

PUBLIC RECORD

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9255

In the Matter of
TRANS UNION CORPORATION,
a corporation.

INITIAL DECISION

James P. Timony
Administrative Law Judge

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I. INTRODUCTION

The complaint, filed on December 15, 1992, alleges that Trans Union's sale of target marketing lists, with consumer information from its credit reporting files, was the sale of consumer reports to persons who did not have a permissible purpose to receive them, in violation of the FCRA, 15 U.S.C. § 1681.¹ Administrative Law Judge Parker entered summary decision on September 20, 1993, upholding the complaint.

Trans Union appealed to the Commission, which upheld Judge Parker on September 28, 1994.

¹ 116 F.T.C. 1334 (1993). The original complaint in this matter also alleged violations of the FCRA by Respondent in connection with its prescreening activities. Those allegations were settled by consent agreement on November 18, 1993. *Id.* at 1357-61. Respondent's prescreening is not, therefore, at issue.

² 118 F.T.C. 821 at 838-95 (1994).

³ Judge Parker ruled that the time limits required by recent amendment were impossible in this case. Order of September 30, 1996.

⁴ References to the record are made using the following abbreviations:

F	Finding of Fact
CX	Commission Exhibit

(continued...)

⁴ (...continued)

TU

Respondent's Exhibit

References to trial transcript are usually made using witness name, page and lines:

Dexter 1231/4-21.

References to exhibits include number and page:

CX 125-3

TU-115 p.4.

8. Credit grantors supply information to consumer reporting agencies so they can later determine credit eligibility based on information they receive from consumer reporting agencies. (Pendleton 405/1-5.)

9. Credit grantors need accurate data about the creditworthiness of consumers. (Johnson 1206/17 -- 1209/7.)

2. Evolution of the Credit Reporting Industry

10. The credit reporting industry has changed over time. Initially, retailers and other credit grantors relied on their own experience with a consumer to grant credit. Credit grantors started to exchange information about consumers. Credit bureaus developed to pool information about consumers. (Johnson 1206/16 -- 1208/1.)

11. After World War II, consumer credit grew. Computers enabled consumer reporting agencies to store more information. (Johnson 1205/24 -- 1206/11; 1210/7-16.) This led to a uniform system of reporting credit information. (Johnson 1206/7-11; 1210/7-16.) The industry consolidated with large regional and national privately held consumer reporting agencies. (Connelly 2494/19 -- 2496/21.)

12. From 1975 to 1980, the large national consumer reporting agencies offered “affiliations” whereby local bureaus own data housed in the computers of the national consumer reporting agencies which supply information in their computers to credit grantors. (Connelly 2498/4 -- 2499/2, 2499/7-15.) In the late 1980s, a final wave of consolidation took place, resulting in three consumer reporting agencies -- Equifax, Experian, and Trans Union. (Connelly 2506/2 -- 2508/14.)

3. Credit Scoring

13. The information credit grantors use to evaluate consumers has evolved. At first, credit grantors pooled only negative information. Consumer reporting agencies started gathering both negative and positive information. (Johnson 1209/12-25.)

14. Computers enabled credit grantors to analyze information about a consumer through “credit scoring.” (Johnson 1209/15 -- 1213/11.)

15. Credit scoring uses credit information to build models to predict a consumer’s likely future credit performance. Most of the data used for credit scoring comes from the consumer reporting agencies. (Coffman 3825/18 -- 3826/2; Rapaport 673/15-25.) This data is objective and is a better predictor than information provided by the consumer filling out an application. (Coffman 3806/2-14; 3857/24 -- 3858/4; 3858/17 -- 3859/3; CX 122-P.)

C. Trans Union Consumer Reporting

16. Trans Union has CRONUS, its system for supplying consumer reports. (Botruff 2043/3-6; Rock 2086/15-16.) CRONUS contains 600 million records. (Weith 1867/21-23.)

17. Trans Union receives consumer accounts receivable information from credit grantors such as banks, mortgage companies, credit unions, automobile dealers, and collection agencies, as well as public record information. (Stockdale 873/22-25.) Trans Union receives 16,000 magnetic tapes or computer disks monthly, with information on 85,000 customers. (Stockdale 874/4-23.)

18. Trans Union receives information on 1.8 billion tradelines⁵ a month, including public records, collections, student loans, and child support information. (Stockdale 908/1-19.) Some customers report information daily to Trans Union; most report monthly or according to their billing cycles. (Stockdale 904/8-11; Frank CX 186 at 19/3-6.) Most subscribers to Trans Union (credit grantors) report customer account information in the Metro Format, a form designed by credit grantors. (Stockdale 901/11-18; Botruff CX 181 at 26/15 -- 27/17; 65/3-12.)

19. Information submitted by credit grantors to Trans Union is added to CRONUS. (Stockdale 879/14-19; 880/3 -- 881/8.) Accounts receivable information is separated geographically. (Stockdale 879/7-16.) Due to large volume, only some files on CRONUS can be updated each day. (Stockdale 879/13-16.) CRONUS is updated each week. (Botruff CX 181 at 30/18 -- 32/7.)

20. To match incoming information to that in CRONUS, Trans Union will use account number, name, account type and house number of address. If no match occurs, a new record is created on CRONUS. (Stockdale 909/13 -- 910/8; 911/17-25.)

21. Information is also added to CRONUS by the ANCI file. (Stockdale 881/10 -- 882/9; 884/6-11.) The ANCI file gets information from consumers and credit grantors. (Stockdale 882/10-24.) Each day the ANCI file is read into CRONUS. (Stockdale 884/6-11.)

22. For CRONUS, tradeline information includes: a customer's account number, name, address, telephone number, social security number, and any generational suffix; the open date of the account; the subscriber's (credit grantor) name and code, and its kind of business ("KOB"); the verified date on the account; the type of loan; the credit limit assigned by the credit grantor; and the closed date of the account. (Stockdale 893/6-15; 894/4-12; 895/16 -- 896/1; 896/19-22;

⁵ A "tradeline" is a consumer account. F 22, 23.

than 1% of the records in CRONUS do not have tradelines. (Stockdale 906/1-8, 21-23; 904/15-18; Botruff CX 181 at 62/15-24; Tr. 904-05; CX 358-G.)

D. Trans Union's Target Marketing

24. Trans Union uses credit information from CRONUS, along with other information, to create products for its target marketing business, using the "Master File" database (F 25-36; 112-116), and "Standard Characteristics" (F 108-111). Trans Union's target marketing products are: "indicator" or "select" (F 37-76); modeled products (F 77-98); and TransLink and the other databases (F 99-107).

1. Trans Union's Master File

25. Trans Union's data for target marketing is its Master File. (CX 72-C.) The source for the Master File is CRONUS and the TransMark file which is a "snapshot" of CRONUS. (Cabigon 1365/13-18; Kinsinger 2017/19-23; Weith CX 196 at 179/11-13.) The TransMark database is created each month of records from CRONUS. (Weith CX 196 at 179/12-13, 21-22; 180/11-12.) It combines all CRONUS records on the same name and address. (Weith CX 196 at 186/12-19; 188/7-14.)

26. The Master File is rebuilt three times a year (in 1997, in April, September and December). (Admitted; Cabigon 1366/6-12; Davis 62/16 -- 63/8.) The Master File involves 160 million persons and 105-110 million households. (Weith 1859/8-18; CX 333.)

27. The Master File excludes persons based on the number of and qualifications of their tradelines. (Weith CX 196 at 189/19 -- 190/11; 191/7-15; CX 101-A - C; Cabigon 1372/7 -- 1374/8; CX 329-A; CX 341.)

28. The September 1997 Master File initially verifies the existence of at least one open and qualifying trade in the individual's CRONUS record. "Verified" means that some activity occurred within the last 12 months, and "activity" means that something was reported, such as the opening of the tradeline or the receipt of a payment. (Cabigon 1372/18 -- 1373/7; CX 329-A; Weith CX 196 at 197/24 -- 198/14.)

29. For a single trade to qualify for the Master File, there must be no date closed present on the record, the trade must not be disputed, and the trade cannot be a collection set or a public record set. (Weith CX 196 at 191/7-15; 227/1-5; Cabigon 1374/5-21.)

30. A single tradeline with an account type "I" (installment) or "M" (mortgage) and a current balance of zero will not count as the single qualifying trade for the Master File because those indicators signify that the tradeline is closed. (Weith CX 196 at 194/13 -- 195/3.)

31. The Master File "list exclusion" is a second qualification requiring that a consumer have at least two open trades, one verified within 12 months. Prior to January 1998, consumers with less than two open trades but still meeting the one qualified tradeline requirement were placed in the Emerging Consumers file. Consumers who have at least two open trades, one verified within 12 months, were then included in the Master File and the Attribute or Standard Characteristics File. (Cabigon 1373/8 -- 1374/4; CX 329-A; Weith CX 196 at 224/23 -- 225/10; CX 104-B.)

32. Trans Union withdrew some information in the Master File for sale after September 30, 1997, but the minimum requirement for the Master File did not change until January 1998. (Weith 1831/23 -- 1832/6.)

33. The minimum requirement for the Master File now is either two trades reported in the last six months, or one trade reported in the last six months matched to an outside vendor file. (Weith 1830/23 -- 1831/4; Cabigon 1386/14 -- 1388/7; CX 332-A; CX 339-A.)

34. The Master File obtains a subscriber number from a person's tradeline in CRONUS. (Cabigon 1393/11-16; Weith 1847/13 -- 1848/19.)

35. Employees of ACXIOM, a corporation whose single largest stockholder and second largest customer is Trans Union, with Trans Union employees, build and sell information in the Master File. ACXIOM ensures that addresses are correct. (Davis 85/12-17; Weith 1842/4-15; Hinman 2338/7 -- 2339/11.)

36. The Master File is verified through the U.S. Postal Service's National Change of Address file ("NCOA"). (Weith 1838/10-21; Davis 87/1-10.) Fraudulent addresses are excluded. (Weith 1833/19 -- 1834/24.)

2. Indicators from the September 1997 Master File

37. The Master File contains "indicators" ("selects") (such as the fact that a person has a bank card) derived from CRONUS and other sources. CX 1-A -- Z-6 shows the selects available to a customer assembling a target marketing list. (Davis 91/2-21.) Half of this information is from CRONUS. (Cabigon 1438/12-25.)

a. Automobile

38. Trans Union offers data showing open automobile loans, loan type (lease, refinanced loan, equity transfer loan, automobile loan), open dates and expiration dates for the lease or loan, and the high credit amount of most current loans/leases. Trans Union also offers "driver" lists. (CX 1-A -- E.)

39. The source for the "auto expiration date" (CX 1-A), "auto high credit" (CX 1-B), "auto loan type" (CX 1-B), and "auto open date" (CX 1-C), is CRONUS. (Cabigon 1377/10-24.) A consumer is a "driver" (CX 1-E) if CRONUS shows an auto loan or a business that issues gasoline cards. (Cabigon 1378/12-19.) When the September 1997 Master File examines CRONUS to determine whether a person has an auto loan, it will not consider the loan if the open date is more than five years old. (Weith CX 196 at 211/13-16; 212/3-4.) The availability of loan and lease dates permits targeted promotions. (CX 45; CX 261-E -- G, J.)

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b. Bank Card

44. Trans Union offers a list of persons with an open bank card (including the open date of the most recent bank card) and an open premium bank card (including the open date of the most recent premium bank card). (CX 1-C, R, T.) Trans Union's September 1997 Master List

defines and calculates its premium bank card select as a bank card with a credit limit of more than \$9,999. (Dexter 1271/17-20; CX 64-A; Weith 1867/5-13.)

45. To generate the indicator "presence of an open bank card" (CX 1-C), the September 1997 Master File program looks to the CRONUS record. (Cabigon 1377/21 -- 1378/4.) For a person to qualify for a premium bank card, CRONUS must indicate a tradeline with a type of business "B," an account type equal "R," and a credit limit field indicating greater than or equal to \$9,999. (Weith CX 196 at 230/22 -- 231/8; CX 102-E; Cabigon 1427/9-17.)

46. Trans Union's target marketing competitors offer bank card and premium bank card selects obtained from self-reported survey responses or from files of credit card information obtained from Business Development, Incorporated ("Business Development") or Dresden Direct. (F 47-50; 148-154.)

47. [

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48. First Data's active bank card select is an open bank card in a household. (Cleary 3094/17-22; TU-119 at 6.) [

] Nothing in the self-reported credit card information nor in the information provided by Business Development reveals the open date of the bank cards or premium bank cards. (TU-130 p.4; TU-117 p.2; TU-120 p.2; Schultea 3928/2-4; CX 310-D.)

49. [

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50. In addition to information from self-reported questionnaire responses and Dresden Direct, ACXIOM obtains credit card information from other sources, including information that a consumer used a credit card at one time, obtained from companies that compile that information. (Hinman 2247/18 -- 2248/7, 14-16.)

51. JAMI Marketing ("JAMI") manages several lists that purport to provide credit card information. The source of the credit card data in those lists is neither credit grantors nor consumer reporting agencies. (Miller 3017/6-11.) The source is a list of the list owners' customers who used a credit card to make a purchase from the list owner. (Miller 3018/22 -- 3019/11; 3058/5-17; 3060/20 -- 3061/13; 3065/13 -- 3067/25.) JAMI-managed lists do not have premium bank card selects. (Miller 3019/22 -- 3020/5.)

c. Department Store Card

52. Trans Union's September 1997 Master File offers open department store trades (including open date of the most recent department store trade). (CX 1-E, R.) To generate the open department store card indicator (CX 1-E), the Master File looks to CRONUS. (Cabigon 1378/5-11.)

53. Trans Union's target marketing competitors offer similar department store card selects obtained from self-reported survey responses or from files of credit card information obtained from Business Development, or Dresden Direct. (F 54; 47-48; 148-154.)

54. [

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d. Finance Trade

55. Trans Union's September 1997 Master File List offers several finance loan lists including an open finance trade (with the open date of the most recent finance loan), a "30/60/90 day" finance trade, a mortgage or auto loan, and a closed finance loan trade. (CX 1-F, R.) A "30/60/90 day" trade is due in 30/60/90 days. (Davis 154/24 -- 155/7; Cabigon 1412/7-11.)

56. To generate the open finance trade indicator (CX 1-F), the September 1997 Master File examines CRONUS to determine if the subscriber's business is "finance," if the account type is installment, and if the finance trade has an open date. (Cabigon 1378/20-23; Weith CX 196 at 228/14-25; CX 102-A -- B.)

57. To generate the indicator "30/60/90 day finance trade" (CX 1-F), the September 1997 Master File determines if the individual has a tradeline with a finance company that issues 30/60/90 day loans by examining from CRONUS the subscriber's business and the account. (Cabigon 1378/24 -- 1379/16.) To generate the "finance loan closed" indicator (CX 1-F), the September 1997 Master File uses CRONUS. (Cabigon 1379/20-24.)

e. Head of Household

58. Trans Union offers a select for head of household. (CX 1-H.) The "head of household" (CX 1-H) is derived from CRONUS; the person with the highest number of trades is the head of household. (Cabigon 1380/1-19; Weith 1832/11-14.) If a household contains two CRONUS records with the same number of trades, the head is the first record on file. (Weith

and mortgage balance information from CRONUS and subtracting them from the estimated home value. (Weith 1846/17 -- 1847/5; 1850/1-3; Cabigon 1380/20 -- 1381/11.)

65. [

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66. Metromail obtains information regarding mortgages -- including rate type, loan type (FHA, VA, Conventional), mortgage amount, and purchase price -- from deeds in the public record. (Litz 2972/6-9; 2975/5 -- 2976/7.) Metromail also offers its clients the "Equity Spenders" list which identifies households, from public record information and from self-reported information, that have recently refinanced or purchased a home. (Litz 2973/6-19; TU-115 p. 113; TU-116 p. 16.)

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g. Length of Residence

70. Trans Union offers a length of residence select showing the number of years a person has resided at an address. (CX 1-J.) The Master File length of residence indicator uses data from CRONUS, including mortgage open dates. (Cabigon 1371/9 -- 1372/3; 1381/12-17; 1415/14-19.)

h. Mail Order Buyer

71. Trans Union lists mail order buyers, including its "MOB1" indicator (CX 1-J) based on identifying tradelines (such as Spiegel's, L.L. Bean, Eddie Bauer) on CRONUS and identifying as a mail-order buyer on the Master File persons with those tradelines. (Weith 1847/13 -- 1848/19.)

i. Singles Select

72. Trans Union offers a "singles" list showing single persons. (CX 1-U.) This Master File indicator is from tradelines on CRONUS showing that credit was granted to a person (rather than a joint account). (Cabigon 1419/21 -- 1420/4; Weith CX 196 at 219/2-4; CX 99-O.)

j. Student Loan

73. Trans Union offers several student loan selects showing a student loan (with the open date of the most recent student loan), the aggregate high credit amount of all of a person's student loans, and a closed student loan. (CX 1-W.) A CRONUS record qualifies as a student loan on the September 1997 Master File if the loan type is "student" and the date closed is not equal to zero. (Weith CX 196 at 212/10-21; CX 100-N.)

k. Upscale Retail Card Selects

74. Trans Union's September 1997 Master File offers a select for an open upscale retail card (including the open date). In its promotional materials and internally, Trans Union indicates that its upscale store select is based upon the National Retail Federation's listing of "prestigious" stores. (CX 1-Q, Y; CX 72-C; Davis 226/24 -- 227/3.)

75. For the upscale retail card and open date indicators, the September 1997 Master File searches CRONUS records to find an open upscale retail card and an open date for the tradeline. (Cabigon 1383/2-12; 1393/11-16; Weith CX 196 at 229/7 -- 230/6; CX 102-D.)

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3. The September 1997 Master File

a. Trans Union's "E-Val"

77. Trans Union offers a product called E-VAL, a scoring system that estimates the

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83. According to the SILHOUETTE User's Guide, "[a]ssignment to a cluster is based on a credit view of consumers Cluster 8, because of its generally high level of credit activity, might contain consumers who are good candidates for credit offers." SILHOUETTE distinguishes its clusters based on some of the same factors used by Trans Union in its target marketing list products -- e.g., finance accounts, bank revolving, department store, retail -- and the variables in clusters can be "zero," "one," and higher numbers. (CX 122.)

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86. Until October 1, 1997, Trans Union offered SOLO to its target marketing customers; currently SOLO is available only in the context of firm offers of credit. (Davis 68/19-22.) Trans Union withdrew SOLO because of the FCRA amendments and the fact that customers had learned that SOLO clusters correlated with credit performance characteristics. (Davis 67/23 -- 68/4.)

87. Prior to October 1, 1997, Trans Union attached SOLO codes to a customer's own client lists, allowing clients to analyze their existing customer base by SOLO codes. (Dexter 1312/17 -- 1315/4; Davis 70/6-18; CX 14.) This good credit risk list constitutes a consumer report. (Marquis CX 188 at 128/2-9.) [

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88. Until September 30, 1997, Trans Union offered to append SOLO clusters to TransLink lists. (Dexter 1236/22 -- 1237/25; Davis 67/19 -- 68/4; CX 125-E.)

89. [

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90. Products similar to Trans Union's SOLO and P\$YCLE in the target marketing list industry are not as strong as the Trans Union products. (Hinman 2271/9-11.) ACXIOM received SOLO and P\$YCLE codes from Trans Union until October 1, 1997. (Hinman 2269/15 -- 2270/12.) The models that ACXIOM used in place of P\$YCLE and SOLO (Claritas' Affluence and WealthWise and Experian's P\$YCLE) do not provide as strong predictive results as the Trans Union products. (Hinman 2270/13 -- 2271/15.)

e. TIE

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98. Metromail contributes income information, based on census data and self-reported consumer survey responses, to IN-SOURCE, a joint product with Experian. (Litz 2983/14 -- 2984/11.) ACXIOM also has income information that it receives from other companies' self-

101. When Trans Union returns to the merchant the name and address of the person on the credit card, the merchant prints a mailing label and sends the consumer a piece of junk mail. The merchant can use the consumer's purchase information and know what the consumer bought. (Marquis CX 188 at 144/7-10; 151/10-12.)

102. Trans Union is the only consumer reporting agency that owns and markets this reverse append product. (Davis 141/6-9; CX 78-Z-29.) Direct Tech, currently owned by Experian, licenses the reverse append product from Trans Union. (Smith 3298/16-23; 3303/5-12.)

103. Citibank does not permit Trans Union to use their credit card account numbers for reverse-append disclosure of names and addresses in the TransLink product. (Marquis CX 188 at 147/20 -- 148/1.)

104. TransLink is among Trans Union's largest selling target marketing products. (Admission.)

105. Until September 30, 1997, Trans Union appended SOLO, TIE, age data, and other Master File elements to TransLink lists. (Dexter 1236/22 -- 1237/25; Smith 1488/23 -- 1489/5; CX 125-E; CX 129; CX 279-B.)

b. New Issues File

106. Trans Union offers the New Issues File whereby customers may rent a list of persons who received credit within the last 90 days. The file is created by selecting from CRONUS names and addresses of consumers with at least two tradelines, one of which has an open date within the last 90 days. (CX 4; Respondent's Admissions.) A customer sees the time (30/60/90 days) and the type of credit (retail, finance, mortgage or auto loan trades). (Davis 42/16 -- 43/1; CX 4.) Trans Union discontinued the sale of the New Issues File for target marketing customers and now the file is available only for firm offers of credit. (Davis 81/24 -- 82/4.)

c. Emerging Consumers File

107. The Emerging Consumers File, based on data from CRONUS, included persons with one tradeline within the prior twelve months. (Cabigon 1373/13-23; CX 329-F.) The tradeline qualified if it was not closed. (Trans Union Corporation's Answers to Complaint Counsel's Third Set of Interrogatories, Answer to Interrogatory No. 3.) Trans Union discontinued the Emerging Consumer File in part because it might be "communicating information that we shouldn't be communicating." (Davis 89/18-20.)

5. Characteristics and Attributes

108. [

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109. The source for the Attribute File is CRONUS. (Cabigon 1368/8-22; Davis 35/19-21.) To be included in the Attribute File, a person must have at least two open tradelines, one within the last 12 months. (Cabigon 1373/23 -- 1374/4; CX 329-A.)

110. Trans Union released to its target marketing clients its Standard Characteristics ("Marketing Variables" (CX 78-Z-20 -- 22)) with names and addresses. (Davis 58/22 -- 59/14.) Among these characteristics are: months since oldest trade opened, and the number of personal finance inquiries, finance installment trades opened in 24 months, and bank card trades. (CX 78-Z-20 -- Z-22.) Trans Union discontinued the disclosure of these characteristics for target marketing on October 1, 1997. (Davis 59/15-19.)

111. The Standard Characteristics File is available for use in the PerformanceBase/RelationBase File only if a customer is extending a firm offer of credit. (Davis 40/10-16; 120/17 -- 121/4; Dexter 1281/11-16; CX 317.)

6. Changes in the Trans Union's Master File
and Target Marketing Products

112. The Master File's content remained unchanged until December 1997. On October 1, 1997, Trans Union discontinued certain files for target marketing. CX 2 lists the files in September 1997 that remained available after October 1, 1997. Trans Union discontinued: all open dates; high credit and loan type (although a finance mortgage trade remained available); student loan closed; and PIC, P\$YCLE, E-Val, SOLO and TIE. (CX 1-A -- Z-6; CX 2-A -- T; Dexter 1281/11 -- 1282/8; Davis 98/17 -- 99/7; 142/5-12.)

113. Trans Union discontinued the Master File items after October 1, 1997, which were reintroduced in December 1997: 30/60/90 day finance loan; premium bank card; length of residence; and income and home value (both purchased from an outside source). (Davis 165/7 -- 166/23; CX 342-E, H -- K, M -- N.)

114. Trans Union stopped offering the data in Findings 112-113 to its target marketing customers as of October 1, 1997, because "before it was a cease and desist penalty, it now became a \$2500 per occurrence penalty" (Dexter 1280/19 -- 1281/10; Marquis CX 188 at 174/23 -- 175/6, 22-25); Trans Union "had gone from an environment where the worst thing that could

happen is that we would have to stop selling lists to a world where there were significant financial penalties” (Davis 142/22-25; CX 298-B.)

115. CX 342 contains the Master File items available after December 1997, derived from CRONUS, showing presence of: an auto trade; second auto trade; bank card trade; department store card; driver data; finance loan; 30/60/90 day finance trade; head of household; seven KOB (kind of business) items; mail order trade; one mortgage; two or more mortgages; gold, platinum or optima card; student loan; and upscale retail trade. (CX 315-D, E, G -- M, Q -- W; CX 332-B; Cabigon 1426/9-23; 1427/18 -- 1428/3; 1429/9-17; 1429/22 -- 1430/2; Weith 13:1832/2 -- 1833/6.)

116. A file (“Preapproved File”) similar to the September 1997 Master File is now available.

117. This file includes the Standard Characteristics and all of the data are only available for firm offers of credit. (Cabigon 1384/6 -- 1385/18; CX 340-B; CX 333; CX 334; CX 335.)

7. Promotion of Trans Union’s Target Marketing

a. Sales and Revenue

118. Trans Union sells its target marketing lists nationwide. Salespeople look to firms using mail solicitations or telemarketing. Trans Union also sells lists to brokers, list managers, and wholesalers, who sell the information from Trans Union lists with their own data, for sale or lease to direct marketers. (Davis 45/3 -- 47/24; CX 15; CX 34; CX 41; CX 54; CX 307; CX 42; CX 51; Dexter 1231/4-21.)

119. Trans Union sells target marketing lists for one-time use by its customers either by rental or by license. Trans Union charges a “base price” per thousand names, with additional charges per thousand based on the “selects” that the customer has chosen. (Davis 44/6-24; 64/6-22; 65/3-14.)

120. Trans Union and its competitors in the target marketing list industry advertise their lists in the Direct Marketing List Source which includes over 19,000 entries, including consumer, business, and international lists, that are available in 212 markets. It is published every other month by Standard Rate and Data Service (“SRDS”), the leading publisher of advertising rate and direct marketing information, and is considered to be the “Bible” of the target marketing list industry. (Markowski 2427/6-10; 2429/10-20; 2439/1-8; 2430/5-10; 2431/2-4; Dixon 298/9-16; Hinman 2256/17 -- 2257/22.)

121. The format for the Direct Marketing List Source has eleven segments, describing the list, selects and the list source. (TU-163 at A-11.) The information provided is obtained by SRDS from the list owner/manager. Numerous listings in SRDS, however, do not contain

information for every segment, including source. The only segment that SRDS confirms independently involves the five most recent sales of the list. (Markowski 2440/3-11; 2441/6-25.)

122. Trans Union's PerformanceData division employs 46 people including 10 salespersons. PerformanceData had 440 target marketing customers and \$34 million in revenue in 1997. (Davis 27/18-21; 37/25 --38/4; 48/8-10; 141/10-14.)

b. Credit-Based Marketing Information

123. Trans Union promotes its Master File as a unique source of credit-based marketing information from CRONUS. (CX 57; CX 58-C; CX 60-A; CX 69; CX 81; CX 264-A; CX 297-A.) A promotional letter states: "Trans Union is a unique provider of credit-based marketing information. Our database is unmatched when compared to traditional direct marketing vehicles on the market today." (CX 260-B.)

124. Trans Union promotes target marketing lists with credit information:

- a. Trans Union's Standard Characteristics correlate highly with "lending activity." (CX 263-A.)
- b. Trans Union data is "highly predictive in response modeling and profiling, especially with financial offers." (CX 265-A.)
- c. Trans Union's finance trade select provides consumers who have "generally had trouble with their credit in the past and are highly responsive to credit offers." (CX 68-A.)
- d. Trans Union information contains "spending, payment and demographic data" that is "highly predictive and cost effective." (CX 57.)
- e. "[S]ince credit has been established [for consumers on the student loan list], one could argue that this list would have higher pass rates through the credit bureaus." (CX 136.)
- f. "[The demographic variables that Trans Union can provide] are derived from approved application information and financial information provided by subscribers." (CX 70-A.)
- g. Trans Union's premium bank card select indicates individuals "who have been approved for this high credit amount in the past." (CX 64-A.)

125. Trans Union distinguishes itself from "its traditional competitors within the credit reporting industry," who have not pursued Trans Union's "open policy" regarding the use of

credit information by target marketers. (CX 61-A; CX 78-G; CX 268-A.) Although Experian “comes closest as a competitor,” Experian “cannot provide . . . credit based data . . . our data far outweighs their strength.” (CX 70-B; Dixon 267/11 -- 268/1.)

126. Trans Union promotes the fact that each person in the Master File must have at least two active lines of credit. (CX 7; CX 33-A; CX 61-A; CX 78-G; CX 268-A.) Trans Union also publicizes that a person with no activity in a 12 month period, such as payments or credit, is dropped from the Master File. (CX 69-A.) Trans Union also publicizes the criteria for other lists in its Master File, such as the premium bank card with a credit limit above \$9,999. (CX 64-A.)

127. The Master File lists chosen by Trans Union’s target marketing clients show individual credit information. (CX 33-A; CX 38-C, D; CX 62; CX 68; CX 79; CX 256-A, B; CX 257.) In response to a client offering a \$5,000 unsecured loan whose “ideal candidate” had \$10,000-\$15,000 in debt, and \$20,000+ in home equity, a salesperson recommended persons with open mortgage trades, open finance trades, \$30,000+ in home equity and a home market value below \$250,000. (CX 67.) Home Mortgage Funding, a mortgage refinancing lender, selected persons with open finance trades and multiple mortgages for a telemarketing offer to assist those whose property “came up as having a high interest” mortgage. (CX 19-A -- F.)

128. Mortgage refinance companies and home equity lenders use the Master File lists for finance loans, first and second mortgages, length of residence, high credit amounts or initial loan values for mortgages, and home equity or home value. (CX 18-A, B, J; CX 23-B, C, F, G; CX 24-A, B, L; CX 39-B -- D.) Client mail or telemarketing shows that those solicited have high interest loans or other debt to consolidate. (CX 19-F; CX 26-H; CX 28-B; CX 32-B; CX 39-D.) Clients, such as Mainstreet Mortgage, use a select identifying individuals with open mortgages issued from finance companies. (CX 40-C, D.) Respondent’s witness, Kenneth Scott, stated that finance company users are people who have had credit problems in the past, and, quite likely, have had a bankruptcy. (Scott 2855/23 -- 2856/7.)

129. Trans Union’s mortgage open date lists permit a target marketing client to determine the date a mortgage was taken out and the interest rate. The Mortgage Banc ordered a list of persons with FHA mortgages opened between January 1994 and October 1995 with initial loan values between \$75,000-\$99,999 and between \$100,000-\$150,000. (CX 17-A-B.) Another ordered a list of persons with FHA mortgages opened between January and June 1995 with an opening balance greater than \$100,000. (CX 21-A.)

130. Trans Union’s lists allow target marketing customers to obtain lists based on detailed credit information, such as whether the person has at least three open tradelines and the types of tradelines (CX 25-A) or whether a person has two open tradelines, one of which has been open for more than 36 months. (CX 23-B -- C; CX 28-A.)

131. Clients may copy information from the Master File. (Davis 162/2-17; Dexter 1249 -

the first and second most current auto loans/leases and mortgages; home value ranges; and length of residence. (CX 1-C, J, N, P.) Other information is "printable," including high credit amounts and loan type for auto loans and mortgages and the aggregate high credit for all student loans (CX 1-B, C, O, P, W.)

132. Trans Union's Master File showing the presence of an upscale retail card was used as part of the credit-based decision for a mailing of a "pre-approved Rubenstein Bros" credit offer. (CX 35-A; Tr. 1938-40, 1945-46, 1957-59, 1962-66, 1973-74.)

c. Depth and Timeliness

133. Trans Union emphasizes that the Master File is "the freshest and most comprehensive" data due to its "robust and extensive source of original credit based information" (CX 268-A; CX 264-A), and that Trans Union has the largest data of consumer credit information in the United States. (CX 75-B.) Trans Union describes the Master File as the "richest source of individual-level financial data available" (CX 321), and that its database is "kept fresh and current by nearly two billion updates supplied by credit grantors every month, and is maintained for accuracy and quality." (CX 72-B.)

134. Trans Union's "primary database" is updated every 6.5 days from accounts receivable information from the nation's credit grantors. (CX 78-G; CX 268-B.) Trans Union has automobile loan information for all states. (CX 66-A.)

d. Individual Observed Behavior

135. Trans Union promotes the Master File as a unique source for individual-level observed behavior data. According to CX 83-C, a PerformanceData brochure, the Master File is "without equal" and its information is "highly accurate" and is "based on actual behavior -- not self-reported or neighborhood values." (CX 83-C.) The Master File is "living and breathing

- 8. Individual Observed Credit Information for Target Marketing
 - a. Trans Union's Competitors' Target Marketing Lists

137. Trans Union's competitors in the target marketing list industry include: First Data Solutions (formerly Donnelley Marketing) ("First Data"); R.L. Polk & Company ("Polk"); Metromail Corporation ("Metromail"); ACXIAM Corporation ("ACXIAM"); and Experian (formerly TRW)("Experian"). (Davis 161/5-16; Cleary 2942/4-18; Hinman 2199/19 -- 2200/17; M.Smith 3299/22 -- 3300/8.)

(1) First Data, Metromail, and Polk

138. First Data, Metromail, and Polk provide their customers with lists of consumers for use in target marketing. (Hinman 2213/8 -- 2214/14; Scott 2686/15 -- 2687/8.) First Data's DQI² contains 97 million households and the names of 185 million persons (Cleary 3083/25 -- 3084/7); Metromail's National Consumer Database ("NCDB") contains 100 million households and the names of 155 million persons (Litz 2968/12-23; 2969/5-10); [

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141. Metromail's NCDB gets information from: public records of real estate transactions from county clerks, courthouses and tax assessor files maintained in Metromail's Realty Database, a separate file of 30 million homeowners; information that Metromail obtains from newspapers; and information from catalogers and magazines that Metromail maintains in its Mail Order Responder (MOR) Bank. (TU-115 pp. 158 and 160; Litz 2970/5 -- 2971/7; 2972/10 -- 2973/3.)

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143. First Data, Metromail, and Polk have self-reported information. Metromail's BehaviorBank includes 28 million households and 40 million persons (TU-115 p. 166); Polk's Lifestyle Selector includes 36 million persons (Nusbaum 2879/11-19); [] Self-reported information is obtained from responses to consumer surveys and from product registration cards. (TU-117; TU-120; TU-130.) Metromail's BehaviorBank data is stored separately from the NCDB information; some of the names in the two files overlap. (Litz 2976/16 -- 2977/17.) [

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(2) ACXIOM

144. ACXIOM is developing a list database called InfoBase Prospects, on 117 million households and names of 160 million persons. (Hinman 2340/4-10; 2261/12-19) ACXIOM compiles Consumer InfoBase from data it obtains from credit card information from Trans Union and from Dresden Direct (Hinman 2247/23 -- 2248/21); property transaction data, including mortgage data from deeds obtained from county tax assessors registrars (Hinman 2250/5-14); and income information from self-reported survey data and estimated income models obtained from Polk, Experian and Metromail, and, prior to September 30, 1997, from Trans Union. (Hinman 2251/11 -- 2252/21.) Data in Consumer InfoBase is in InfoBase Prospects. ACXIOM is prohibited by contract from using in its target marketing list business any data supplied by Trans Union for Consumer InfoBase. (Hinman 2308/21 -- 2309/3.)

(3) Experian

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146. Experian uses individual information in its consumer reporting database (FileOne) to compile PDS allowed by the consent order Experian (at that time "TRW") entered with the FTC:

name; telephone number; address; zip code; year of birth; age; generational designation; and social security number. The consent order permits Experian to also use mother's maiden name but it does not. (TU-109; M.Smith 3293/24 -- 3294/11.) [

151. Business Development updates the National Marketing File whenever it receives a list of consumers from a client. If a consumer is already in the National Marketing File, the counter is increased by one and, if the client is a bank and there is no "B" in the bank card field, a "B" is added. The bank card field contains only one "B" even if the consumer has appeared on more than one bank's list. (Schultea 3913/2-4.) If there is a consumer name on the client's list that is not already in the National Marketing File, the name is added to the file. (Schultea 3917/20 -- 3918/18.)

152. A record is deleted from the National Marketing File only when the U.S. Postal Service's National Change of Address ("NCOA") file indicates that the address is no longer viable or the consumer is deceased, in which case the entire record is removed from the National Marketing File. (Schultea 3912/4-12; 3918/24 -- 3919/7; 3920/2-11.) Otherwise, the information from the original file build in 1989-1990 is still contained in the National Marketing File, as is all information added later. The National Marketing File contains references to credit card accounts that have been closed or are inactive. (Schultea 3922/3-14.)

153. Business Development does not know that the consumers in the National Marketing File use one or more credit cards. Business Development's lists show active bank card holders, active retail card holders, and active finance users. (Schultea 3928-34, 3940.)

154. Business Development knows only that consumers have, or had, the number of credit cards -- but not that they are using that credit or that they currently have the number of cards designated. (CX 310-C, D; Schultea 3923/8-23; 3924/24 -- 3925/5.) A "B" indicates only that consumers have, or had, a bank card, not that they currently have or use a bank card. (Schultea 3926/16-20.) The National Marketing File does not contain salary ranges, age ranges, dates accounts were opened, credit limits on accounts, loan amounts, whether a consumer file has been closed, or whether a consumer has a new bank card. (Schultea 3927/15 -- 3928/13.)

b. Trans Union's Exclusively Individual-Level Data

155. Consumer information in target marketing lists can be individual, household, census block, zip-plus-four, and zip code. "Zip-plus-four" refers to a geographic area defined by a nine digit postal code and, in target marketing terms, "zip-plus-four" level data refers to aggregated

an individual it gets even more powerful.” “Powerful” in this context refers to the “[a]bility to accomplish your market objective. To achieve your response rate or to predict a buying behavior.” (Hinman 2259/6 -- 2260/2.)

157. Trans Union’s competitors in the target marketing list industry furnish information in their target marketing lists primarily at the household level or broader.

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160. ACXIOM collects information on an individual level and records it on a household level. (Hinman 2260/15-16.) Within ACXIOM’s household-level records, estimated income is household-level, but age and date of birth is individual-level data. (Hinman 2262/4-11.)

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E. Use of Trans Union’s Target Marketing Information in Credit Eligibility

The Court of Appeals remanded this case on the issue of whether the existence of a tradeline constitutes a consumer report. The Court stated that complaint counsel might satisfy the

factual burden with evidence indicating that Trans Union intended the existence of a tradeline to serve as a factor in credit-granting decisions. The Court added that evidence “that credit decisions could be made, even in part, on such ‘existence’ information might be probative of Trans Union’s intent,” and that the Commission might embark on a similar inquiry with respect to any list criterion employed by Trans Union in its target marketing lists. (Trans Union, 81 F.3d at 233.)

164. The existence of a tradeline, sold by Trans Union in its target marketing business, is used in credit scoring models by credit grantors in their eligibility determinations.

1. Credit Scoring

165. Predictive decision tools use data and statistical analyses to develop ways of using past information to predict future outcomes. Credit scoring uses past information on credit to predict likely outcomes. (Rapaport 673/15-25; Coffman 379/16-22.)

166. Most credit risk models use credit bureau data to observe consumer behavior. (Coffman 3825/18 -- 3826/2.)

167. Established in 1956, Fair Isaac Company (“FICO”) is the leading developer of tools used by the credit industry to determine credit risk. (Rapaport 672/25 -- 673/6.) FICO has scorecards using self-reported information from consumers’ applications and credit bureau information to help credit grantors predict credit risk. (Rapaport 674/15-20; 675/18 -- 676/2.)

168. FICO collaborated with each major credit bureau to develop credit risk scoring offered by each bureau under different names: EMPIRICA at Trans Union; Experian/Fair Isaac model at Experian; and Beacon at Equifax. (Rapaport 680/8-21.)

169. A credit grantor can purchase a credit score along with a credit report from the three major credit bureaus. (Rapaport 681/19-25.) Credit bureau scores use information only available on a credit report and predict credit risk involving the general population, not just the individual credit grantor. Credit bureau scores can be used for decisions to grant an applicant credit, to make a preapproved credit offer, to reissue, increase or decrease a credit line, or for over-limit authorizations. (Rapaport 675/1-8; 679/11 -- 680/7; 680/25 -- 681/9.) Credit card issuers, retailers, finance companies, auto lenders, installment lenders, utilities, and student loan lenders use bureau scores. (Rapaport 682/9-16.)

170. The credit score is returned by the credit bureau from which it is purchased. FICO products return a score and four reason codes showing why an individual’s score deviated from the optimal score. Credit grantors use reason codes to provide reasons for adverse action when

a. FICO's Scoring Models

171. Using Trans Union's credit bureau information, FICO and Trans Union offer: EMPIRICA, a generic risk score which predicts the likelihood of delinquency on a loan or credit transaction by a consumer having at least one tradeline that was delinquent or worse in a two year period; Horizon, which predicts the likelihood a consumer will go bankrupt; and UniQuote, which predicts the likelihood a mortgage account will become delinquent. (Rapaport 690/15 -- 691/7; 692/21 -- 693/7; Tr. 800-02.) Industry Options, a refinement of EMPIRICA, offers scores for the bank card, personal finance, installment and auto loan industries. (Rapaport 692/1-18.)

172. CX 87 is a list of all the scoring factors or adverse action reason codes that are used by EMPIRICA and its Industry Options. CX 309 contains reason codes for the Horizon bankruptcy score. (Rapaport 693/17-22.)

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b. Scoring Model Design and Terminology

174. A credit scoring model may use scorecards, variables, and score values. A scorecard contains characteristics, ranges of attributes and score values of each attribute. (Rapaport 683/20 -- 684/18.)

175. A characteristic is a piece of information describing a consumer such as the number of bank cards in a consumer's credit report. (Coffman 3828/14-23.)

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2. Information Used in Scoring

184. Except for owning property in the case of a mortgage loan, there is no one factor that would make an applicant eligible for credit. (Coffman 3860/20 -- 3861/25.) []

a. Tradelines

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] "EMPIRICA NOT SCORED:
INSUFFICIENT CREDIT message occurs when a credit file does not contain a tradeline opened
for at least six months and a tradeline updated within the last six months." (CX 87-A.)

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b. Characteristics and Attributes

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(1) Bank Card

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195. Number of open bank card trades is a scorecard attribute. (Coffman 3868/16 -- 3869/10.) The predictive attribute "number of open bank card trades" may be qualified by the condition that the trades must have been updated within the last six or twelve months. (Coffman 3869/6-15.) In some models the weight given to the attribute "zero" open bank card trades and the weight given to "one" bank card trade differs. (Coffman 3869/16 -- 3870/9.)

(2) Open Date of Tradelines

196. Scoring models look to the open date of tradelines to determine the age of the oldest trade, how long the consumer has had credit, and how long the consumer has had credit. Certain types of credit. (Coffman 3847/13-17, 23-24; 3876/14 -- 3877/20.) Age of oldest trade is an important indicator of credit performance. (Rapaport 774/6-19.)

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(3) Collection Account

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(4) Finance Trade

(5) Mortgage

204. The number and amount of mortgages are used as predictive attributes. (Coffman 3862/5-17.) Some scoring models accord different scores for mortgage trades. (Coffman 3860/20 -- 3861/25.)

205. Some scoring models use the attribute "mortgage exact amount" and verified mortgage trades with different loan amounts are given different scores. (Coffman 3870/10 -- 3871/4.)

(6) Automobile Loan

206. Some scoring models use as predictive variables the number of auto loans, updated and verified within a certain period as an open loan. (Coffman 3865/10 -- 3866/2; 3867/13-16; 3866/17 -- 3867/12.)

(7) Credit Limit and Date Verified

207. To calculate credit use, a scoring model examines the credit limit in the consumer's credit report; for the calculation, a trade would be open, timely verified, and undisputed. (Coffman 3849/12 -- 3850/8; 3882/7 -- 3884/4.) A recent analysis of a consumer's credit report is important. (Coffman 3850/10-23.)

(8) Zip, Age & SSN

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3. Information Sold by Trans Union in its Target Marketing Business Used in Credit Scoring

211. The presence or absence of a tradeline, bank card, retail account, finance loan, auto loan, collection account or a mortgage is used in credit scoring; so are the amount of a mortgage, the open dates, credit limits, and date of a tradeline. (F 181, 182, 185-187, 189, 191, 192-207.)

4. Credit Grantors Eligibility

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a. Invitation to Apply

213. An invitation to apply is an application for credit, mailed to persons who may return the application to the credit grantor. (Koppin 483/25 -- 484/2; 488/24 -- 489/2; Zancola 666/2-8; 666/25 -- 667/2.) Credit grantors purchase lists of names for mailing the invitation to apply. (Koppin 486/18-20; 487/2-4.) This mailing is not a guaranteed offer of credit. (Pendleton 360/13-18; Zancola 666/2-6; Koppin 482/24 -- 483/2; 489/2-4.) The credit grantor decides to grant credit only after receipt of the completed application. (Pendleton 360/13-25; Koppin 486/23 -- 487/1.)

(1) Wachovia's Invitation to Apply

214. In evaluating applications responding to an invitation to apply, Wachovia uses a credit scoring process by Wachovia and FICO. (Pendleton 360/20 -- 361/9.) [

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(2) Discover's Invitation to Apply

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231. Discover formerly used the existence of a student loan as one of the factors in deciding to extend credit but that was stopped. (Stormoen 2959/22 -- 2960/24.)

b. Information Sold by Trans Union in its Target Marketing Business is Used in Credit Grantors' Scoring

232. In deciding credit eligibility, credit grantors use the presence of a tradeline, bank card, or mortgage. Credit grantors also use: FICO scores, the number of retail cards, and the open dates and credit limits for tradelines. (F 216, 218, 220, 224, 226-229.)

c. Prescreened Offers of Credit

233. In a prescreened offer of credit, a credit grantor mails a firm offer of credit to a

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(2) First Card's Prescreen

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(4) Northern Trust's Prescreen Process

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d. Information Sold by Trans Union in its Target Marketing Business is Used in Credit Grantor's Prescreening

295. Credit grantors use a tradeline, bank card, finance company trade, mortgage, refinanced trade, and a student loan in prescreening. (F 243-245, 248-252, 258, 259, 269, 278-282, 288, 290, 291.) Credit grantors also use FICO scores, type of tradeline, and credit limit and open date of tradelines in prescreening. (F 242, 247, 253, 254, 264, 268, 275, 277, 283, 289.)

F. Consumers' Privacy and Disclosure of Consumer Reports

1. Survey of Consumer Privacy

296. Complaint counsel offered a survey to assess consumer attitudes regarding the use of information derived from CRONUS and from credit reports to compile marketing lists. (Mazis 1080/10-18.)

297. Dr. Michael Mazis wrote the questionnaire and determined the methodology for the privacy survey. (Mazis 1081/21-24.) International Communications Research ("ICR") conducted the survey using Dr. Mazis' questionnaire and methodology. (Mazis 1082/25 -- 1083/3; Waldeck 1057/1-8; 1057/14-20; 1068/8-23.) ICR is qualified to conduct such a consumer survey. (Waldeck 1051/24 -- 1052/3.)

298. Ms. Karen Waldeck collected and reported the data for Dr. Mazis' survey (CX 274) and prepared a final report. (CX 274; Waldeck 1054/3-5; 1054/20 -- 1055/1; 1063/1-9; 1064/16 - - 1065/6.)

299. Dr. Mazis used a telephone survey to obtain a nationally representative sample. (Mazis 1082/22 -- 1084/10.) ICR conducted the survey by telephone. (Waldeck 1057/3-7.)

300. ICR selected the households to be surveyed through random digit dialing. (Waldeck 1059/9-12; Mazis 1084/5-6, 24-25; CX 274-C; CX 354-A.)

301. In order to ensure a random sampling within each household, ICR used the "last birthday" method requiring interviewers to request to speak with the individual over the age of 18 who had the most recent birthday in each household. (Waldeck 1059/25 -- 1060/8; Mazis 1088/16-18; CX 274-C; CX 354-A.)

302. A pre-test of the questionnaire was conducted prior to conducting the survey. (Waldeck 1058/24 -- 1059/1; CX 354-A.) The pre-test resulted in only minor changes to the questionnaire, and demonstrated significant variation in responses indicating that the questions were understood. (Mazis 1087/3-14; Waldeck 1068/16-23.) The interviewers conducting the pre-test and the survey had no knowledge that the FTC was the client for whom the survey was

conducted nor were they aware of the purpose for which it was conducted. (Waldeck 1061/12-15.)

303. After collecting data, ICR conducted a test to verify the data and that the interview was properly conducted. (Waldeck 1064/4-15; Mazis 1089/11-16; CX 354-A.) ICR's validation test requires calling back at least 20% of the individuals surveyed and confirming their responses to selected questions. (Waldeck 1064/4-16.) A 20% validation test is considered standard within the survey industry. (Mazis 1089/14-16.)

304. The sample size of the survey ICR conducted was 1,002. (Waldeck 1060/12-16; CX 354-A.) This was projectable to United States households with a margin of error of plus or minus 3%. (Mazis 1089/17-19; CX 354-A.)

305. The questionnaire stated that the survey concerned marketing lists. (Mazis 1091/6-10; CX 274-Z-34.) Participants could indicate that they had "no opinion" in response to a question. (Mazis 1092/11-19; CX 274-Z-34.)

306. Participants were provided with potential responses from "very acceptable" to "somewhat acceptable" and "somewhat unacceptable" to "very unacceptable," and definitions of each of these terms. (Mazis 1092/2; 1092/24 -- 1093/5; CX 274-Z-34.)

307. Interviewers asked questions regarding types of consumer information used to create marketing lists. (Mazis 1095/14 -- 1096/1; 1097/10-21; CX 274-Z-34 -- Z-35.) For example: "Do you think that it is very acceptable, somewhat acceptable, somewhat unacceptable, very unacceptable to sell to companies a list of individuals based on whether or not they have a second mortgage?" (CX 274-Z-35.)

308. Fifty percent of the respondents were first asked: "Do you think that it is very acceptable, somewhat acceptable, somewhat unacceptable, very unacceptable to sell to companies a list of individuals based on whether or not they have a mortgage?" followed by the question: "Do you think that it is very acceptable, somewhat acceptable, somewhat unacceptable, very unacceptable to sell to companies a list of individuals based on the state that they live in?" (Mazis 1095/13-20; CX 274-Z-34.) For the other 50% of the interviewees the order of these questions was reversed. Consecutive questions on a similar topic are rotated to prevent "order bias." (Mazis 1094/13 -- 1095/10; CX 274-Z-34.)

309. Interviewers asked similar questions on a random basis, with regard to selling lists based on the following:

your estimated income
whether or not you have an auto loan or lease
whether or not you have a second mortgage
type of mortgage you have
the approximate amount of your mortgage
estimated amount of your home equity
whether or not you live in an apartment
whether or not you have a credit card
whether or not you have a premium bankcard

(Mazis 1097/23 -- 1098/8; CX 274-Z-35.)

310. Dr. Mazis prepared charts, CX 354-A -- D, summarizing his findings of the survey.
(Mazis 1104/2-4; 1105/24 -- 1106/6; CX 354-A-D.)

311. The results were as follows (stated in terms of the combined percentage of respondents indicating somewhat or very unacceptable to sell marketing list based on):

respondents found the use of credit report information for the compilation of marketing lists to be unacceptable. (Mazis 1105/13-19; CX 354-B.)

317. Based on these results, Dr. Mazis determined that consumers have a strong privacy interest in the use of information from their credit reports. (Mazis 1107/23-25.)

318. Consumers also have a strong privacy interest regarding the use of specific types of information derived from CRONUS for the purpose of compiling marketing lists. (Mazis 1109/20-25.)

319. The conclusion that the Fair Credit Reporting Act protects consumers' privacy interests by prohibiting the unauthorized dissemination of their credit histories to third-party marketers is supported by the results of the consumer survey performed by ICR.

2. Government Interest in Consumers' Privacy

320. Professor Joel Reidenberg testified to the privacy protections afforded to consumers' credit information under the Fair Credit Reporting Act. (Reidenberg 964/5-14.)

321. Fair information practices are a set of standards that are applied to the treatment of personal information. These standards focus on ensuring fairness to the individual in the treatment of his or her personal information. (Reidenberg 947/7-13.) Personal information is "information that relates to an identified or identifiable individual." (Reidenberg 949/20-21.)

322. Fair information practices espouse the principle that personal information should be collected openly for use for a specified purpose. (Reidenberg 947/14-19.) Once collected, personal information should only be used for the purpose for which it was collected, unless the individual has the opportunity to participate in the decision to allow other uses. (Reidenberg 947/18-24.)

323. Congress has enacted legislation regarding the use of personal information. (Reidenberg 953/24 -- 954/11.) The Fair Credit Reporting Act imposes legal obligations upon the credit reporting sector that are consistent with fair information practices standards. (Reidenberg 955/22 -- 956/18.)

324. Professor Reidenberg analyzed the legislative history of the FCRA. (Reidenberg 974/8-20; 986/10-13.)

325. In enacting the FCRA, Congress intended to ensure confidence in the credit

326. Prior to the FCRA, the media publicized stories regarding non-credit related disclosures of information by consumer reporting agencies. These news accounts were considered by Congress in formulating the FCRA. (Reidenberg 960/19 -- 961/5.) Congress also considered testimony by Professor Alan Westin regarding examples of such disclosures. (Reidenberg 961/22 -- 962/5.)

327. The FCRA addressed non-credit disclosures by requiring “permissible purposes” for the disclosure of information held by consumer reporting agencies. (Reidenberg 955/22 -- 956/4; 956/9-11.)

328. Under the FCRA, a permissible purpose for disclosure exists if a consumer authorizes the disclosure. (Reidenberg 975/3-8.)

329. The 1996 amendments to the FCRA authorize disclosure of credit report information for prescreening if: (1) a firm offer of credit is made with limited post-screening to verify identity and continued compliance with the grantor’s selection criteria; (2) the credit grantor’s selection criteria are identified; (3) the prescreening has an opt-out system; and (4) the credit grantor provides notice to the individual. (Reidenberg 967/2-23; 971/5-11.)

330. Under the amended FCRA, the permissible purpose for disclosure of credit reports in prescreening extends to firm offers of credit or insurance. Oscar Marquis, Trans Union’s general counsel, rejected proposed prescreen mailings of a sweepstakes/magazine subscription promotion and other non-credit offers, that would have used “credit criteria” because he did not consider them to be offers of credit. Prior to October 1, 1997 such offers would have been target marketing. (Marquis CX 188 at 167/24 -- 171/22.)

331. In the amended FCRA, the right to opt-out of prescreening provides consumers with a right to participate in the decision to use their information for firm offers of credit. (Reidenberg 976/11-16.) Use of credit report data for a prescreen firm offer of credit is consistent with the purpose of collecting the information. (Reidenberg 966/19 -- 967/1.)

332. Professor Reidenberg testified that the maintenance of documentation of criteria is unique to the FCRA (Reidenberg 971/2-16), and that the opt-out requirements are the “only situation in the private sector where . . . a third party has to tell you where they got your name.” (Reidenberg 967/23 -- 968/1.)

333. Trans Union does not provide target marketing lists on New Hampshire residents because the state credit reporting statute requires prior consent. (Marquis CX 188 at 148/11-19; N.H. Rev. Stat. Ann. § 359.)

3. Opt-Out

334. "Opt-out" refers to the procedure whereby consumers can request that their names be removed from target marketing lists, including direct mail and telemarketing lists. (Davis 210/20-25.)

335. The target marketing list industry consists of list providers, list managers, list brokers, and list users/renters/purchasers. (Miller 3008/5-25; 3034/1-9, 17-24; 3034/25 -- 3035/1-25.) Consumers in general are unaware that their names and addresses are used to compile lists since the majority of all lists are developed as a result of secondary uses of information. (CX 151-A.)

336. Most consumers are unaware that they can opt-out of target marketing lists. (Beales 3669 -- 3670/14; Westin 3639/8-19.) Of consumers surveyed in 1991 and 1996, 44% stated that they were aware of procedures that would allow them to remove their name from direct mail lists. (TU-88 at FTC B0003194.)

337. The Direct Marketing Association ("DMA") maintains two opt-out files for use by its member companies. Consumers who request that DMA place their names on the opt-out lists must reregister after five years. (Cleary 3081/15 -- 3082/14.)

338. DMA member companies are not required to use the DMA opt-out files, and can nevertheless make available on their mailing and telemarketing lists the names of those consumers who have requested to opt-out at the DMA. (Cleary 3082/17 -- 3083/6; Nusbaum 2905/24 -- 2906/25.)

339. DMA has a small advertising budget to notify consumers of their right to opt-out and relies on consumer affairs columnists, government, and interview news programming to notify consumers of DMA opt-out availability. (Cleary 3142/10-20.)

340. List brokers and list managers do not notify consumers about the opt-out process. They rely on the opt-out service provided by the DMA. (Miller 3073/15-19.)

341. Respondent's own witness was unaware of any list providers that require their clients to notify consumers of the opt-out process, except where required by law in the context of prescreening. (Hinman 2238/1-17.)

342. Trans Union's opt-out program complies with Section 604(e)(5) of the Fair Credit Reporting Act, which requires consumer reporting agencies to notify consumers of their right to opt-out of firm offers of credit. (Botruff 2065/22 -- 2066/9; TU-203.) Trans Union provides consumers with the choice of opting out for a two-year period or opting out permanently -- the percentage of those who choose to opt-out permanently is in the high nineties. (Botruff 2063/1-7.)

343. Trans Union does not require its list clients to notify consumers of their right to opt-out of target marketing lists other than on prescreen. Trans Union sales people who review non-prescreen promotional pieces are not aware of any such mailings that carry an opt-out notification. None of the non-prescreen promotional mail in evidence contains an opt-out notification that informs the consumers that their names are on a Trans Union list nor how to opt-out of Trans Union's target marketing lists. (Dexter 1276/15 -- 1277/1; Clifton 1916/25 -- 1917/23; CX 11; CX 18-A-J; CX 19-A-G; CX 20; CX 24-A-M; CX 25; CX 26-A-I; CX 26-A-E; CX 32-A-B; CX 35-A-D; CX 36 A-D; CX 39-A-D; CX 40-A-H; CX 256; TU-175; TU-176.) There is no direct, credible evidence of the success rate of the opt-out actually stopping direct mail or telemarketing calls.

344. DMA's Mail Preference Service consists of names of 3.5 million consumers who do not want their names to be included on any target marketing mailing lists. (Tr. 3081-82, 2203-04.)

345. DMA's Telephone Preference Service includes the names of 750,000 consumers who do not want their names included on any telemarketing lists. (Tr. 3081-82, 2204.)

346. Trans Union's "Privacy Protocol," which appears on Trans Union's website, states that Trans Union "believe[s] consumers should have the right to make informed decisions about the use of their personal data, including the right to be removed from direct marketing lists." (TU-50; TU-51.) PerformanceData employees, including Jay Frank, Senior Vice President in charge of PerformanceData, indicated that they had either never seen the protocol, or were unfamiliar with its substance. (Porretto 1620/2-13; Dixon 293/14-16; Dexter 1286/2-14; Frank CX 186 at 64/6 -- 65/11.)

347. CRONUS indicates whether a consumer wants to be excluded from any direct mail or telemarketing list. (Tr. 3677-78.). In January 1997, CRONUS contained the names of 5.1 million consumers who opted out. (Tr. 2060.)

348. Trans Union placed an advertisement in the September 22, 1997 edition of the USA Today praising the benefits of direct mail advertisements and notifying consumers that information in Trans Union's consumer files may be used in connection with credit or insurance transactions that are not initiated by the consumer and of the address and toll-free telephone number for consumers to use to opt-out, but warning that the opt-out does not guarantee that the consumer won't receive direct mail offers from other sources. (TU-203.)

349. In February 1998, CRONUS contained the names of 6.1 million consumers who opted out. (Tr. 2066.)

350. PerformanceData does not include in the List Master File the name of any consumer in CRONUS who has opted out. (Tr. 3677-78.)

351. PerformanceData obtains from ACXIOM a list of telephone numbers to be included in the List Master File. (Tr. 3678.) The list of telephone numbers which PerformanceData receives from ACXIOM does not include unlisted telephone numbers or the telephone number of consumers whose names appear on DMA's Telephone Preference Service. (Tr. 3678-79.)

352. PerformanceData and the list providers who testified voluntarily do not include on any direct mailing or target marketing list the names of consumers who opt-out. (Tr. 3677-79, 2205, 2905-07, 2996-98, 3080-83, 3379-80.)

G. The Direct Marketing Industry

353. There are 15,000 companies engaged in supplying consumer direct marketing lists. (Tr. 3337.)

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359. Experian's Fall 1997 Catalog of Consumer Lists and Processing Services advertises a 30-day new mover list totaling 950,000 consumers a month and a 14-day new mover list totaling 550,000 consumers a month with a 12-month total of 11,406,804 consumers. (TU-112.)

360. At the time that TRW entered into the consent decree with the Commission, TRW was using credit attributes from its consumer reporting database, aggregated to a geographic area defined by a nine digit postal zip code ("zip-plus-four"), in connection with its target marketing business without objection by FTC representatives. (Tr. 3290-93, 3305-07.) This information was made available by TRW for statistical modeling and as a data attribute. (Tr. 3306.)

361. There are 20 million zip-plus-four's in the U.S. A zip-plus-four includes 5-15 households. (Tr. 2688.)

I. The 1996 Amendments to the FCRA

362. On September 30, 1996, Congress passed amendments to the FCRA effective September 30, 1997. These amendments were included in the Omnibus Consolidated Appropriations Act of 1997. (CX-167-A.)

363. Effective September 30, 1997, § 603 of the FCRA was amended to include a definition of "firm offer of credit or insurance." FCRA, § 603(1)(1997).

364. Section 604(c) of the amended FCRA created a new permissible purpose for transactions not initiated by consumers, *i.e.*, prescreening; a provision addressing the information a credit grantor could receive on consumers in prescreening; and provisions for "opt-outs." FCRA, §§ 604(c) and (e)(1997).

365. Under the amended FCRA, when a consumer responds and accepts a firm offer of credit, a credit grantor can then review the consumer's credit report and deny the consumer the credit offered if the consumer's credit report reflects something negative about the consumer's

367. The FCRA amendments passed by Congress do not include the provision in the bill passed by the Senate which affirmatively authorized the use of information from consumer files in connection with direct marketing transactions. (CX-167-A&B; TU-213.) On September 30, 1996, the following colloquy took place between Senator Bryan and Chairman Alfonse D'Amato (R-NY):

Mr. BRYAN. Mr. President, I wish to engage my esteemed colleague Chairman D'Amato in a brief colloquy to clarify two items pertaining to the Fair Credit Reporting Act (FCRA) amendments contained in the H.R. 4278, the Omnibus Consolidated Appropriations Act of 1997. First, the House of Representatives in negotiations over the weekend deleted a Senate-approved measure which would have codified the permissibility of direct marketing under the FCRA. The deletion leaves the law silent on this issue, retaining the status quo. The House action does not reflect any congressional intent regarding the extent to which direct marketing is permissible under FCRA.

The second item relates to a requirement imposed under section 609 of the FCRA for personnel being accessible to consumers. The requirement that personnel be available under normal business hours is not intended in any manner to interfere with the use of automated menu telephone systems which provide the consumers with a range of options. The standard is satisfied as long as the system provides a consumer the option to speak to a live operator at some point in the audio menu.

Does the chairman confirm these understandings?

Mr. D'AMATO. Yes, Senator Bryan. I agree with your assessment on these points.

(TU-213; Tr. 2555-56.)

III. ANALYSIS

A. Target Marketing

Target marketing involves selling goods and services directly to consumers by mail or telephone. Consumers are picked by geographic, credit-related, demographic traits. (F 5.) Marketers want to limit the number and type of persons solicited to improve the response rate in order to increase profits.

Trans Union's target marketing lists⁶ use consumer information from CRONUS. On October 1, 1997, Trans Union stopped selling some target marketing lists and data in non-prescreen promotions.⁷ On that day amendments to the FCRA became effective, providing for civil penalty liability. 15 U.S.C. § 1681s(a)(2). Trans Union ceased selling those products for use other than firm offers of credit because of potential civil penalty liability for violations of the FCRA under the new amendments.⁸ Trans Union's caution there seems to conflict with its perseverance in this case. There would be no such risk if the products being sold to target marketers were not consumer reports.

Four weeks prior to trial in this matter, Trans Union revised its target marketing database,⁹ involving data on bank cards, finance trades, dollar amounts and open dates. In late-January 1998 Trans Union created a separate database (known as PerformanceBase or RelationBase) for dollar amounts, open and closed dates, loan types, home equity, and SOLO.¹⁰ The data on PerformanceBase is now available only for firm offers of credit.

These revisions do not vitiate the charges in the complaint.¹¹

Trans Union's target marketing product is the Master File.¹² Until January 1998, when Master File was changed to comply with the October 1, 1997 changes to the FCRA, the Master

⁶ Trans Union sold its lists under different names -- TransMark, Trans Union Lists and PerformanceData. (F 4.)

⁷ F 112 - 113.

⁸ F 114.

⁹ F 32, 33, 112.

¹⁰ F 116. CX 333, 334 and 335 set out the contents and quantities for the List Master file (CX 333), the "pre-approved file (in RelationBase)"(CX 334), and a comparison of the two (CX 335).

¹¹ Trans Union continues to sell data for target marketing from its Master File (F 25, 115), and has not argued abandonment. Because of the possibility of recurrence, abandonment of a practice is not a basis to avoid entry of a Commission order. Official Airline Guides v. FTC, 630 F.2d 920, 928 (2d Cir. 1980).

¹² This database was referred to by the Court of Appeals as the "base list." Trans Union, 81 F.3d at 229, 232, 234.

File required at least two open tradelines, one of which must have been verified within 12 months.¹³ The January 1998 Master File requires one tradeline.¹⁴

Consumer files in the Master File may have data on a bank card, auto loan, or mortgage, but every file must have at least two (or, as of January 1998, one) qualifying tradelines. The individual consumer information that comes from CRONUS may include the presence, amount, dates, and type of: auto loan, bank card, premium bank card, department (retail) card, upscale retail card, finance loan (mortgage, auto), student loan, and head of household.

In addition to its Master File, Trans Union sells other target marketing products that use consumer credit information from CRONUS. Trans Union sells monthly and weekly lists of persons who have been issued new credit -- in a bank card, mortgage, auto, retail card, upscale retail card, and finance company -- within the last 30 to 90 days. Trans Union also sells its income estimator ("TIE") showing a person's income. SOLO shows 35 credit characteristics; E-VAL provides information about home value and home equity; PIC uses data from CRONUS, and external survey data, to predict the likelihood of purchase of such products as mutual funds and IRA accounts.

Trans Union also sells TransLink, a product that "reverse appends" a consumer's name and address to a third-party credit card account number obtained by a merchant at the point of sale and supplied to Trans Union for the purpose of discovering the card account holder's identity and address. Although TIE, E-Val, SOLO and PIC are now available only for firm offers of credit, Trans Union continues to sell its TransLink product to those without a permissible purpose to receive consumer reports.

Each of Trans Union's target marketing products is a consumer report because it discloses information from Trans Union's consumer reporting database that is also used by credit grantors for credit eligibility determinations. This is true of the element common to all Trans Union target marketing products -- existence of tradeline -- as well as the specific elements included in list selects and in Trans Union's specialized products such as SOLO and TIE.

B. Credit "Eligibility" Information

Credit grantors make eligibility determinations on applications submitted by consumers. Credit grantors also seek to increase their business by extending credit to new account holders through their own marketing efforts, including: prescreened offers of credit; non-prescreened

¹³ F 28, 31, 126. "Tradeline" refers to information supplied by a credit grantor about a consumer's account: the account number, type of account, date opened, high credit, current balance, payment history. F 22, 28.

¹⁴ F 33.

offers, known as “invitations to apply”; and in-branch or take-one applications for credit.¹⁵ In each case, credit grantors use their own standards to evaluate the creditworthiness of applicants and other consumers to whom the credit grantor wishes to extend an unsolicited offer of credit. In many cases, credit grantors make use of credit scoring models to assist them in their eligibility determinations. Credit scoring is the most direct evidence that Trans Union itself intended the same elements that it uses in its target marketing lists also to be collected and used for eligibility determinations.

1. Credit Scoring

The Court of Appeals stated that, “[o]n remand, if the FTC wishes to classify existence-of-tradeline information as a consumer report, it must gather evidence that indicates that Trans Union intended the mere existence of a tradeline . . . to serve as a factor in credit-granting decisions . . .” 81 F.3d at 233. The trial record proves Trans Union’s intent because it establishes that credit scoring products developed by Trans Union use number of tradelines in credit scoring based on information from CRONUS.¹⁶ Credit scoring, including Trans Union’s own scoring, use factors -- such as presence of bank cards, auto loans and mortgages -- also used by Trans Union in target marketing lists.¹⁷

Credit scoring weighs factors in a credit grantor’s decision to approve credit, evaluating the risk posed by each applicant. With computers, credit scoring has become more prevalent. It

¹⁵ F 212.

¹⁶ F 186.

¹⁷ F 190-191, 211.

¹⁸ F 167.

¹⁹ F 167.

²⁰ F 168-169.

²¹ F 169.

²² F 170.

²³ F 167-168, 171. Industry Options, a refinement of EMPIRICA, offers scores for the bank card, personal finance, installment and auto loan industries. Trans Union also offers DELPHI, a bankruptcy model, developed with another modeling company, MDS. F 173.

²⁴ F 186-187; CX 89-S. DELPHI requires at least one qualifying tradeline to score a consumer file. F 185.

²⁵ F 188. An "EMPIRICA NOT SCORED: INSUFFICIENT CREDIT message occurs updeddelin witht cthe last ateasmonths." (CX 87-A.) F 189.

b. Number of Tradelines

Credit scoring involves identifying, by statistical analysis, characteristics in consumers' credit histories that predict credit performance.²⁷ A "characteristic" is information from a consumer's credit history, such as the number of bank credit cards in a consumer's credit report.²⁸ Variables ("attributes") are assigned weights, based on credit history and statistical analysis.²⁹ For the characteristic "open bank cards," attributes are the number of bank cards, such as "zero," "one," "2-3," "4-6," "7 or more."

The first step in scoring puts a consumer's credit file into a scorecard based on information in the consumer's file. A scorecard is tailored to homogenous people.³⁰ EMPIRICA uses ten scorecards. Each scorecard contains characteristics, attributes and weights.³¹

Scoring assesses the consumer's credit history to gauge the number of tradelines. EMPIRICA's ten scorecards are "each tailored to a distinct consumer group based on their credit behavior."³² As stated in Trans Union's EMPIRICA brochure:³³

EMPIRICA selects one of 10 different scorecards which best reflects the consumer's credit history to calculate the EMPIRICA score. Scorecard selection is based upon such credit information as:

- Number of tradelines
- Age of oldest tradeline
- Age of newest tradeline

²⁷ F 174-177, 179.

²⁸ F 175.

²⁹ F 176, 180.

³⁰ F 178.

³¹ F 181, 183.

³² Id.; CX 88-B.

³³ CX 88-E.

Of the ten scorecards, two are for applicants with serious delinquency, and one is for

³⁴ F 181.

³⁵ Trans Union promotes EMPIRICA for credit decisions, setting credit limits, assigning interest rates, repricing accounts and improving collections. CX 88-C.

³⁶ CX 93, F 190.

³⁷ F 191-194.

³⁸ F 191, 202-203.

³⁹ F 191, 196-199.

⁴⁰ F 200-201.

"lack of recent information on auto loans or lack of auto loans."⁴¹ For Horizon, reason codes include: "[N]o mortgage loans reported."⁴²

Factors used by Trans Union in its target marketing lists are also used in scoring models. Michael Rapaport of FICO and John Coffman of May & Speh, another credit scoring firm,⁴³ testified that they use information that Trans Union makes available in its target marketing lists. Mr. Rapaport testified that these factors include: presence or absence of a retail account, an auto loan, a mortgage loan, as well as a consumer's homeowner status. Scoring models also consider the open date of the newest tradeline, finance loan, and auto loan.⁴⁴ Dr. Coffman testified that number and amount of mortgages are used as predictive attributes in credit risk scoring. He also testified that verified mortgage trades in different loan amounts are given different scores.⁴⁵ Dr. Coffman has seen auto loans used as a predictive characteristic.⁴⁶ He testified that, to calculate credit, scoring models examine the credit limit in a consumer's credit report.⁴⁷ The use of these factors in target marketing lists and in Trans Union credit scoring establishes Trans Union's intent.⁴⁸

In its opinion, the Court of Appeals stated that

On remand, if the FTC wishes to classify existence-of-tradeline information as a consumer report, it must gather evidence that indicates that Trans Union intended . . . or, of course, that someone used or expected [existence-of-tradeline information] to be used [as a factor in credit-granting decisions].

⁴¹ CX 87.

⁴² CX 309.

⁴³ Rapaport 672/11-22, 674/12-14; Coffman 3795/20 -- 3796/23, 3798/1-18, 3800/4, 6, 13, 20-21, 3803/13 -- 3804/22..

⁴⁴ F 191.

⁴⁵ F 204-205.

⁴⁶ F 206.

⁴⁷ F 207.

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Trans Union, 81 F.3d at 233. The evidence proves that credit grantors consider existence of tradeline (and other factors that Trans Union uses in its target marketing lists) to extend consumer credit. Credit grantors extend credit to new accounts by prescreened offers of credit and invitations to apply.

2. Prescreening

The FCRA requires that consumer reporting agencies furnish consumer reports only to those with a "permissible purpose" to obtain a report; prescreen offers are an exception to the requirement that, for a permissible purpose to exist, the consumer must have initiated the transaction. Trans Union, 81 F.3d at 234. Prescreening is the process whereby a credit grantor extends credit to consumers who meet credit standards. A prescreened list is a list of consumer reports because it shows that each consumer meets criteria for creditworthiness. The Commission interpreted the FCRA to permit prescreening if the credit grantor agrees in advance that each consumer whose name is on the list after prescreening will receive an offer of credit.⁴⁹

The Court of Appeals, in its opinion remanding this case, indicated that prescreening was reasonable and noted that "prescreening and the guaranteed offers of credit it spawns can *only* take place through the use of consumer reports" Trans Union, 81 F.3d at 234 (emphasis in original). Prescreening is now sanctioned by the FCRA in amendments effective October 1, 1997. Section 604(c), 15 U.S.C. § 1681b(c).

The mail offer of a pre-approved credit card is an unsolicited offer to consumers; the consumer has not applied for credit, and the credit grantor does not have application information. The credit grantor decides upon credit criteria to extend the "firm offer" of credit to creditworthy consumers.⁵⁰ These criteria result in an offer of credit and are "intended . . . to serve as a factor in credit-granting decisions" Trans Union, 81 F.3d at 233.

Credit grantors deciding to extend credit in prescreen offers use tradeline information from consumer reporting agencies, including Trans Union.⁵¹ The presence of one or more tradelines is a threshold criterion for prescreens. Consumers without minimum tradelines are not offered credit.⁵²

⁴⁹ Commentary on the Fair Credit Reporting Act, 55 Fed. Reg. 18,804, 18,815 (1990).

⁵⁰ F 233.

⁵¹ F 237, 243-245, 258, 278-281, 288, 290, 295.

⁵² F 238, 244-245, 258, 276, 287.

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⁵³ Northern Trust's Personal Financial Services Marketing division issues consumer loans, including debt consolidation loans, preapproved home equity loans, and automobile loans. (McCoy 493/25-494/6.).

⁵⁴ F 288-290.

⁵⁵ Wachovia Bank Card Services (Wachovia) is a subsidiary of Wachovia Bank of Georgia and is an issuer of MasterCard and Visa credit cards, including bank cards. (Pendleton 351/24-352/6.) Wachovia has 3 million active bank card holders and \$5.3 billion outstanding. (Pendleton 410/1-2.).

⁵⁶ F 243.

⁵⁷ F 240, 242.

⁵⁸ F 245.

⁵⁹ F 246.

⁶⁰ F 247, 249-250, 252.

⁶¹ F 248, 251.

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⁶² F 253-254.

⁶³ FCC National Bank (First Card) is a division of First Chicago NBD and is an issuer of Visa and MasterCard credit cards. (Koppin 476/5-15.) First Card has 14 million credit card holders, 11 million active credit card holders, and about \$17.8 billion outstanding. (Koppin 482/7-11.)

⁶⁴ F 258.

⁶⁵ F 268-269.

⁶⁶ Chase Manhattan Bank issues a variety of credit cards and has 20 million credit card holders. (Zancola 662/6-12; 665/9-11.)

⁶⁷ F 278. For purposes of this criterion, there is no requirement that the trade be open -- only the number of trades. CX 280-Z-46; F 281.

⁶⁸ F 276, 278-281. [

] F 280.

⁶⁹ F 279, 281.

⁷⁰ F 281.

⁷¹ F 283 [

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⁷⁸ F 216. [

] F 217.

⁷⁹ F 38, 44, 218.

⁸⁰ F 220.

⁸¹ F 221-222.

⁸² F 223.

⁸³ F 226.

⁸⁴ F 227.

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In deciding credit eligibility on invitations to apply, credit grantors use the presence of a tradeline, a bank card, and a mortgage. Credit grantors also use as factors: FICO scores, the number of retail cards, and the open dates and credit limits for tradelines.⁹⁰ Credit grantors have used presence of a student loan in credit eligibility.

Each of these elements, by their use in credit decisions, is a factor in credit eligibility.

C. Trans Union's Target Marketing Lists

1. Target Marketing Databases

The Trans Union target marketing lists come primarily from CRONUS, the company's credit report database.

a. CRONUS

CRONUS is the Trans Union database for individual consumer credit data used to supply

⁸⁵ F 228.

⁸⁶ F 38 (high credit), 45, 56 (open date).

⁸⁷ F 229.

⁸⁸ F 231.

⁸⁹ F 230.

⁹⁰ F 232.

250 million records of previous addresses.⁹¹ A “record” on CRONUS means name and address. Additional consumer information -- account number, open date, account type, payment history -- is known as a tradeline. A record can be created on CRONUS by an inquiry or public record entry alone; having a record on CRONUS does not imply the existence of a tradeline. CRONUS

⁹¹ F 16.

⁹² F 22-23.

⁹³ F 17-19.

⁹⁴ F 17-18, 22.

⁹⁵ F 19. There is a second database -- ANCI -- that accumulates information daily -- showing inquiries when a Trans Union customer obtains a credit report on a consumer, and manual changes to a consumer file done in response to a consumer dispute. The information on ANCI is checked whenever a consumer report is delivered, and is used in the update of CRONUS. F 21.

⁹⁶ F 25.

⁹⁷ Id.

criteria.⁹⁸ The Master File rejects tradelines in CRONUS reported by collection agencies indicating derogatory information.⁹⁹

Prior to the December 1997 Master file, the minimum requirement for a consumer to be included was two open tradelines, one verified within twelve months.¹⁰⁰ After December 1997, it is either two trades reported in the last six months, or one trade reported in the last six months matched to an outside vendor file.¹⁰¹ If a person meets the minimum requirement in the Master File, the consumer's record is further examined for individual information from CRONUS.¹⁰² The Master File is rebuilt every four months.¹⁰³

c. Characteristics and Attribute File

Trans Union uses over 300 credit attributes from CRONUS. This Attribute File, also known as Standard Characteristics, contains credit information about creditworthiness, *i.e.*, the number of trades with payments over 180 days or the maximum balance owed on all mortgage trades. Standard Characteristics are used by Trans Union in target marketing products such as PIC, P\$YCLE, SOLO, TIE, and E-Val.¹⁰⁴

Trans Union released characteristics, with names and addresses attached, to its target marketing clients. Trans Union discontinued the disclosure of these characteristics on October 1, 1997.¹⁰⁵ Trans Union's Standard Characteristics are no longer available for use in Trans Union's

⁹⁸ F 27-30.

⁹⁹ F 29. If a consumer's only tradeline is a collection account, that person will not appear on Trans Union's Master File. The impact is to shield from the list collection accounts denoting less creditworthy individuals. F 200-201.

¹⁰⁰ F 31.

¹⁰¹ F 33.

¹⁰² F 25, 34, 39, 45, 52, 56-58, 60-64, 70-73, 75.

¹⁰³ F 26. List orders are handled by ACXIOM Corporation, a data processing firm in Conway, Arkansas. Trans Union owns an interest in ACXIOM. Trans Union also contracts with ACXIOM to perform computer functions for Trans Union, in Chicago and in Conway. F 35.

¹⁰⁴ F 108. The source for the Attribute File is CRONUS. In order to be in the Attribute File, a person must have at least two open tradelines, one of which is verified within 12 months. F 109.

¹⁰⁵ F 110. Among the characteristics are individual level information such as: months
(continued...)

target marketing business; they are available as part of the PerformanceBase/ RelationBase File only for use in firm offers of credit.¹⁰⁶

2. Promotion and Sale of Trans Union's Target Marketing Products

Trans Union salespeople around the country sell its target marketing lists.¹⁰⁷ They identify prospects by mail solicitation or telemarketing. Trans Union also sells lists to brokers, list managers, and wholesalers (Metromail, R.L. Polk, ACXION and Donnelley Marketing), who sell Trans Union lists or information from Trans Union's lists and their own database, to direct marketers. Trans Union provides target marketing lists for one-time use by its customers by rental or license.¹⁰⁸

Trans Union promotes lists by emphasizing the unique source of Trans Union's credit-based consumer data.¹⁰⁹ Trans Union equates target marketing products with credit information by stating, for example, that Trans Union's Standard Characteristics correlate highly with "lending activity," and Trans Union data are "highly predictive . . . especially with financial offers."¹¹⁰

Trans Union salespeople refer to the credit-based character of the target marketing lists. Trans Union's finance list provides persons who have "generally had trouble with their credit in the past and are highly responsive to credit offers" (CX 68-A); for persons on the student loan list, "since credit has been established, one could argue that this list would have higher pass rates through the credit bureaus" (CX 136); and Trans Union's premium bank card list indicates persons "who have been approved for this high credit amount in the past" (CX 64-A).¹¹¹

¹⁰⁵ (...continued)

since oldest trade opened, and number of personal finance inquiries, finance installment trades opened in 24 months, and bank card trades. Id.

¹⁰⁶ F 111.

¹⁰⁷ F 118. PerformanceData employs 46 people including 10 salespersons. PerformanceData had 440 target marketing customers (many of whom are third parties representing other customers) and \$34 million in revenue in 1997. F 122.

¹⁰⁸ F 118-119.

¹⁰⁹ F 123.

¹¹⁰ F 124; CX 263-A and CX 265-A.

¹¹¹ F 124.

¹¹² F 133.

¹¹³ F 126.

¹¹⁴ F 126.

¹¹⁵ F 44, 126.

¹¹⁶ F 127.

¹¹⁷ F 128-130.

¹¹⁸ F 133. Trans Union describes the Master File as the “richest source of individual-level

information relied upon by other target marketers, such as Polk, Donnelley, and Metromail, whose target marketing databases contain survey information directly from consumers, who may provide inaccurate information. Trans Union promotes the fact that its data is more objective because it is reported by third-party credit grantors.¹²⁰

Target marketing customers can obtain Trans Union lists with credit information similar to prescreen criteria, such as whether the individual has at least three open tradelines and the types of tradelines, or whether a person has two open tradelines, one open for more than 36 months.¹²¹ Clients may also have certain information from the Master File printed out, permitting target mail and telephone solicitations.¹²²

3. Master File Lists Show Detailed Credit Information

Only Trans Union offers target marketing lists based on individual-level credit data. These lists are unique in their source, in the extent of individual information they reveal, and in their use in target mail and telephone promotions.

a. Automobile

Trans Union offers lists indicating the presence and number of open automobile loans, loan type (lease, refinanced loan, equity transfer loan), the open and expiration dates for the lease or loan, and the high credit amount of the lease or loan. Trans Union also offers a "driver" list.¹²³

Other target marketing firms offer automobile lists limited to ownership information and not the range of credit-based data that Trans Union supplies. Other lists obtain data from self-

¹²⁰ F 136.

¹²¹ F 130. Trans Union's Master File has also been used for mailing a "pre-approved" credit offer. F 132.

¹²² F 131. For the September 1997 Master File, "printable" information includes: open dates for the first and second most current auto loans/leases and mortgages, home value ranges, and length of residence. (CX 1-C, J, N, P). Other information is printable upon request, including high credit amounts and loan type for auto loans and mortgages and the aggregate high credit for all student loans (CX 1-B -- C, O -- P, W).

¹²³ F 38. The source for the Master File "auto expiration date" (CX 1-A), "auto high credit" (CX 1-B), "auto loan type" (CX 1-B), and "auto open date" (CX 1-C), is individual records in CRONUS. A person is a "driver" (CX 1-E) if the CRONUS record for the person shows an auto loan or a tradeline with a business that issues gas cards. When the Master File program examines CRONUS records to determine whether a person has an auto loan, it will not consider the record if the open date is more than five years old. F 39.

reported survey responses or from the state departments of motor vehicles registration data, not from consumer reporting information.¹²⁴ [

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b. Bank Card

Trans Union sells lists that permit target marketing of persons who have an open bank card (including the open date of the most recent bank card) and holders of an open premium bank card (including the open date of the most recent premium bank card). Trans Union defines its premium bank card list as disclosing a bank card with a credit limit of more than \$9,999.¹²⁷

Other firms offer bank card lists, with the information at the household level, from self-reported survey responses or from suppliers of credit card information not from consumer credit reporting databases.¹²⁸ This material is not comparable to the range, depth, accuracy or timeliness of Trans Union's CRONUS-derived, individual-level credit card information.¹²⁹ [

¹²⁴ F 40, 134.

¹²⁵ F 41. [

] F 43.

¹²⁶ F 42.

¹²⁷ F 44, 126. To generate the "presence of an open bank card," the Master File looks to the date open of the individual CRONUS record for bank card tradelines. For a person to qualify as a premium bank card holder, the individual CRONUS record must indicate a tradeline with a kind of business, account type, and a credit limit greater than \$9,999. F 45.

¹²⁸ F 46.

¹²⁹ F 46-48, 131-146, 148-154, 157-160.

¹³⁰ F 47-48.

¹³¹ F 48.

¹³² F 44, 48-51.

¹³³ F 49.

¹³⁴ F 52. To determine the "presence of an open department store card" (CX 1-E), the Master File looks to the individual CRONUS record. F 52.

¹³⁵ F 53.

finance trade, a financial loan identifier (identifying mortgage or auto loans from a finance company), and presence of a closed finance loan trade.¹³⁷ The finance loan lists are promoted by Trans Union, and used by Trans Union list clients, to market to riskier segments of the population, because finance companies historically lend to more marginal credit risks.¹³⁸

e. Head of Household

Trans Union offers a list for head of household, derived from individual CRONUS records, naming the person with the greatest number of trades in a household as the head of household.¹³⁹ No other list provider offers a list showing the person in a household with the greatest number of tradelines.¹⁴⁰

f. Mortgage

Trans Union offers mortgage related lists including: the presence of an open mortgage, presence of a second open mortgage, and the open and closed dates and high credit amounts (stated in range values) of both mortgage trades. Trans Union's list customers can also obtain information about the type of mortgage loan (VA and FHA loans, refinanced and secured mortgages, and secured home improvement loans).¹⁴¹ The lists for presence of mortgages, mortgage high credit range, mortgage closed dates, and mortgage type are derived from individual CRONUS records.¹⁴² The Master File list "Home Value Range" uses Trans Union's Standard Characteristics, which is CRONUS-derived individual credit information, to calculate a consumer's home value.¹⁴³

¹³⁷ F 55. To determine the "presence of an open finance trade" (CX 1-F), the Master File examines the individual CRONUS record showing whether the subscriber's business is "finance," the account type is installment, and if the finance trade has an open date. F 56. Trans Union defines a "30/60/90 day" trade where payment is due in 30/60/90 days. F 55. To determine the "presence of a 30/60/90 day finance trade," the Master File examines an individual CRONUS record for the subscriber's kind of business and the account type. A "finance loan closed" also uses individual CRONUS records. F 57.

¹³⁸ F 124, 128, 203.

¹³⁹ F 58.

¹⁴⁰ F 58.

¹⁴¹ F 59.

¹⁴² F 60.

¹⁴³ F 61-63. This is the same model used by Trans Union to create E-Val. Among the
(continued...)

¹⁴³ (...continued)

standard characteristics used by Trans Union for the home value calculation are: months since oldest revolving trade opened, total mortgage high credit/credit limit, maximum balance owed on all mortgage trades, and total balance of all mortgage trades. F 62.

¹⁴⁴ F 65, 66. [

] F 66.

of home equity loans; it permits them to solicit those likely to be qualified to purchase. Using Trans Union's mortgage data, a telemarketer of home equity loans can obtain names of consumers who have multiple mortgages, are homeowners, age 24-55, with home market value \$50,000 - \$299,000. (CX-24.) Lists can use open dates of loans (e.g., month that a mortgage was taken out);¹⁵⁰ loan types or sources (e.g., mortgages issued by finance companies (CX-40); and types of credit cards (e.g., upscale retail cards (CX- 35)).¹⁵¹

g. Length of Residence

Trans Union offers a length of residence list showing the number of years a person has resided at a current address. The Master File length of residence indicator uses individual data from CRONUS, including mortgage open dates.¹⁵²

h. Mail Order

Trans Union offers mail order buyer lists; many are based on information purchased from outside vendors. One top seller, however -- Trans Union's "MOB1" -- is based on individual credit information in CRONUS.¹⁵³

i. Singles

Trans Union offers a "singles" list of unmarried consumers, based on tradelines for the person in CRONUS.¹⁵⁴

j. Student Loan

¹⁴⁹ (...continued)
CRONUS and subtracting them from the modeled home value. F 64.

¹⁵⁰ Knowing that a homeowner took out a mortgage during a period of high interest rates facilitates telemarketing and other promotions that specifically mention refinancing the prospect's high-interest loan. F 129; CX 19-F.

¹⁵¹ F 127-129.

¹⁵² F 70.

¹⁵³ F 71. Trans Union sells its lists to mail-order sellers (Spiegel's, L.L. Bean, Eddie Bauer); it examines individual consumer records on CRONUS and identifies as a mail-order buyer on the Master File those consumers who have open tradelines with mail order companies. Id.

¹⁵⁴ F 72.

Trans Union offers several student loan lists including presence and open date of a student loan, the aggregate high credit amount of all of a person's student loan, and a closed student loan, all derived from CRONUS individual credit information.¹⁵⁵

k. Upscale Card

Trans Union offers a list for the presence and open date of an open upscale retail card (Neiman Marcus, Saks, Tiffany). To find the upscale retail card and open date, the Master File uses individual CRONUS records, including the specific subscriber number on the individual consumer's tradeline. If the subscriber code matches the code for one of the companies on the National Retail Federation list of upscale stores, the person is named as having an open upscale retail card on the Master File.¹⁵⁶

List providers other than Trans Union do not differentiate their retail card lists to provide an "upscale" list. [

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4. September 1997 Master File

a. E-Val

Trans Union offers E-VAL, a scoring system that predicts the amount of equity available in a consumer's home. E-Val is also available on Trans Union's Master File in the form of its "Home Value Ranges," "Home Equity (Actual)," and "Home Equity Range" lists. E-Val lists were available for sale to target marketing customers prior to October 1, 1997; they are now available only for firm offers.¹⁵⁸

b. PIC

PIC, created by Trans Union and an outside modeling firm, predicts the likelihood that a person owns a financial service. Trans Union used surveys and characteristics from the consumers' CRONUS files in PIC. A PIC score is calculated using individual credit data to predict the likelihood of a person owning an IRA account or certificate of deposit. Until

¹⁵⁵ F 73.

¹⁵⁶ F 74-75.

¹⁵⁷ F 76.

¹⁵⁸ F 61, 77.

October 1, 1997, Trans Union offered PIC as a Master File select; PIC is now available only for firm offers of credit.¹⁵⁹

c. P\$YCLE

P\$YCLE, created by between Trans Union and Claritas, assigns consumers to one of 42 segments (known as “clusters” or “buckets”). P\$YCLE uses individual-level Standard Characteristics to calculate an estimate of a person’s income producing assets, and assign the person to a P\$YCLE’s “bucket.” Trans Union offered P\$YCLE for non-firm offers prior to October 1, 1997; P\$YCLE is now available only for firm offers.¹⁶⁰

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d. SOLO

SOLO puts consumers into groups (“clusters”) based on individual level CRONUS data, including 35 credit characteristics. SOLO is a “sister product” to SILHOUETTE, a Trans Union product identifying people likely to respond to a firm offer of credit and is available only to those with a permissible purpose under the FCRA.¹⁶²

SILHOUETTE’s characteristics include “number and types of trades . . . age of trades, credit limits, credit utilization, payment history” According to the SILHOUETTE User’s Guide, “[a]ssignment to a cluster is based on a credit view of consumers . . . Cluster 8, because of its generally high level of credit activity, might contain consumers who are good candidates for credit offers.” SILHOUETTE distinguishes clusters based on some of the same factors used by Trans Union in its Master File target marketing list products -- e.g., finance accounts, bank revolving, department store, retail.¹⁶³

SOLO and SILHOUETTE use the same 35 Trans Union Standard Characteristics; SOLO’s 41 clusters were developed from SILHOUETTE’s 25 clusters. SOLO and

¹⁵⁹ F 78.

¹⁶⁰ F 79.

¹⁶¹ F 80.

¹⁶² F 81.

¹⁶³ F 82-83.

SILHOUETTE evaluate individual credit behavior. SOLO is described by Trans Union as "a disguised version of SILHOUETTE for list applications."¹⁶⁴

Trans Union's internal Seller's Guide describes SOLO as "objectively-reported, behavior-based information, rather than self-reported (and therefore inevitably biased) information." It notes that "SOLO is most often used by credit grantors for non-preapproved offers, such as home equity offers or secured card offers."¹⁶⁵ Until October 1, 1997, Trans Union offered SOLO to its target marketing customers; now SOLO is available only for firm offers of credit. Trans Union withdrew SOLO from its target marketing customers because of the FCRA Amendments and because customers had learned that SOLO clusters correlated with how consumers pay their bills.¹⁶⁶ Prior to October 1, 1997, Trans Union attached SOLO codes to a customer's own client lists. Trans Union's internal seller's guide for SOLO states that SOLO clusters can be used to "profile" one's "best customers."¹⁶⁷ Trans Union intends that SOLO is used for credit eligibility. The internal Trans Union SOLO seller's guide discusses its use for preapproved offers of credit, and tracking "activation, utilization, retention, and/or profitability" of credit accounts, and use with Trans Union's income estimator, "TIE," for prescreened offers.¹⁶⁸

Competitors' models similar to Trans Union's SOLO and P\$YCLE are not comparable because they do not use individual credit information. ACXIOM received SOLO and P\$YCLE codes from Trans Union until October 1, 1997. The models that ACXIOM uses in place of Trans Union's P\$YCLE and SOLO (Claritas' Affluence and WealthWise and Experian's P\$YCLE), do not predict as well as the Trans Union data.¹⁶⁹

e. TIE

TIE, Trans Union's income estimator, calculates an individual consumer's estimated income based on credit data from CRONUS. Prior to October 1, 1997, TIE was offered for

¹⁶⁴ F 82, 85; CX 110. "SILHOUETTE provides . . . actual credit data to categorize [sic] individuals. Therefore the FTC requires permissible purpose . . . to use SILHOUETTE. SOLO is also based on credit information; however, when SOLO clusters are reported back, the credit characteristics are masked . . ." F 85; CX 115-Z-49.

¹⁶⁵ F 84-89.

¹⁶⁶ F 86.

¹⁶⁷ F 87. Until September 30, 1997, Trans Union appended SOLO clusters to TransLink lists. F 88, 105.

¹⁶⁸ F 89.

¹⁶⁹ F 90.

target marketing purposes; it is now available only for firm offers.¹⁷⁰ To receive a TIE score, a consumer must have at least two tradelines, one of which must have a credit line greater than zero, and one must have been open for at least twelve months. To calculate a consumer's TIE score, Trans Union uses 23 Standard Characteristics, such as number of tradelines.¹⁷¹

Trans Union intends TIE to be used in credit granting. A product brochure for TIE states that TIE can be used to "[f]ine tune credit limits and loan conditions on credit applications," to "'Red Flag' applicants whose low income estimate may indicate the need for additional verification," and to "[f]lag accounts to increase/decrease lines of credit." Trans Union's internal seller's guide for TIE recommends uses of TIE: credit risk scoring for new or existing accounts; use in prescreen criteria; as a supplement to credit applicant data; and to set initial credit limits.¹⁷²

Competitive list providers offer estimated income developed from public record and self-reported data, subjective information that has not been verified, and household income rather than individual level income. TIE is updated every seven days, whereas the income estimates of other list providers rely on census data updated every ten years.¹⁷³ [] [] offer an income product, based on self-reported information and census figures. None of that information is individual credit data nor is it from credit reporting agencies.¹⁷⁴

5. Trans Union's Other Target Marketing Lists

a. TransLink

TransLink is Trans Union's reverse append product that associates a name and address with a bank card number. It works as follows: consumers charge purchases at a merchant using credit cards other than the merchant's own credit card; the merchant sends to Trans Union a list of the credit card account numbers; Trans Union, using individual account information from CRONUS, returns to the merchant the names and addresses of the consumers. The merchant can then send those consumers promotions.¹⁷⁵ The merchant "prints a mailing label and sends [the consumer] a piece of junk mail." Until September 30, 1997, Trans Union appended SOLO, TIE and age data to TransLink lists.

¹⁷⁰ F 91.

¹⁷¹ F 92.

¹⁷² F 93-94.

¹⁷³ F 95.

¹⁷⁴ F 95-98.

¹⁷⁵ F 99, 101.

Trans Union promotes TransLink as a file that is

created from consumers who frequently use their MasterCard, Visa, American Express, Discover, Optima and other third party cards. This file contains a consumer's active tradeline number and address . . . Successful address matches can also be linked to Trans Union's Master File for other demographic appends.

¹⁷⁶ CX 58-D.

¹⁷⁷ F 104.

¹⁷⁸ F 106.

¹⁷⁹ F 107.

¹⁸⁰ Brief pp. 17-18.

proposition.¹⁸¹ Respondent also cites Alioto v. Cowles Communications, Inc., 519 F.2d 777, 779 (9th Cir. 1975), which used the clear and convincing standard in a case where the burden of proof requires a showing that a libelous statement was made in reckless disregard of the truth. In general, the clear and convincing burden of proof is used where the Court considers a particular type of claim should be disfavored on policy grounds.¹⁸² No such precedent is cited here, and the preponderance of the evidence standard applies in this case.

¹⁸¹ Id. p. 18 n.9. McGraw-Hill Pub. Co., 57 F.T.C. 1152 (1960), cited by respondent as requiring "clear and convincing evidence," specifically used the preponderance of the evidence burden of proof, 57 F.T.C. at 1171.

¹⁸² Treatise on Constitutional Law, Rotunda, Vol. 3 at p. 168 (1986).

E. Trans Union Target Marketing Products As Consumer Reports

1. FCRA

The FCRA defines "consumer report" to mean

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

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 604.

15 U.S.C. § 1681a(d).

In the context of this litigation, as framed by the Court of Appeals,

[t]o qualify as the sort of "information" that can constitute a consumer report, then, an entry on a Trans Union mailing list must (A) "bear[] on" at least one of the seven factors and (B) be used, expected to be used, or collected for one of three types of purposes.

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The issue here is whether information that Trans Union conveys in its target marketing lists is also information that is used by credit grantors in eligibility determinations. The Court of Appeals indicated that to be "a factor," information should play a role in the credit decision but that it need not be the decisive factor. Trans Union, 81 F.3d at 233. Thus, the Court of Appeals noted that on remand the FTC could show that Trans Union used or expected existence-of-tradeline information to be used as a factor in credit-granting decisions by demonstrating "that credit decisions could be made, even in part, on such 'existence' information." Id.

Under the language of the statute, existence-of-tradeline information could constitute a consumer report because it serves as "a factor" in credit grantors' decisions to grant credit. Trans Union's credit scoring and the criteria they use for prescreen and invitation to apply offers, show that the presence of a tradeline may be a factor in determining whether a consumer is eligible for credit. Other factors used by credit grantors, including presence, type and date of tradelines, are used in Trans Union's target marketing lists. Trans Union's lists may be consumer reports because the information is "used . . . or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . credit." 15 U.S.C. 1681a(d)(1).

2. Facts

The factors that Trans Union uses in target marketing products are also used by credit grantors deciding credit.¹⁸³ That makes them "consumer reports." 15 U.S.C. 1681a(d)(1). Trans Union, 81 F.3d at 233.

Every name on Trans Union's target marketing lists must have at least one qualifying tradeline.¹⁸⁴ This is also required in Trans Union's credit scoring, and in credit grantors' decisions

¹⁸³ Respondent called witnesses who testified that data from the Master List File could not be used in part to determine credit eligibility. Respondent's witnesses were not credible on this issue. Dr. Coffman, who works with Trans Union on predictive models, showed bias when he testified, inconsistently, that a post office box may be part of eligibility because some creditors will not mail to a post office box. (Tr. 3840.) Furthermore, Dr. Coffman testified that based on his experience with credit risk scoring models he has seen the number of mortgages and their amounts, the number of auto loans, the number of open bank cards, and the age of the oldest trade and credit limits used as predictive attributes in scoring models. (F 195, 204-07; Coffman 3862/5-17; 3868/16 -- 3869/10; 3869/6 -- 3871/4; 3876/14 -- 3877/20; 3882/7 -- 3884/4.) Another respondent witness, Kenneth Scott, president of a direct marketing advertising agency, has experience in marketing credit cards, not in eligibility determinations. (Scott 2608/23 -- 2609/18; 2614/17 -- 2616/16; 2622/23 -- 2624/1.)

¹⁸⁴ F 28-31, 33, 92, 106-107, 109, 126.

to make firm offers of credit in prescreen promotions.¹⁸⁵ When Trans Union sells a target marketing list, it is selling a list of people who have at least one tradeline; a list of people who have one tradeline is a series of consumer reports, and the recipient of the list must have a "permissible purpose" in order for Trans Union lawfully to furnish the list.¹⁸⁶ The Court of Appeals has already held that target marketing is not a "legitimate business purpose under the Act." Trans Union, 81 F.3d at 233-34. Therefore, Trans Union's sales of target marketing lists constitute furnishing consumer reports to those who do not have a permissible purpose to receive them, in violation of Sections 604 and 607(a) of the FCRA. 15 U.S.C. §§ 1681b, 1681e(a).

Trans Union's target marketing customers can get a list of consumers who have an open bank card tradeline.¹⁸⁷ The same criterion is used by credit grantors in their eligibility decisions,¹⁸⁸ based on consumer reports, and, Trans Union's sale of such a list to a target marketer who has no permissible purpose to receive the consumer reports is a violation of the FCRA. Similarly, Trans Union's SOLO and TIE use credit eligibility factors.¹⁸⁹ They are marketed by Trans Union for both target marketing and credit eligibility.¹⁹⁰

F. Trans Union's Constitutional Rights

Trans Union asserts First Amendment and Equal Protection arguments in its defense. The Commission, in its September 28, 1994 opinion, rejected Trans Union's constitutional arguments. (118 F.T.C. at 879-890.) The Court of Appeals did not reach Trans Union's First Amendment claim, but signaled its views. The Court stated:

Trans Union raises a serious First Amendment claim with respect to the Act's application. Its target marketing list competitors who aren't consumer reporting agencies under the Act can use any

¹⁸⁵ F 185-188, 243-245, 258, 278-282, 288, 290.

¹⁸⁶ Age of newest and oldest tradeline is also an eligibility factor. F 117, 196, 198-199, 228; 18 F.T.C. at 841-42.

¹⁸⁷ F 44.

¹⁸⁸ E.g., F 216, 224, 248-252.

¹⁸⁹ F 82, 85, 92, 108.

¹⁹⁰ F 87-89, 93-94.

¹⁹¹ The Commission has not been unfairly discriminatory in applying the FCRA to the sale of target marketing information by competing credit reporting firms. Trans Union's practices go beyond the activity allowed by the TRW consent order. (F 357.)

Respondent argues that credit grantors disseminate information about their customers for target marketing though it is just as invasive of privacy as anything done by PerformanceData. E.g., to a lesser degree, TRW used credit attributes from its consumer reporting database, aggregated to a nine digit zip code. (F 360.) Administrative agencies, however, have the prosecutorial discretion to go after one law breaker at a time. Moog Industries, Inc. v. FTC, 355

Target marketing lists are the means by which direct and telemarketers tell consumers about their business. Information on home sales and mortgages are found in these lists (Tr. 2657-59), as is information on automobile ownership, F 38, bank cards, F 44, department store cards, F 52, finance loans, F 55, mail order buyers, F 71, student loans, F 10, and upscale retail credit cards, F 74. Target marketing lists are as much a part of the process of speech as loudspeakers, Saia v. New York, 334 U.S. 558 (1948); public sidewalks, United States v. Grace, 461 U.S. 171 (1983); or free standing newsracks used to distribute free magazines, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993). Target marketing lists involve information taken from the database gathered and used in the sale of credit reports. They constitute commercial speech.¹⁹³

2. Commercial Speech Law

The sale of consumer reports receives limited First Amendment protection as “commercial speech.” Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762, n.8 (1985). “[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,’ and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.” Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989). Restrictions on truthful commercial speech will be upheld if the government asserts a substantial interest, the regulation directly advances that interest, and the regulation is narrowly drawn. Florida Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995); Central Hudson Gas & Electric Corp., v. Public Serv. Comm’n of N.Y., 447 U.S. 557, 564 (1980).¹⁹⁴

a. Privacy Interest in the FCRA

¹⁹³ PerformanceData has provided a list to a wholesaler whose client was the National Republican Committee, which used the list to solicit consumers to make campaign contributions (CX 22; Tr. 308-09); the predominant use of the lists, however, is for commercial purposes. TU 171-73, TU 175; TU. 307-08, TU-315-19, TU-1317-21.

¹⁹⁴ Though not yet explicitly overruled, the Central Hudson test for commercial speech must be used with some apprehension. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) held a state ban on price advertising of alcoholic beverages to be impermissible under the First Amendment, and the varying opinions of the Court show minority support for the Central Hudson test and adumbrate change. Sean P. Costello, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 Case W. Res. L. Rev. 681, 685 (1997). Nevertheless, Central Hudson continues in use. International Dairy Food Ass’n v. Amestoy, 92 F.3d 67, 72 (2d Cir. 1996); Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325, 327, 330 (4th Cir. 1996); Miller v. Stuart, 117 F.3d 1376, 1382 (11th Cir. 1997), cert. denied, 139 L.E. 2d 753, 118 S.Ct. 852.

The FCRA protects consumers' privacy by prohibiting consumer reporting agencies from communicating information covered by the Act to marketers for impermissible purposes. Protecting the privacy of consumers may be a "substantial" governmental interest. Florida Bar v. Went For It Inc., 515 U.S. at 621 (substantial government interest in protecting the privacy of personal injury victims against invasive contact by lawyers).

Trans Union sells information from its consumer credit database to target marketers who engage in the direct promotion. Trans Union invades consumers' privacy when it sells consumers' credit histories to third-party marketers without consumers' knowledge or consent; that privacy interest is substantial.¹⁹⁵

The FCRA is based on "a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality and a respect for the consumer's right to privacy." Section 602 of the FCRA, 15 U.S.C. § 1681. Congress aimed at the risks to privacy from unregulated use of personal information;¹⁹⁶ the dissemination of credit reports for purposes other than granting credit was the problem.¹⁹⁷

¹⁹⁵ F 316-19, 325, 353-55. In Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465 n.25 (1978), the Court held that an in-person solicitation by an attorney visiting a potential client in her hospital bed recovering from an accident was intimidating and invaded her privacy. In Shapiro v. Kentucky Bar Ass'n, 486 U.S. 466, 476 (1988), the Court held that there was no invasion of the potential client's privacy by a lawyer's solicitation letter, but the Court stated that the invasion of privacy, if any, occurred when the lawyer discovered the recipient's legal affairs, not when he confronts the recipient with the discovery. In this case, the invasion of privacy occurs when respondent takes information from the credit report database, puts it in the target marketing lists, and sells the lists to direct and telemarketers.

¹⁹⁶ Alan Westin, Privacy and Freedom 163-165 (Athenaeum 1967).

¹⁹⁷ F 325-26. Fair Credit Reporting Hearings on H.R. 16340 before the Subcomm. On Consumer Affairs of the House Comm. On Banking and Currency, 91st Cong., 2nd Sess. 31 (1970) at 109; Hearings on S. 823 before the Subcomm. On Financial Institutions Of The Senate Banking and Currency Comm., 91st Cong., 1st Sess. 92 (1969) at 359, 433.

b. Public Confidence in Credit Reporting

Congress also intended to assure the integrity of the credit reporting system and the public's confidence in the credit reporting system.¹⁹⁸ Credit reporting is vital to the United States economy and to consumers, and "unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." Section 602 of the FCRA, 15 U.S.C. §1681.

c. Citizens' Concerns

Citizens worry about "secondary" uses of their personal information. (F 316-18, 325-26.) In 1996, Congress narrowed disclosure of credit report information for "legitimate business need" by adding that a "business transaction" must be consumer-initiated. Section 604(a)(3)(F)(I). A permissible purpose to obtain a consumer report without the consent of the consumer exists only for firm offers of credit or insurance and only with notice and an "opt-out" privacy safeguard.¹⁹⁹ A firm offer of credit is needed to make a prescreen offer permissible.²⁰⁰ Congress deleted the proposed Senate language authorizing credit report information to be used in target marketing.²⁰¹

d. Government Interest Directly Advanced

The Order here must advance an interest "in a direct and material way." Florida Bar, 515 U.S. at 625-6. There, the Court relied on a survey of the effects of lawyer advertising on public opinion, to show that Florida's 30-day ban on solicitation directly advanced the interests of consumer privacy. 515 U.S. at 625. This record contains uncontradicted evidence of consumer privacy interests supporting limitation on uses of consumer credit information beyond those

¹⁹⁸ F 325.

¹⁹⁹ F 331.

²⁰⁰ F 329. A prescreen ("firm offer") is only permissible if the consumer reporting agency offers the consumer an election to be excluded from marketing lists of potential borrowers and publicizes this option to consumers. Section 604(c) and Section 604(e)(1) and (5). The statute now limits the type of information that may be disclosed to the credit or insurance grantor (Section 604(c)(2)) and requires that the solicitation disclose that information contained in the consumer's consumer report was used and inform the consumer of the right and procedure to opt-out. Section 615(d).

²⁰¹ F 367.

²⁰² F 316-19.

²⁰³ F 318.

²⁰⁴ "[W]e find no resemblance between target marketing and [the Act's permissible] purposes: extension of credit, employment, underwriting of insurance, and license eligibility . . . If Trans Union's provision of lists derived from its 'base list' for target marketing is to be lawful under the Act, it must be because the information is not so sensitive as to rise to the level of a consumer report." Trans Union, 81 F.3d at 234.

²⁰⁵ F 6-12, 16-19, 21, 325-26.

²⁰⁶ F 328-29, 331.

more extensive than necessary to serve the substantial government interest in protecting consumers from impermissible uses of their credit information.

F. Summary

Trans Union's target marketing lists are "consumer reports" as defined in the Fair Credit Reporting Act. A tradeline in a consumer's credit file used in Trans Union's target marketing lists is collected by Trans Union "to serve as a factor in credit-granting decisions." Credit grantors "used or expected it to be used for the purpose." Trans Union Corp. v. FTC, 81 F.3d 228, 233 (D.C. Cir. 1996). Other elements from individual consumer credit files, used by Trans Union in its target marketing lists, also are used in credit grantors' decisions to grant credit, including tradelines by type (bank card, finance company, mortgage, automobile loan), open date of tradelines, high credit limit, current mortgage balance, and estimated individual income.²⁰⁷

The same elements from credit files at Trans Union are used as factors in credit grantors' decisions to grant credit to consumers. Target marketing lists assembled from these elements are "consumer reports." Target marketing is not a permissible purpose for furnishing a consumer report; sale by Trans Union of its target marketing lists thus violates the FCRA.²⁰⁸ Trans Union, 81 F.3d at 234.

The Fair Credit Reporting Act complies with First Amendment commercial free speech and equal protection standards: the FCRA protects a substantial government interest in the privacy of individual consumer information in credit bureau files; the law directly advances that governmental interest in protecting consumer privacy and provides a reasonable fit to serve the governmental interest. The record shows substantial citizen concern over the privacy of the individual information collected, stored, and sold by credit bureaus. The FCRA affords privacy protection tailored to the sensitive nature of the data collected by consumer reporting agencies and their unique status as repositories of the data.

²⁰⁷ Certain data from the consumer files are used for identification rather than as an element in credit determination (name, telephone number, mother's maiden name, address, zip code, year of birth, age, any generational designation, social security number). (F 357, but see F 360.)

²⁰⁸ On October 1, 1997 -- the first day that it would face potential civil penalty liability for violations of the FCRA -- Trans Union reduced the information from its consumer credit database that it makes available through its target marketing lists.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, Trans Union Corporation.
2. Trans Union is a corporation doing business under the laws of the state of Delaware, with its office located at 555 West Adams Street, Chicago, Illinois 60661.
3. Trans Union assembles information on consumers to furnish consumer reports to subscribers and consumers. Trans Union furnishes these consumer reports in interstate commerce.
4. Trans Union is a consumer reporting agency. Section 603(f) of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681a(f).
5. Trans Union's target marketing lists are consumer reports. Section 603(d)(1) of the FCRA, 15 U.S.C. § 1681a(d)(1). Trans Union Corp. v. FTC, 81 F.3d 228 (D.C. Cir. 1996).
6. Trans Union furnishes consumer report information in target marketing lists to persons who do not have a permissible purpose under Section 604 of the FCRA, 15 U.S.C. § 1681b; Trans Union Corp. v. FTC, 81 F.3d 228, 233-34 (D.C. Cir. 1996).
7. By this conduct, Trans Union violates Section 604 and Section 607(a) of the FCRA. 15 U.S.C. §§ 1681b, 1681e(a).
8. An appropriate Order follows.

ORDER

IT IS HEREBY ORDERED that respondent, Trans Union Corporation:

- a) Cease and desist from distributing or selling consumer reports in the form of target marketing lists to any person unless respondent has reason to believe that such person either intends to make a firm offer of credit to all consumers on the lists or to use such lists for purposes authorized under Section 604 of the FCRA.
- b) Maintain for at least five (5) years from the date of service of this Order and upon request make available to the Federal Trade Commission for inspection and copying, all records and documents necessary to demonstrate fully its compliance with this Order.
- c) Deliver a copy of this Order to all present and future management officials having administrative, sales, advertising, or policy responsibilities with respect to the subject matter of this Order.
- d) For the five (5) year period following the entry of this Order, notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that might affect compliance obligations arising out of this Order.