems probable that the items in question were disclosed, and that such disclosure was forgotten by these witnesses. Thus, no findings of violation have been based on the testimony of these witnesses with respect to disclosure.

The testimony of several other witnesses was directly rebutted by contemporaneous documents tending to show that complaint counsel's witnesses were mistaken in their testimony (L. Raber,[274] Carreathers,[275] Drezek,[276] Hillman,[277] [295]Moss,[278] McKeown,[279] and

Retail was to correct the error. He did not recall whether he asked what other information was in the report (Tr. 3823-25, 3835). In fact, the report, a Streamlined Auto Report, contained little additional information (CX 303). Under these circumstances, the fact that Mr. Van Sickle's birthdate was not disclosed, is not found to be a violation of the Act.

[273] In the case of consumer Suerth, while the alleged omissions were not completely innocuous items (Tr. 1500-02; CX 280A-C), they were far more neutral than the items which were disclosed (see Finding 578). In addition, Ms. Suerth's memory was shown to be hazy on details surrounding the disclosure, *e.g.*, whether disclosure was given by telephone or in person (Tr. 1497, 1520-21, 1526; CX 300A-B).

[274] Consumer L. Raber's testimony that he called Retail's Baltimore office and was denied disclosure until he made clear he knew his rights under FCRA (Tr. 990-94) and that disclosure, when it was given, was incomplete (Tr. 995-96) was not persuasive. Direct rebuttal by the discloser, Mr. Keilbar, and contemporaneous documents indicated that Mr. Raber's memory was hazy, *e.g.*, Mr. Keilbar actually called Mr. Raber (after Mrs. Raber had requested he do so), advised him he could not receive a copy of the report and gave him telephone disclosure (RX 467A; Tr. 7640-42).

[275] Ms. Carreathers' testimony that she received no disclosure and, thus, gave no corrections during disclosure (Tr. 3327-28, 3339) was effectively rebutted by the testimony of Mr. Tilden (the discloser), supported by RX 412A-C. RX 412A-C showed that disclosure was given, and corrections made at the request of Ms. Carreathers (Tr. 11783-86).

[276] Mr. Drezek's testimony that he did not receive disclosure that his report showed (accurately) that his wife had epilepsy (Tr. 4103) was rebutted by RX 498A, showing this fact was disclosed and confirmed.

[277] Consumer Hillman's testimony that she was refused, or received incomplete disclosure (Tr. 2717-19) was effectively rebutted by testimony of two rebuttal witnesses, Mr. Dewing (Tr. 9309) and Mr. Eaton (Tr. 9322-23), supported by RX 493D and E, which showed Ms. Hillman's recollections were inaccurate.

[278] Mr. Moss' recollection of his disclosure (Tr. 3961-64) was found to be inaccurate when rebutted by the testimony of the discloser, Mr. Pettit (Tr. 11650-52) and RX 455F, which contained Mr. Pettit's handwritten notes from the disclosure and showed additional information given by Mr. Moss which related to the items he claimed were not disclosed.

[279] Mrs. McKeown's recollections were shown to be inaccurate, *e.g.*, she testified that certain things were disclosed to her (Tr. 505-06) which were not even in her report (CX 176A-B).

Notaro[280]).

Several of complaint counsel's witnesses, some of whom were rebutted, appeared to be confused and were unable to clearly state the events which occurred in connection with them. It is impossible to ascertain with confidence what actually transpired in these instances and, in some instances, even what was alleged to have transpired. No findings have been based on their testimony (Mumford 1142–75; J. Crouch, R. Crouch;[281] Conger 3769–89; Comerata;[282] [296]Harrington[283]).

(c) Paragraphs 24–25 of the Complaint

Consumer Lowe's testimony (Tr. 2091–103) does not support a finding of violation. She was unable to remember the events in question and did not testify with clarity regarding these matters. Similarly, no findings of violation were based on the testimony of consumer Conger (Tr. 3769–69).

In the instance of consumer Robinson, there was insufficient evidence to link the allegations to which he testified to Retail.[284] Thus, no findings are based on his testimony.

The testimony of consumers Parnell, L. Raber, Hillman, Moss and Phares contained allegations of failure to disclose. While the contacts in these cases took place by telephone, there was no evidence that telephone disclosure was singled out or that the treatment of these consumers was a result of their calling by telephone rather than going to the offices. Thus, the evidence pertaining to these witnesses was considered under paragraphs 22 and 23 under which it was also offered.

Consumers Luster (Tr. 3164–84), B. Raber (Tr. 1002–06) and M. McCune (Tr. 4378–412) were also offered under these paragraphs,

[280] Mr. Notaro's memory was found to be inaccurate. He appeared to be confused with regard to which of Retail's offices he contacted at various times (see Tr. 4460–61, 10545–47; RX 457A–B). The contemporaneous documents were found to be persuasive.

[281] The testimony of Mr. and Mrs. Crouch conflicted on major issues, *e.g.*, whether disclosure was given (Tr. 3186–88, 3207). The rebuttal witness, the discloser, testified as to yet another recollection (RX 421D, pp. 34–35). Under the circumstances, no findings of violation can be based on their testimony.

[282] In the case of consumer Comerata, her testimony on cross-examination indicated that the most significant item in her report—that Retail was unable to locate anyone in Aspen who knew her—was disclosed (Tr. 3227; CX 63, 64, 65). The testimony was unclear regarding whether anything else was disclosed (Tr. 3219–20).

[283] The introduction of CX 1570A, a consumer log from the Chicago office (Tr. 14841–42), corroborated Mr. Harrington's testimony that he contacted the Chicago office in March of 1973 (Tr. 2515–16) and impeached the testimony of respondent's witness, Mr. Brenner (Tr. 9621). However, the record in connection with Mr. Harrington is confused and he appeared generally unsure of what actually took place. No finding of violation is based on this testimony.

[284] Mr. Robinson testified that he called Retail and was refused disclosure by telephone (Tr. 2175). However, rebuttal testimony indicated that Mr. Robinson may have called a local credit bureau rather than Retail (Tr. 7021–61).

but their testimony contained no facts relevant to telephone disclosure. Thus, no findings are based on their testimony. [297]

The testimony of consumer Drezek regarding telephone disclosure (Tr. 4102) does not support a finding of violation when read in light of the rebuttal testimony and contemporaneous documents which showed that Mr. Drezek did not recall accurately with whom he spoke at Retail and what was told to him (see p. 294 n. 276).

(d) Paragraphs 26–27 of the Complaint

The testimony of Mr. and Mrs. Crouch does not support a finding of violation in connection with reinvestigation as their testimony indicated that they were unable to clearly remember the events in question (see p. 295 n. 281).[285] Similarly, no violation was found in the case of consumer McKeown.[286] In addition, consumer Moss' recollections were found to be confused, and a finding of violation is not based on his testimony (see also p. 295 n. 278).

Consumer Mumford's testimony was too confused to permit a finding of whether disclosure was complete (see p. 295) or the reinvestigation complete. The record does show a reinvestigation was conducted (CX 201, 202A–B, 197, 198A–B). Under the circumstances, no violation is found.

The testimony of consumers Spillane,[287] [298]T. Smith,[288] Van

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[285] The item that both Mr. and Mrs. Crouch alleged was disputed, namely, that Mr. Crouch was disabled and incapable of driving (Tr. 3210, 3187–88) was not even in the report in question (CX 74A–C).

[286] Mrs. McKeown testified that she disputed facts disclosed to her (Tr. 505–06, 511–12). However, the alleged dispute concerned information not in the report (CX 176A–B; see also p. 295 n. 279).

[287] Consumer Spillane disputed his report during disclosure (Tr. 3844–47) and supplied Retail with the names of references to be contacted (Tr. 3848). A reinvestigation was conducted, but the references Mr. Spillane provided were apparently not contacted (CX 267; Tr. 3848). Mr. Spillane received disclosure of the results of the reinvestigation (Tr. 3849), and disputed them (CX 265). When it was suggested to Mr. Spillane that he write out his dispute in detail, he responded that he did not want inaccurate information and a denial in the file; he wanted the inaccurate information deleted (Tr. 3851). The discloser also suggested that yet another reinvestigation could be conducted, but Mr. Spillane rejected that alternative, stating he "didn't feel that [his] reputation could stand another one of [their] investigations" (Tr. 3852). Under the circumstances, no violation is found. FCRA imposes no duty to contact a consumer's references in a reinvestigation, nor is there a duty to continue reinvestigating after one reinvestigation has been completed and the consumer declines an offer of further reinvestigation.

[288] As noted earlier (Finding 546), the information which Mr. Smith disputed was deleted from his report and a corrected copy sent to the requesting company. Thus, no failure to reinvestigate is found.