

OPINION OF THE COMMISSION

By Thompson, Commissioner:

I. INTRODUCTION

In this information age, technological advances in information gathering and dissemination have generated substantial benefits for American consumers by providing them with, among other things, the strongest and most efficient credit markets in the world. In 1970, Congress recognized the importance of personal financial data to these markets when it enacted the Fair Credit Reporting Act (“FCRA” or “Act”). Congress expressly noted in the Act’s findings and statement of purpose that the “banking system is dependent upon fair and accurate credit reporting” and acknowledged the “vital role” of credit bureaus (called “consumer reporting agencies” under the Act) “in assembling and evaluating consumer credit and other information on consumers.” 15 U.S.C. § 1681(a)(1) and (3).

Under the U.S. credit reporting system, consumer reporting agencies (hereinafter “CRAs”) collect consumer credit information from credit grantors and other sources, compile the information into credit reports, and then sell the reports to banks and other lenders, as well as to employers and insurance companies. Credit grantors have an incentive to provide data to CRAs because they benefit from the credit reporting system as well. The effectiveness of this system depends upon a constant flow of consumers’ credit information into large databases maintained by CRAs. It also depends on accuracy and timeliness. As a result, CRAs, unlike other data providers, have access to a broad range of continually-updated, detailed information about millions of consumers’ personal credit histories. This information includes, for example, consumers’ delinquencies and defaults, the types of credit accounts they have, when they obtained credit, and additional information that banks and other lenders often use in determining whether to extend credit.

Although Congress understood the importance of CRAs’ access to such information regarding millions of consumers, it also recognized the importance of protecting consumers’ financial privacy. In fact, legislative history reveals that one of the FCRA’s principal goals was to protect the privacy of individuals whose sensitive credit and financial data are collected, used, reviewed and transmitted by CRAs.¹ Thus, in enacting the FCRA, Congress struck a balance between these competing interests. While Congress did not disturb the ability of CRAs to collect personal credit information, it did provide safeguards designed to protect the confidentiality of these data. Specifically, Section 604 of the FCRA limits the circumstances under which a CRA may disclose a “consumer report”² - - the statutory term for information commonly referred to as

¹ Report of the Committee on Banking and Currency, S. Rep. No. 91-517 (1969).

² Section 603(d) of the FCRA defines “consumer report” as: “[a]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s

a credit report. For instance, Section 604 allows a CRA to furnish consumer reports to, *inter alia*, persons with certain “permissible purposes.” These permissible purposes include: (1) the extension of credit; (2) employment purposes; (3) underwriting of insurance; (4) determination of license eligibility; (5) risk assessment for an existing credit obligation; and (6) legitimate business need for the information. 15 U.S.C. § 1681b. Section 607 of the Act also requires CRAs to maintain reasonable procedures to ensure that they only furnish consumer reports for the purposes set forth in Section 604. *See* 15 U.S.C. § 1681e(a).

After careful consideration of the parties’ arguments and thorough review of the substantial record in this case, the Commission concludes that Trans Union Corporation (“Trans Union”), a CRA, violates or has violated Sections 604 and 607 of the FCRA through the activities of its target marketing business.³ In connection with its consumer reporting business, Trans Union receives various types of personal, credit information about consumers. Much of this information constitutes a “consumer report” as that term is defined by Section 603(d). Trans Union’s sale of consumer reports to target marketers without a “permissible purpose” under the FCRA is a violation of the Act.

II. PROCEDURAL HISTORY

On December 15, 1992, the Commission filed an administrative complaint alleging, in pertinent part, that Trans Union violated Sections 604 and 607(a) of the FCRA by

compil[ing], for sale to clients, lists of consumers, based in whole or in part on information contained in its consumer reporting database bearing on the characteristics enumerated in Section 603, thereby creating consumer reports, and provid[ing] such consumer reports in the form of target marketing lists to persons that do not intend to make a firm offer of credit to all those consumers on the list and who intend to use the information for purposes not authorized under [the FCRA].

In re Trans Union Corporation, 116 F.T.C. 1334, 1336 (1993).

On September 20, 1993, Administrative Law Judge (“ALJ”) Parker entered a summary decision in favor of Complaint Counsel. The Commission upheld that decision, ruling specifically that Trans Union’s target marketing lists were “consumer reports” because the minimum criteria

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 a consumer’s eligibility for . . . credit or insurance . . . [or] employment . . .” 15 U.S.C. § 1681a(d).

³ As described *infra*, Trans Union may have discontinued some of the practices at issue in this matter. To the extent it continues to engage in certain other of the activities at issue, however, Trans Union’s FCRA violations are ongoing.

for a consumer file appearing on any of the target marketing lists - - that the consumer had at least two open credit accounts - - satisfied the definition of “consumer report” under Section 603(d) of the Act. *In re Trans Union Corporation*, 118 F.T.C. 821, 869-70 (1994). A key part of the Commission’s determination was its finding that the mere existence of two credit accounts, or “tradelines,”⁴ constituted information “collected in whole or in part by [Trans Union] with the expectation that it would be used by credit grantors for the purpose of serving as a factor in

⁴ A “tradeline” is a segment of a consumer report that reflects a credit relationship between a consumer and a creditor - - usually a debt or a potential debt owed by the consumer to the credit grantor. An example of such an account relationship is a consumer’s Visa, American Express or other credit card account. A typical consumer report contains multiple tradelines, and each reveals specific information about the account relationship, including: the account holder’s account number, name, address, telephone number, date of birth, social security number, any generational suffix; the name and subscriber code of the credit grantor and its kind of business; the open date of the account; the verified date on the account; the type of loan; the credit limit assigned by the credit grantor; the payment patterns and history; the present status of the account; and the closed date of the account. Public record information such as bankruptcies, tax liens, foreclosures and civil judgments as well as collection accounts are also considered tradelines. *See Stockdale 872, 875/23--876/2, 888/5-24, 893/6-15, 894/4-12, 895/16--896/1, 896/19-23, 897/13--898/2; Botruff 2049/1-6; Weith 1844/18-22; Smith 3372/15--3373/15.*

constitutional. Trans Union appealed both rulings.⁵

After reviewing the full record in this case, including the extensive arguments of the parties, we adopt the ALJ's July 1998 findings and conclusions to the extent that they are consistent with those set forth in this opinion.

III. STANDARD OF REVIEW

The Commission reviews the decision of the ALJ under a *de novo* standard. FTC Rules of Practice, Rule 3.54(a). The Commission can, however, give some deference to the ALJ's credibility determinations because, as the trier of fact, the ALJ had the opportunity to "closely scrutinize witnesses' overall demeanor and to judge their credibility." *In the Matter of Horizon Corp.*, 97 F.T.C. 464, 857 n.77 (1981).

IV. FACTUAL BACKGROUND

A. Trans Union's Business

⁵ References to the record are abbreviated as follows, using the following hypothetical examples:

Initial Decision	ID at 200.
Initial Decision Finding	IDF-500.
Complaint Counsel Exhibit	CX-500.
Trans Union Exhibit	TU-500.
Trial Transcript testimony	Jones 1234/56-78.
Deposition Transcript testimony	Jones CX-100 at 123/45-46.
Trans Union's Appellant Brief	TUAB at 200.
Complaint Counsel's Answering Brief	CCAB at 200.
Trans Union's Reply Brief	TURB at 200.
Complaint Counsel's Proposed Findings	CCPF at 200.
Trans Union's Proposed Findings	TUPF at 200.

The millions of pieces of consumer information Trans Union receives every month are maintained in an extensive database called CRONUS. **(Weith 1867/19--1870/9; Botruff CX 181 at 19/14-22).**⁶ The information in CRONUS comes from credit grantors - - including banks, mortgage companies, credit unions and auto dealers - - collection agencies, public records and others. **(Stockdale 873/22-25).** The information is very current as Trans Union receives new data every day and updates CRONUS weekly. **(Botruff CX 181 at 30/18--31/8).** Information compiled on a specific consumer within CRONUS is called a consumer file.

In addition to its credit reporting business, Trans Union also sells a variety of target marketing products through its subsidiary, Performance Data (formerly Trans Mark and Trans Union Lists). Performance Data creates lists of the names and addresses of specific classes of consumers and sells them to target marketers who in turn solicit the consumers to purchase goods and services. Performance Data employs 46 people, including 10 salespersons. **(Davis 37/25--38/4).** At the beginning of 1998, Performance Data had 440 customers; during 1997, it generated over \$34 million in sales. **(Davis 48/8-10, 141/13-14).** Performance Data's sales comprise 2% of the target marketing industry. **(Davis 3322/15-18).** Hereinafter, unless otherwise noted, our references to Trans Union's target marketing business include Performance Data's activities.

As a CRA, Trans Union is in a special position. Trans Union has access to a vast array of very current and detailed consumer information from its credit reporting business which affords it a distinct advantage as a target marketer. Trans Union takes consumer information from CRONUS to create two primary databases called the Master File and the Standard Characteristics database. **(Cabigon 1365/13-18; Kinsinger 2017/19-23; Weith CX-196 at 179/11-13).** Trans Union offers different target marketing products based upon the information gathered in these two databases as well as data taken directly from CRONUS. *See* chart detailing Trans Union's various target marketing products, appended hereto as Figure 1. For the reasons explained in detail *infra* p. 13, the fact that Trans Union uses CRONUS information in its target marketing business is significant because CRONUS information is far richer and more detailed than the data collected and used by non-CRA competitors who sell target marketing lists. Trans Union is also the only CRA that sells to target marketers an array of personal credit information obtained from its credit reporting database.

1. The Master File

The CRONUS-derived Master File is one of the databases Trans Union uses for target marketing. **(CX-72-C).** It contains information on 160 million people and 105-110 million households. **(Weith 1859/8-18; CX-333).** Trans Union updates the Master File three times per year. **(Cabigon 1366/10-12; Davis 62/16--63/7).**

In order for Trans Union to include a CRONUS consumer file in the Master File, thereby

⁶ Each month CRONUS takes in 85,000 updates from credit grantors and data providers and 1.8 billion tradelines. **(Stockdale 874/4-10, 908/1-19).**

making the consumer's name and address available for target marketing purposes, the consumer file must satisfy several minimum criteria. These criteria have changed over time. Prior to January 1998, each CRONUS consumer file had to show at least two open tradelines with one of the tradelines verified - - *i.e.*, that some reported activity took place - - during the preceding 12 months. (**Cabigon 1372/18--1373/7; CX-329-A; Weith CX-196 at 197/24--198/14**). In addition, a qualifying tradeline could not be closed or an account about which there was a consumer dispute, and could not be a collection record or public record. These criteria are hereinafter referred to as the "pre-1998 Minimum Criteria." (**Weith CX-196 at 191/7-15, 227/1-5; Cabigon 1374/5-22**).

In January 1998, in order to be included in the Master File, Trans Union began to require CRONUS consumer files to contain two tradelines active within the last six months *or* one tradeline active in the last six months with an address confirmed by an outside source. We refer to these later criteria as the "post-1997 Minimum Criteria" and both sets jointly as the "Minimum Criteria". (**Weith 1830/23--1831/4; Cabigon 1386/14--1388/7; CX-332-A; CX-339-A**). As with the pre-1998 Minimum Criteria, the qualifying tradeline could not be a collection record or a public record. (**Cabigon 1374/12-21; CX-332-A; CX-340-A**).

Trans Union claims that the two tradeline, pre-1998 Minimum Criteria did not reveal consumer credit information and that the two tradeline minimum was only important because it confirmed, by two sources, the subject's current name and address. **TUAB at 11**. Statements made by Trans Union during the relevant time and in its regular course of business, however, belie this simple characterization. For instance, Trans Union's promotions boasted that the Master File is a list of "135 million *financially active individuals*" (emphasis added), that "[a]ny adult with at least two active tradelines is represented," and that a person with no activity in a 12 month period - - *i.e.*, making payments or establishing credit - - is dropped from the Master File. (**CX-70-A; CX-69-A; CX-58-C**). We agree with Trans Union's written characterizations and find that the "two-tradeline minimum" criterion indicates more than just a confirmed address. It instead reveals a significant fact about consumers in the Master File, *i.e.*, that they are current, at least somewhat active users of credit.

2. Trans Union's "Master File / Selects" Product

While the Master File contains names, addresses and other demographic information on people who meet the Minimum Criteria discussed above, it also is frequently enhanced with the addition of other personal, often credit-related, information on each individual. This enhancement enables Trans Union to offer its target marketing customers the opportunity to select, from the 160 million consumer files in the Master File, names and addresses of a smaller set of consumers who meet certain criteria specified by the target marketing customer. The criteria Trans Union uses to create these subsets are called "indicators" or "selects," and Trans Union generates half of them from its consumer reporting database CRONUS. (**Cabigon 1438/12-25**).

Trans Union's target marketing customers use the Master File / Selects product in two

⁷ In the lending industry, having a finance loan indicates that the consumer has approached a lender of “last resort” and is more likely to need credit. (**Rapaport 792/17--793/21**). Trans Union expressly advised its mortgage lender / customers to use the homeowner and finance tradeline selects

high credit value;
C *Student Loan* - - indicating whether the consumer has a student loan, the type of loan, the open date of the most recent student loan, whether it is closed, and the high credit amount (r

⁸ **IDF-37; TUPF at 186; CX-1; Cabigon 1378/12-19.**

age 25 and 75 and had upscale retail cards and phone numbers. (CX-35).⁹

3. Trans Union's Standard Characteristics / Model Products

As previously described, Trans Union also maintains a second database, called the "Standard Characteristics" or "Attribute" file. This file contains 313 attributes on each CRONUS consumer who meets the Master File Minimum Criteria. (Cabigon 1373/23--1374/4; CX-329-A). Trans Union used this personal credit information to create certain proprietary models that it offered to target marketers until October 1997. These proprietary models assign a value, or "score," to each consumer file in the following ways through the following products:

- C E-Val. A scoring system that, using information in the Standard Characteristics file, estimates the amount of equity available in a consumer's home. A Trans Union customer can purchase a consumer's E-Val "score" showing: (1) the estimated actual amount of equity in the consumer's home; (2) the percentage of equity over home value; and (3) the home value range. (CX-1-I-J; CX-118-B; Davis 134/12--135/11).
- C TIE. The TIE scoring system provides a consumer's estimated income within a \$5,000 range (culminating in an over \$100,000 category). (CX-1-X). TIE estimates income by modeling 23 attributes in the Standard Characteristics file. (CX-120; CX-119-I; Wiermanski 1803/17-24).
- C SOLO. The Solo model places consumers into one of 40 "clusters," based on a modeling of 35 attributes in the Standard Characteristics file. (Wiermanski 1736/23-25; CX-114; Davis 67/2-13). SOLO evaluates individual behavior and describes tendencies based on how individuals are using credit. (IDF-85). Examples of SOLO cluster categories are: "Urban Ethnics," "Urban Upscale," "Empty Nesters," "Single Strugglers," "Kids and Cars." (CX-114-F).
- C P\$YCLE. This model also assigns people to one of 60 "buckets" that are intended to estimate a consumer's income producing assets. (Pellizzon 3446/16--3447/3, 3461/12-15; Davis 109/16--110/24, 214/1-9). Categories of buckets include, "The Wealth Market," "Upscale Retired," "Downscale Retired." (TU-22-B).
- C PIC. The PIC product uses the Standard Characteristics file to model the likelihood that a person owns financial service products. (TU-20; Weith 1864/6-10). On the Master File, the PIC option will indicate whether there is a negative or positive propensity to purchase, among other things, a home equity loan, a mutual fund, an installment loan or term life insurance. (CX-1-S).

⁹ Most of these lenders sought lists of consumers with some type of finance tradeline. See *supra* n.7.

4. Trans Union's Other Target Marketing Products

In addition to its Master File / Selects product and the Standard Characteristics models, Trans Union offers several other products derived from CRONUS, including:

- C TransLink / Reverse Append. This product provides merchants with names and addresses of bank card holders. The merchant submits to Trans Union a list of bank card numbers that were used to make purchases from the merchant. Trans Union then retrieves from CRONUS the name and address of the primary cardholder.¹⁰ (**Weith 1823/22--1824/14; Dexter 1305/24--1307/6; Davis 89/25--90/10; CX-126; CX-132-D; CX-133-B; CX-266**). While a customer name is presumably already available to the merchant,¹¹ the address is not. **TUAB at 4**. By purchasing TransLink, merchants can obtain a useful list of names and addresses without asking their customers for this information. TransLink is among Trans Union's largest selling target marketing services and Trans Union is the only CRA that provides this type of "reverse append" service. Until September 30, 1997, Trans Union appended SOLO, TIE and age data to TransLink lists; it currently only appends age data. (**Dexter 1236/22--1237/25; Smith 1488/23--1489/5; CX-125-E; CX-129**).
- C New Issues File. This file contains names and addresses of individuals who received credit within the last 90 days. It also discloses when an individual obtained the credit and the type of credit issued. (**CX-4; IDF-106; Davis 42/16--43/1**).
- C Emerging Consumers File. This file included individuals with only one tradeline from the prior twelve months. (**Cabigon 1373/12-22; CX 329-F**). To qualify, the tradeline must be open. (**IDF-107**). Trans Union discontinued the Emerging Consumers File in part because it feared that it might be "communicating information that we shouldn't be communicating." (**Davis 89/18-20**).

5. Changes in Trans Union's Practices

The target marketing practices described above led the Commission to issue its complaint in 1992. In October 1997, contemporaneous with the effective date of the 1996 FCRA amendments, Trans Union discontinued some of the practices that were the most problematic under the FCRA. Specifically, the company stopped providing certain information about open dates of loans, high credit amounts, most loan types, and whether a student loan was closed.

¹⁰ Citibank does not permit Trans Union to use its credit card account numbers for reverse-append disclosure of names and addresses through Trans Link. (**Marquis CX-188 at 147/20--148/1**).

¹¹ This information may not reflect the person who actually used the card with the merchant if the account is a joint account. (**Weith 1824/16--1825/17, 1827/4-15**).

Trans Union also ceased providing to target marketing customers its modeled products (*e.g.*, E-Val, PIC), its New Issues File, and its Emerging Consumers File.¹²

Trans Union changed its practices shortly after the 1996 FCRA amendments authorized for the first time civil penalties of \$2,500 per FCRA violation (*i.e.*, \$2,500 per prohibited disclosure of consumer financial information). 15 U.S.C. § 1681s(2)(A). Trans Union's General Counsel Oscar Marquis stated that the company stopped providing certain lists in light of the new statute's provision for civil penalties. (**Marquis CX-188 at 174/23--175/6, 22-25**). In the words of Stephen Dexter, a senior account manager with Performance Data, "[a]s of 10/1/97, the risk outweighed the reward for violating the FCRA." (**Dexter 1280/19--1281/10**). Jan Davis, Vice President and General Manager at Performance Data, also testified that Trans Union "had gone from an environment where the worst thing that could happen is that we would have to stop selling certain lists to a world where there were significant financial penalties." (**Davis 142/21-25**). "[B]efore it was a cease and desist penalty, it now became a \$2,500 per occurrence penalty." (**Dexter 1280/19--1281/10**).

In December 1997, however, Trans Union reintroduced the practice of selling "type of tradeline" information - - *e.g.*, information reflecting a specific type of account relationship between a credit grantor and a customer. Thus, Trans Union currently offers its customers access to the following information about consumers in its Master File: whether the consumer has an auto loan; a second auto loan; a bank card; a department store card; a finance loan; a 30/60/90 day finance loan; a mortgage; two or more mortgages; a gold, platinum or optima card; a student loan; an upscale retail card; seven kinds of business tradelines; a mail order trade; and auto loans. (**CX-342; CX-315-D, E, G-M, Q-W; CX-332-B; Cabigon 1426/9-23, 1427/18--1428/3, 1429/9--1430/2; Weith 1832/2--1833/6**).

B. Trans Union and Its Competitors

Trans Union has both CRA and non-CRA competitors in the target marketing industry. But Trans Union differs from its CRA rivals - - Experian and Equifax - - in at least two significant respects. First, Trans Union bases its target marketing lists on a minimum requirement of some tradeline activity. Although Experian, like Trans Union, also derives its target marketing database from its consumer reporting database, it does not require that a tradeline exist. (**Smith 3428/18--3429/18**). Similarly, Equifax also does not apply a minimum tradeline criterion. Its target marketing activities are limited to providing certain data to Claritas, Inc., which then offers target marketing products to customers. (**IDF-40, 162-163**).

Second, Trans Union is unique among CRAs because it provides credit data on individuals. By contrast, the other CRAs provide consumer credit information on an

¹² Trans Union continues to offer these products to entities extending so called "firm offers" of credit, a practice allowed under the prescreening provisions of the FCRA, described *infra* p. 18.

“aggregated” basis, *i.e.*, information about a group of people. Both Experian and Equifax aggregate information about individuals’ credit characteristics on a zip code or “zip-plus-four” geographic basis.¹³ With zip-plus-four aggregation, a company essentially pulls all the credit reports of individuals within a geographical area covering 5-15 households (the zip-plus-four geographical area), adds all the credit data together, and then divides by the number of people in the area who have credit reports. **(Smith 3290/11-24)**. This aggregation “shows what a typical consumer looks like in that area as opposed to the specific consumer in the area.” **(Smith 3290/14-18; TU-112; TU-113)**.

Experian does provide some “individual-level data,” but it is limited by a consent agreement that the company entered into with the Commission in 1993 (hereinafter “TRW Consent”). Pursuant to the TRW Consent, Experian can disclose from its consumer reporting database only the following information about individuals: name, address, telephone number, mother’s maiden name, zip code, year of birth, age, any generational designation, social security number, or substantially similar identifier. **(TU-109; Smith 3287/11--3294/11)**. This information is commonly referred to as “above the line” information because of its physical location on most consumer reports. *See, e.g.*, **TU-61(a)**. The TRW Consent prohibits the disclosure of “below-the-line” information, *i.e.*, most tradeline data including credit performance information.¹⁴ TRW / Experian previously offered a reverse append product, but apparently discontinued the practice based on the TRW Consent’s provisions. **(Smith 3295/9-17)**. The TRW Consent agreement does not address the legality of Experian’s current practice of disclosing credit information on an *aggregated* basis.

Equifax, Trans Union’s other CRA competitor, does not offer any individual credit data in its target marketing business. Prior to 1997, Equifax’s subsidiary, National Decision Systems (“NDS”), offered “Ace Indicators,” a product which disclosed information based on 39 credit performance characteristics aggregated at the zip-plus-four level. In 1997, however, Equifax sold NDS to Claritas, Inc., which now continues to use Equifax data at zip-plus-four-level to offer the Ace Indicators product. **(TU-103; TU-114; TU-177(c); Pellizzon 3440--3446)**. Claritas edits its ACE Indicators data to ensure that data are not released that describe one household, one record, or one individual. This “confidentiality edit” is applied where there are too few records in a zip-plus-four area. **(Pellizzon 3471/12--3472/4)**.

Trans Union also faces competition from various non-CRAs. The industry leaders in this category are R.L. Polk & Company (“Polk”), ACXIAM Corporation (“ACXIAM”), Metromail

¹³ “Zip-plus-four” is the Postal Service’s more refined zip code system which adds four additional digits to identify a specific area within a zip code location.

¹⁴ One of Trans Union’s promotional letters states that “Experian comes closest as a competitor, but since they cannot provide to you any credit based data only the demographic data obtained from the credit reports (abiding by the Consent Decree with the FTC) . . . our data far outweighs their strength.” **(CX-70-B)**.

Corporation (“Metromail”), and First Data Solutions (formerly Donnelly Marketing)(“First Data”). (**Davis 161/5-16; Cleary 2942/4-18; Hinman 2199/19--2200/17; M. Smith 3299/22--3300/8**). These competitors also furnish consumer information on an aggregated basis, *e.g.*, at the household level or broader. (**IDF-157**). While these companies obtain data from a host of sources, including state motor vehicle departments, county records, telephone directory white pages, census data, and self-reported data from surveys or product registration cards, such sources do not compare with the vast scope of information in Trans Union’s credit reporting database. CRONUS information covers a wider population and includes a more comprehensive range of instantly available information on individuals. CRONUS data are also significantly more accurate and timely.

The difference between Trans Union’s target marketing products and those its competitors sell is perhaps best described in Trans Union’s own words: Trans Union states that its Master File contains “the freshest” and “most comprehensive” data due to its “robust and extensive source of the original credit based information” and that Trans Union has the largest data file of consumer credit information in the United States. (**CX-268-A; CX-264-A; CX-75-B**). Trans Union further describes the Master File as the “richest source of individual-level data available” (**CX-321-J**), and asserts that its database is “kept fresh and current by nearly two billion updates supplied by credit grantors every month.” (**CX-72-B**). Finally, Trans Union touts its advantage over other target marketing list providers, due to its ability to capitalize on the information in its credit reporting database. Trans Union boasts that it 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**).

“[N]o one offers you a greater source of true individual-level data than we do This unique resource includes financial and behavioral data on over 140 million consumers This information is not only current, it is also highly accurate All information is based on actual behavior - - not self-reported or neighborhood values. Even our estimates - - of income, net worth, income producing assets, and home market value - - are modeled from actual observations for each individual in our file.

(**CX-83-C**). Such statements by Trans Union provide insight into the nature of the data it collects as a CRA and sells to target marketers.

**V. FCRA ANALYSIS:
ARE TRANS UNION'S TARGET MARKETING LISTS
"CONSUMER REPORTS" UNDER THE FCRA?**

A. Introduction

As discussed above, Trans Union sells lists of consumer names and addresses to its target marketing customers. In creating these target marketing products, Trans Union applies various criteria to identify those consumers in its large database, CRONUS, who possess specific credit-related characteristics. The resulting lists thus communicate far more information to target marketers than simply names and addresses. A purchaser of a Trans Union target marketing list knows that every consumer included has at least one tradeline and possesses whatever additional characteristics the purchaser has specified.

A key question in this case is whether Trans Union's target marketing lists fall within the Act's definition of "consumer report." If they do, then Section 604 requires that Trans Union sell them only to entities who have a "permissible purpose" as defined by the Act. According to the court of appeals, target marketing is not a permissible purpose. *Trans Union*, 81 F.3d at 230. Thus, if Trans Union's lists are consumer reports then Trans Union has violated the FCRA by disseminating those lists for target marketing purposes.

Trans Union's target marketing lists qualify as consumer reports if they communicate information that: (1) bears on a consumer's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" and (2) is "used or expected to be used or collected in whole or in part" to serve as a factor in determining credit eligibility. 15 U.S.C. § 1681a(d)(1) ("Section 603(d)"). Our determination of whether Trans Union's lists are consumer reports does not require a mere application of fact, but instead requires a close examination and interpretation of Section 603(d).¹⁵

The court of appeals determined that the tradeline information in Trans Union's lists meets the first prong of the consumer report definition - - *i.e.*, it bears on one or more of the seven enumerated factors.¹⁶ With respect to the second prong, however, the Court held there was insufficient evidence to support the Commission's 1994 finding and remanded the case back to the Commission, stating:

¹⁵ We are mindful that, to the extent that Section 603(d) raises constitutional questions, we must construe the statute where fairly possible to eliminate such questions as long as such construction is not plainly contrary to Congress' intent. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

¹⁶ "The first element does not seem very demanding, and we do not understand Trans Union to even contest the proposition that a person's having two tradelines 'bear[s]' on one or more of the seven enumerated factors." *Trans Union*, 81 F.3d at 231.

On remand, if the FTC wishes to classify existence-of-tradeline¹⁷ information as a consumer report, it must gather evidence that indicates that Trans Union intended the mere existence of a tradeline, as distinguished from payment history . . . to serve as a factor in credit-granting decisions, or, of course, that someone used or expected it to be used for that purpose. *Evidence - - lacking here - - that credit decisions could be made, even in part, on such “existence” information might be probative of Trans Union’s intent.* If under this standard, tradeline-existence information is found not to [be covered by the definition of consumer report], the FTC may of course embark on a similar inquiry about any individual list criterion to which it objects.

Trans Union, 81 F.3d at 233 (footnotes omitted)(emphasis added).

With this direction in mind, we have reviewed what is now a full record in this case and find that the existence-of-tradeline information, as well as other information Trans Union disclosed in its target marketing lists, meets the Section 603(d) definition of a consumer report. We therefore conclude that Trans Union violated the FCRA by selling consumer reports to target marketers who lacked a statutorily permissible purpose.

In reaching this conclusion, we examined Trans Union’s various target marketing lists - - the Master File / Selects, proprietary models, and reverse append products - - and find that information disclosed through these products is the type of information that is “used” and/or “expected to be used” in whole or in part¹⁸ for the purpose of serving as a factor in establishing a consumer’s eligibility for credit.¹⁹ Accordingly, these products are consumer reports and Trans

¹⁷ “Existence of a tradeline” refers to the *mere* existence of tradeline information as determinative of whether the information disclosed is a consumer report under the FCRA. This term is distinct from the term “type of tradeline” which refers to the character or type of information that is disclosed. *See* discussion *infra* pp. 20-26.

¹⁸ Under Section 603(d), it is not necessary to show that the information communicated by the target marketing lists, standing alone, could be used to make a credit-related decision. We need merely determine that the information is used or expected to be used as “a factor” in such a decision. *Trans Union*, 81 F.3d at 233. Something serves “as a factor” if it “contributes to the production of a result.” *United States v. Wilson*, 896 F.2d 856, 858 n.3 (4th Cir. 1990), *citing Webster’s 3rd International Dictionary*, 1971.

¹⁹ In 1995, the Commission took the position before the court of appeals that Trans Union’s lists, based on the “existence of two tradelines” feature, were “collected for the purpose of” serving as a factor in credit eligibility decisions. The court of appeals rejected this argument on the grounds that the “‘existence of a tradeline’ seems not so much ‘collected’ by Trans Union

Union cannot lawfully sell them for target marketing purposes.

We also analyzed the demographic information that Trans Union maintains in CRONUS and find that, based on the record before us, most of that information - - including name, mother's maiden name, generational designator, address, zip code, telephone number, and social security number - - does not constitute a consumer report because there is no showing that it is used or expected to be used as a factor in determining credit eligibility.²⁰ We conclude, however, that Trans Union, as a CRA, cannot lawfully disclose age information to target marketers because the record in this case shows that lenders use age as a credit factor and age bears on credit capacity.²¹ Accordingly, products that Trans Union creates by way of its consumer reporting business that are based upon, or contain, references to age are consumer reports under Section 603(d) and their disclosure for target marketing purposes violates Section 604 of the Act.²²

B. Analysis of Target Marketing Products

1. Background

To determine whether the information communicated through Trans Union's target marketing lists is "used or expected to be used" in credit eligibility decisions, we reviewed record evidence detailing the various factors lenders use in evaluating credit eligibility. We focused in particular on the factors that are important in calculating credit scores - - a tool that many lenders use in evaluating credit eligibility. We also examined the factors that are important to lenders offering credit in prescreening promotions.²³

as created by it for organizing the nuts-and-bolts payment data upon which credit decisions are made." *Trans Union*, 81 F.3d at 232. On remand, Complaint Counsel and Trans Union have focused their argument on the *used* and *expected to be used* elements of the definition.

²⁰ The Commission's argument before the court of appeals focused on the relevance of Trans Union's data to consumer's *eligibility for credit*, and not to insurance, employment, or other items set forth in Section 603(d). The court of appeals followed suit as did the parties following remand. Accordingly, we limit our analysis to credit eligibility.

²¹ We also stress that, although the FCRA does not prohibit Trans Union from disclosing most demographic information, disclosure of such information may raise significant privacy concerns and may facilitate misuses including identity theft.

²² As noted, the TRW Consent permits Experian to use age information from its consumer reporting business for target marketing purposes. The TRW Consent is not before us in this matter and it is without precedential effect to this opinion.

²³ Through the 1996 amendments to the FCRA (effective September 30, 1997), Congress included an additional statutory permissible purpose - - "prescreening." The FCRA

Credit scoring systems use past credit information and other data to build models that predict a consumer's likely future credit performance. **(Rapaport 673/15-23)**. Credit grantors

amendments allow consumer reporting agencies to provide to a credit grantor names and addresses of consumers meeting certain credit-related criteria so long as the credit grantor makes a *firm offer* of credit or insurance to the recipient. Furthermore, to afford consumers privacy protection, individuals receiving a prescreened offer must be told that they were chosen because they met certain criteria, that they have the right to opt out of appearing on future prescreened offer lists, and the procedures for opting out. 15 U.S.C. § 1681m(d)(1).

²⁴ The first step is called “scorecard segmentation” and is useful because isolating a group with similar traits within a population can improve the predictive quality of the scoring model. **(Rapaport 685/1--686/11, 767/13 --768/24; CX-88-E)**. After determining the predictive characteristics, FICO assigns values to “attributes” within each predictive characteristic - - *e.g.*, four bank cards within “number of bankcards” characteristic. The sum of the values of the attributes is the credit score. **(Rapaport 687/16--688/6, 769/4-23, 851/2-17)**. Trans Union’s credit scoring witness, Dr. John Coffman, flatly contradicted Mr. Rapaport by testifying that individual attributes have no meaning in credit scoring and that it is the combination taken as a whole that has value. **(TUPF at 92)**. Having seen both witnesses testify, the ALJ found Mr. Rapaport more credible and we give deference to this determination. *See In the Matter of Horizon Corp.*, 97 F.T.C. at 857 n.77. Moreover, based upon our review of the record, we find Mr. Rapaport’s testimony to be more persuasive because it was based on Trans Union’s own credit scoring models.

²⁵ FICO has partnered with each of the three major credit bureaus to develop credit risk scoring products. **(Rapaport 680/8-21)**.

²⁶ Industry Options, refinements of the EMPIRICA model, offer scores for the bank card, personal finance, installment and auto loan industries. **(Rapaport 692/1-18)**.

693/7, 799/11--803/15). By working with FICO, Trans Union knew the categories of information in a consumer's credit file that lenders used as predictive characteristics in credit scoring, and hence in credit eligibility decisions.

Prescreening provides another way to determine the factors that bear on credit granting decisions. Trans Union was similarly aware of the prescreen criteria credit grantors use to make firm offers of credit.²⁷

²⁷ Trans Union's subsidiary, Marketing Services, Inc., is engaged in the business of prescreening and reviews approximately four to five billion consumer files per month against criteria provided by approximately 100 to 150 prescreening clients per month. **(Rock 2115/24--2116/13).**

a. Credit Limits

Trans Union does not contest the fact that information about a consumer's credit payment history, balance, *and credit limit*, is used by credit grantors in credit eligibility decisions; is

²⁸ Mr. Rapaport testified that he has seen scoring models that score the open date of newest tradeline, open date of oldest tradeline, open date of newest finance loan, and open date of newest auto loan. (**Rapaport 772/9–774/10; see also Stormoen 3154, 3155/1-6, 3210/5-21**).

²⁹ An open date is particularly significant in the mortgage context because it enables target marketers to determine the date a mortgage was taken out and the interest rate. The Mortgage Banc ordered a list of consumers with FHA mortgages opened between January 1994 and October 1995 with initial loan values between \$75,000-\$99,999 and \$100,000-\$150,000. (**CX-17-A-B**).

Because this evidence clearly demonstrates that credit grantors use open date information to make credit eligibility decisions, we find that the FCRA’s definition of consumer report covers information on the open date of loans and that Trans Union violated the FCRA by disclosing such information in its target marketing lists.

c. Number of Tradelines

The record further shows that the number of tradelines in a consumer’s credit file is also a predictive characteristic in [redacted] scoring models. **(CX-93)**. Lenders like Chase Manhattan also use a “number of tradelines” criterion in evaluating whether to grant credit.³⁰ We therefore conclude that credit grantors use such information in credit eligibility determinations.

Trans Union concedes that lenders use the number of tradelines as a factor in credit granting decisions.³¹ It argues, however, that it does not disclose such information in its target marketing lists. Trans Union instead claims that it merely discloses the existence of a tradeline and the existence of particular types of tradelines. **TUAB at 50**. We find that the record shows otherwise.

In many cases, Trans Union does reveal the number of tradelines a consumer has by permitting its target marketing customers to order, for example, lists of people who have a bank card *and* a retail card *and* an auto loan - - in other words, three tradelines, the minimum requirement in Chase Manhattan’s prescreen. In addition, the record shows that even the “mere” existence of a tradeline counts as a meaningful *number* (*i.e.*, one) in credit scoring. *See infra* p. 25. Trans Union, therefore, violated the FCRA by disclosing in its target marketing lists information concerning an individual’s number of tradelines.

d. Type of Tradeline

Based on our review of the factors that credit grantors use in credit scoring and prescreening, we also find that type of tradeline information is itself a factor in credit eligibility decisions, *regardless of performance on that tradeline*. Consequently, this category of information also constitutes a consumer report. Type of tradeline information is particularly

³⁰ Chase Manhattan’s prescreen criteria require that credit eligible consumers have at least three lines of credit; its analysis of existing account holders showed that consumers with fewer than three tradelines had a higher incidence of failing to repay their accounts. **(CX-280-L; Zancola 736/10-23)**.

³¹ Although Trans Union argued in the first proceeding before the Commission that the number of tradelines is not information that credit grantors use in establishing a consumer’s eligibility for credit, Trans Union appears to have changed its position. Trans Union now argues that credit scoring models treat the characteristic “number of tradelines” (but not the “existence of a tradeline”) as a predictive characteristic. **TUAB at 16, 33--34**.

important in this case because it constitutes the lion's share of Trans Union's target marketing business. This fact is demonstrated by the list of selects that Trans Union offers and sells to its customers. **(CX-1; CX-342)**. As noted, Trans Union offers and sells target marketing lists that provide the names of consumers who have a bank card or a mortgage or an auto loan, among other type-specific credit relationships. *See supra* pp. 7-8.

Evidence in the record also indicates that type of tradeline information is used as one of possibly a dozen predictors of future risk in credit scoring. For example, the existence of a bank card is given weight in Trans Union's own Uniquote and Horizon scoring models and other scoring models. **(Rapaport 785/4--786/7; Coffman 3869/16--3870/9)**.³² One of Wachovia's

³² Section 701(d) of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691(d), requires that when lenders deny credit applications, they must provide reasons for the denial. Credit scoring models generate descriptions of reasons why an applicant's score deviates from an optimal score which can be used by lenders to comply with ECOA obligations. One of EMPIRICA's reasons for denial is "lack of bank cards." **(CX-87; Rapaport 851/23--853/6)**.

³³ Trans Union has crafted a novel, but unsupportable argument that the only reason Wachovia "scored" a bank card reference was not as a factor relevant to establishing credit eligibility, but to establish whether the applicant was willing to list the presence of a bank card on his or her application - - a test of character if you will or, as described by Complaint Counsel, a lie-detector test. We agree with Complaint Counsel that this interpretation is not supported anywhere in the record, even though Trans Union had the opportunity to question Wachovia's witness about it.

³⁴ Trans Union also claims that the ALJ improperly ignored the testimony of Mr. Connelly who stated that the credit risk model requires all information on all tradelines to run - - and that it could not operate using only the information from the Master File. **TUAB at 33.** This argument also misses the point. The Commission is not finding, and need not find, that the information in the Master File is *all* a credit grantor needs to make a credit decision. We are

or a refinanced loan, even if such a tradeline passed the “good performance” test. **(CX-280-Z-34)**. Even in the Wachovia example, for a consumer that passes through a gauntlet of exclusionary criteria, the presence or absence of a bank card may determine the range of acceptable credit scores for a consumer to receive credit. **(CX-275-I, J; Pendleton 396/2-13)**.

These examples demonstrate that, even when all relevant consumer tradelines pass the exclusionary criteria, credit grantors value specific types of tradelines differently - - *e.g.*, a bank card tradeline is generally more highly valued than a finance tradeline. This is confirmed by Ms. Pendleton’s testimony about the risk associated with individuals who do not have any bank card experience, and Mr. Rapaport’s and Mr. Scott’s testimony that people with a finance tradeline are riskier and are likely to have had a bankruptcy. **(Pendleton 395/17--396/1; Scott 2855/23--2856/7; Rapaport 792/17--793/21)**. In addition, Trans Union’s argument that each individual criterion for a prescreen must be examined against other criteria that impose additional requirements simply fails to address the plain language of the FCRA’s Section 603(d) definition of a consumer report - - information that is used “in whole or in part” in credit eligibility determinations.³⁵

Finally, Trans Union’s own promotions clearly indicate that it “expected,” within the meaning of the FCRA Section 603(d), type of tradeline information to be used in credit granting decisions. Indeed, it boasted, “since credit has been established [for individuals on the student loan list], one could argue that this list would have higher pass rates through the credit bureaus.” **(CX-136)**. According to Trans Union, the premium bank card target marketing list identifies individuals “who have been approved for this high amount of credit in the past.” **(CX-64-A)**.

In light of these facts, the Commission finds that a type of tradeline, even without regard to performance on that account, is valuable information used by credit grantors to decide whether

³⁵ Trans Union also argues, based on the testimony of First Card’s Mr. Koppin and Discover’s Mr. Stormoen, that the existence of a type of tradeline is not relevant to determining credit eligibility; rather, it is performance information found in that tradeline that counts. **TUAB 13-14. (Koppin 547–548; Stormoen 3180/6-24)**. Notwithstanding the selected statements of Mr. Koppin and Mr. Stormoen, the weight of the evidence indicates that the existence of a type of tradeline is used as a factor in determining credit eligibility. The portion of Mr. Stormoen’s testimony that Trans Union highlights is belied by the remainder of his testimony describing predictive characteristics that have nothing to do with credit performance, such as number of retail and bank card tradelines, existence of a mortgage, age of oldest tradeline, and even existence of a tradeline. **(Stormoen 3150/3--3151/3, 3153/8--3154/2, 3204/5-17, 3155/11--3156/4)**. Similarly, Mr. Koppin’s testimony must be viewed against First Card’s documentary evidence, described above, that requires the rejection of consumers who have a small company finance tradeline, even if they meet the other good performance criteria of no derogatory or adverse file flags, no trades currently 30 days past due, no trades historically 90 days past due, among others. **(CX-278-B)**.

to extend credit. Therefore, because this information is both used and expected to be used in credit granting decisions, such information is covered by the FCRA's definition of consumer report, and Trans Union's disclosure of type of tradeline information to target marketers violates the Act.

e. Existence of a Tradeline

As discussed, the court of appeals remanded this case so that the Commission could determine whether there was sufficient evidence to show that the mere "existence of a tradeline" is information used, expected to be used, or collected for the purpose of establishing an individual's eligibility for credit. *Trans Union*, 81 F.3d at 233. The consumer names and addresses that Trans Union sells in its target marketing lists have met the Minimum Criteria,³⁶ including that his or her CRONUS (*i.e.* "credit") file has at least one tradeline or, for lists generated prior to January 1998, at least two tradelines. *See* discussion *supra* p. 6.

The record in this case, however, shows that Trans Union's customers do not purchase only the names and addresses of consumers with a tradeline meeting the Minimum Criteria. Instead, they purchase the names and addresses of individuals who also meet other criteria, *e.g.*, consumers who also have an upscale retail card and an auto loan. Indeed, Trans Union's promotional materials recognize that customers do not simply request the Master File list and the materials encourage them to narrow down that list based on additional criteria that meet their needs.

You'll find . . . in our Master File . . . over 140 million consumers. Of course, you won't want to reach all of them. That's why each consumer record includes more than 350 variables that allow you to segment, select, target, and sell with unmatched precision.

(CX-79-B). In other words, Trans Union does not sell lists of people who just have one tradeline. Instead, Trans Union sells lists of people with a tradeline who meet other specified criteria.

Nonetheless, because the Minimum Criteria apply to virtually all of Trans Union target

³⁶ The exception is the lists of consumers Trans Union disclosed or discloses through its TransLink, New Issues and Emerging Consumer products. These names come directly from CRONUS rather than the Master File and thus do not necessarily meet all the elements of the Minimum Criteria. *See* discussion *supra* p. 10. Every consumer identified through these products does, however, have at least one tradeline, the existence of which bears on credit eligibility and is used in credit decisions. Specifically, Trans Link / Reverse Append discloses the names and addresses of consumers with a bank card (and in some instances age and other data) and the New Issues File and Emerging Consumers File disclose (or disclosed) consumers with open credit tradelines. *Id.* Accordingly, the lists Trans Union sells through these products constitute consumer reports.

marketing lists, we make the following determinations based on our review of the record. First, the Minimum Criteria for appearing on Trans Union's base marketing lists are not the "mere existence of tradeline." Rather, the Minimum Criteria also reveal, among other things, the existence of a recently active and current credit relationship. Specifically, the prerequisite for appearing on a list is: (1) the existence of either two tradelines active within the last six months *or* one tradeline active within the last six months with an address matched to an outside vendor file, *and* (2) that the tradeline must have no closed date, must not be disputed, and cannot be a collection tradeline or a public record tradeline.

Second, the record shows that even these Minimum Criteria are more important than they initially appear. Interestingly, Trans Union's Minimum Criteria are substantially similar to FICO's minimum criteria for every credit scoring model that the three national CRAs use. Like the names in the Master File, for example, FICO requires initially that a consumer have at least one open line of credit updated within six months that is not the subject of a dispute and that gives no indication that the subject is deceased. **(Rapaport 763/4-23; CX-89-S; Wiermanski 1795/21--1796/20).**³⁷

The importance of the existence of a tradeline is further revealed through the scorecard segmentation process - - a mechanism for grouping like people together to better determine future risk. *See supra* n.24. Significantly, Mr. Rapaport testified that each of the three national credit reporting agencies uses scorecard segmentation and that they each have a scorecard for consumers who have only one tradeline; consumers who have either zero or two or more tradelines are evaluated through different scorecards. **(Rapaport 770/15--771/5).**

Prescreening criteria similarly illustrate the significance to credit grantors of having a tradeline. The Chase Manhattan prescreen criteria require that a person have at least one tradeline verified within the last six months. **(CX-280-L; Zancola 723/3-6).** Similarly, in the Wachovia prescreen, the first factor applied to a consumer's credit file, without reference to any performance information, is whether the consumer has a line of credit which has been open for a specified duration. **(Pendleton 393/3-23; CX-275-F; CX-276-A).**³⁸

³⁷ When a loan applicant does not have a tradeline, Trans Union's EMPIRICA model cannot calculate a score and returns a message "EMPIRICA Not Scored - Insufficient Credit." **(Rapaport 764/12-15; CX-87-A).** In fact, most credit grantors will not approve an applicant where there is no score due to the absence of a tradeline, although some will build custom scorecards for those who have no tradeline. **(Rapaport 766/1-19).** Discover Card, for instance, declines credit applicants whose credit reports indicate no tradeline. **(Stormoen 3155/24-3156/4).**

³⁸ One of Wachovia's prescreens requires one open tradeline for two years; another Wachovia prescreen requires at least one open tradeline for one year. **(CX-275-C, F; CX-276-A, C; Pendleton 393/3-23, 414/17--415/21).** In addition, First Card's prescreening criteria also reject consumers with no tradeline, although First Card extends credit to consumers without tradelines under special circumstances. **(CX-278-A; Koppin 515/17-24, 516/12-20, 526/9-**

Further, the record demonstrates that Trans Union “expected,” within the meaning of the FCRA, that information regarding the existence of a tradeline (or two tradelines) would be used in credit eligibility decisions. Trans Union promoted: “Any adult with at least two active tradelines of credit is represented on the Masterfile.” (CX-33-A; CX-69-A). “Any individual with at least

528/4). Also, Northern Trust’s 1993 and 1996 home equity prescreens look to tradeline activity within the last year. (CX-281-A; CX-283-A; McCoy 603/9-25, 611/8-12).

³⁹ Trans Union argues that Complaint Counsel “essentially” concedes that information disclosed in its proprietary target marketing models and its reverse append product is not a consumer report. **TURB at 1.** We find to the contrary. Complaint Counsel’s brief expressly states that the modeled products “are not only derived from and disclose credit eligibility factors (IDF-82, 85, 92, 108), they are specifically marketed by Trans Union for *both* target marketing and credit eligibility uses (IDF-87, 89, 93-94).” **CCAB at 88, n.124.** Complaint Counsel’s brief also discusses the privacy-intrusive aspects of reverse append and Trans Union’s use of the product without a permissible purpose. *Id.* at 10.

⁴⁰ Trans Union objects that the ALJ “leaped” without analysis to the conclusion that its proprietary models are “consumer reports,” arguing that the ALJ made no finding about whether the models were used or expected to be used as factors in establishing credit eligibility. **TUAB at 3--4.** We agree that such additional findings must be made before Trans Union can be held responsible for FCRA violations, and based on the record now before us, we make such findings here.

Trans Union’s promotion of each of these products⁴¹ reveals its expectation that they would be used as factors in establishing credit eligibility. Trans Union marketed its E-Val product -- its scoring system that estimates the amount of equity available in a consumer’s home -- to lenders as:

the ideal tool for marketers of home equity lines of credit or other secured loans. It clearly identifies homeowners who have both equity available and an interest in securing credit. . . E-VAL can be of significant value to a wide range of marketers: Banks, Credit Unions, Brokerages, Mortgage Brokers, Mortgage Guarantors, Fannie Mae/Ginnie Mae Agencies, Ad Agencies, Modelers, [and] Catalogers.

(CX-118). The record also shows that Trans Union’s lender/customers requested E-Val home values on individuals in deciding whether to make loan offers. **(CX-23; CX-24; CX-38).**

In its seller’s guide, Trans Union describes the following uses for its income estimator model (“TIE”): “in credit risk scoring for new or existing accounts . . . in existing prescreen criteria . . . as a supplement to credit application data . . . to set initial credit limits.” **(CX-119).** The guide also states that “[t]he most prominent markets for TIE are: credit grantors (including bank card issuers, finance companies, retailers, and auto finance companies) and other lenders (retail banks, savings & loans, and credit unions).” *Id.*⁴² Further, Trans Union’s Vice President Chester Wiermanski testified that TIE was intended for use in approve/decline decisions. **(Wiermanski 1719/25--1720/20).**⁴³ Clearly, Trans Union expected lenders to use information in TIE in credit granting decisions and knew that they did, in fact, use such information in these decisions.

⁴¹ Trans Union openly characterized its “Standard Characteristics,” upon which *all* of its five proprietary models were based, as “correlat[ing] highly with lending activity.” **(CX-263-A).**

⁴² A product brochure for TIE states that customers can use TIE “with confidence” to “[f]ine tune credit limits and loan conditions on credit applications . . . ‘[r]ed flag’ applicants whose low income estimate may indicate the need for additional verification,” and “[f]lag accounts to increase/decrease lines of credit.” **(CX-120-B, C).**

⁴³ Trans Union argues that the ALJ’s finding that it “‘uses TIE in credit granting’ (F 93)” is not supported by the record and that the record shows it merely “contemplates” using TIE in credit granting. **TUAB at 4.** Trans Union’s characterization of the record is correct. Still, Trans Union’s “contemplation” (the actual term used was “envisioning”) of TIE for use in credit approve/decline decisions demonstrates that Trans Union expected information in TIE to be used in credit eligibility decisions. Because Section 603(d) of the FCRA covers such expected use, information in TIE is a consumer report.

Trans Union’s internal seller’s guide for SOLO also notes that “SOLO is most often used by credit grantors for non-preapproved offers, such as home equity offers or secured card offers.” **(CX-115-O)**. It also discusses using SOLO in preapproved offers of credit. **(CX-115-Z-2)**. Trans Union, therefore, expected this product also to be used as a factor in credit granting, and conceded this point when it stated in oral argument that its target marketing customers were using SOLO in credit eligibility decisions. **(Oral Arg. Tr. 100/10-13; Davis 67/19--68/4)**.

The “P\$YCLE” model uses CRONUS data to estimate a consumer’s income producing assets. Trans Union’s promotional brochure for P\$YCLE states:

P\$YCLE allows marketers to segment consumers according to affluence, financial product and service usage, and account balances . . . P\$YCLE, designed for financial service companies.

(TU-56).

Similarly, PIC, Trans Union’s model that predicts the likelihood that an individual owns financial service products, is promoted as follows:

It’s easier to acquire individuals’ money if you know where they keep it . . . Imagine the benefit of knowing which financial vehicles an individual investor will choose. That’s exactly what PIC (Prospect Identification and Classification) offers to marketers of mutual funds, money market accounts, insurance, annuities and *home equity credit lines* . . . Tap into the richest source of individual-level financial data in America . . . a new, higher level of predictive behavior . . . and a profitable way for your company to acquire new business . . . (emphasis added)

(TU-20).

All of this evidence plainly shows that Trans Union fully expected lenders to use information in Trans Union’s proprietary models to find the most eligible and profitable targets for the lenders’ promotions.⁴⁴ In addition, each of the models provides information about the

⁴⁴ Trans Union’s promotions also disclose in general terms what inputs it uses to generate its model results. For E-Val, Trans Union announced, “Open mortgage dates, initial mortgage amount, presence of additional mortgages - - [w]ith this information, we can create reliable estimates of the length of residence and the actual equity ratio and equity amount available to homeowners. By deducting existing mortgage balances from the estimated home value, and applying an adjustment factor of 75%, you now possess invaluable data on 62 million U.S. homeowners.” **(CX-118-B)**. For SOLO, Trans Union stated: “[G]roups individual consumers with similar *lifestyle, spending and payment behaviors* into clusters.” **(CX-114-B)**. For

P\$YCLE, “The P\$YCLE model draws on the five economic and demographic factors that have the greatest effect on consumers’ financial behavior: income producing assets, total household income, age of household head, home ownership, urbanization.” (TU-56). With TIE, the sellers guide tells Trans Union’s salespeople that the model uses 23 key characteristics that predict income - - “age and type of accounts, amount of available credit, amount of credit used, number and type of new accounts.” (CX-119-I).

⁴⁶ See *supra* n.2 and p. 14. Although the court of appeals viewed this part of the definition as “not very demanding,” it did so in the context of examining the impact of the existence of two tradelines. *Trans Union*, 81 F.3d at 231. This part of the definition is not as easily met for other information considered in credit decisions.

⁴⁷ See discussion *infra* pp. 37-39.

⁴⁸ See also *supra* n.21.

⁴⁹ Mr. Rapaport testified that zip codes are not used in credit bureau scoring. **(Rapaport 847/17-21)**. Mr. Koppin stated that zip codes are used in extracts to narrow the

not prohibit Trans Union’s disclosure of simple address information to target marketers.⁵⁰

On the other hand, the record shows that an individual’s age does bear on their credit capacity and is used in credit granting decisions. Witnesses from both Northern Trust and Chase Manhattan testified that their companies do not offer credit to consumers who are younger than the legal age. **(McCoy 631/19-24; Zancola 711/9-16)**. In addition, Discover Card looks at “longevity” of “economic dealings people have,” which may be determined by a consumer’s age. **(Stormoen 3190/20-- 3191/7)**. Mr. Rapaport also testified that some scorecards use age as a factor. **(Rapaport 847/8-16)**. The record, therefore, demonstrates that lenders use age information as a factor in credit granting decisions.⁵¹ Further, age clearly bears on credit capacity where state laws restrict contracting with minors. Therefore, age information falls within the definition of a consumer report and its disclosure by a CRA to target marketers violates the FCRA.

D. Trans Union’s Remaining FCRA Arguments

Trans Union contends that the ALJ’s decision is unsupportable because the ALJ ignored the expert testimony of Dr. John Coffman, Mr. Kenneth Scott, and Mr. Barry Connelly, each of whom testified that the existence of a tradeline does not factor into credit eligibility decisions. **TUAB at 31-33**. Although Trans Union called these witnesses as expert witnesses, it is not clear that the ALJ found them qualified as “experts.” Indeed, the ALJ stated that two of the purported experts were “not credible on this issue” and found that Dr. Coffman showed bias through his inconsistent testimony and that Mr. Scott had no relevant experience to support his testimony. **IDF at 86, n.183**. We agree with the ALJ.

The record indicates that Dr. Coffman made internally inconsistent statements on direct and cross examination. Dr. Coffman stated on direct that none of the information sold by Trans Union was used as a factor in determining credit eligibility, with the exception of P.O. Box information, which was used to exclude certain consumers from prescreened offers of credit. **(Coffman 3840/5-21)**. On cross examination, however, Dr. Coffman admitted that information on the existence and number of mortgages, auto loans, and open bank cards has been used as a predictive attribute in some scoring models. **(Coffman 3862/5--3863/22, 3868/16--3870/9)**.

⁵⁰ Although some lenders will not extend credit to consumers with a P.O. Box address, we do not find that the P.O. Box feature bears on “credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living.”

⁵¹ We recognize that the Equal Credit Opportunity Act generally prohibits credit decisions based on age. 15 U.S.C. § 1691(a). There are exceptions, however: a lender can *favor* applicants who are age 62 or older. A lender also can consider age if it bears on other elements of creditworthiness. For example, a lender can consider whether an applicant is close to retirement age, which could impact future income. Section 202.6 of Regulation B (the implementing regulation of the ECOA), 12 C.F.R. § 202.6.

⁵² In addition, Trans Union's CEO and a Senior Vice President sit on ACB's Board of Directors and thereby control Mr. Connelly's budget as well as his salary. (**Connelly 2570/20–2571/8, 2572/5-11**).

⁵³ Trans Union's remaining arguments are, at best, splitting hairs as they have little impact on the core of Trans Union's practices and, thus, our analysis. For example, when Complaint Counsel showed that Wachovia's PCL prescreen requires at least one tradeline open for a year, Trans Union argues that such tradeline must also have a balance update, not just an open date. **TURB at 18**. In addition, responding to Complaint Counsel's showing that First

E. Conclusion

Based on a thorough review of the record, including the testimony, we find that Trans Union's target marketing lists are indeed consumer reports under the FCRA because they contain information that bears on the factors set forth in Section 603(d)(1) and is used or expected to be used as a factor in determining a consumer's eligibility for credit. By selling these lists to target marketers without a permissible purpose, Trans Union violates the FCRA. This conclusion applies to Trans Union's Master File / Selects; proprietary models; and TransLink / reverse append products.

Trans Union's disclosure to target marketers of information on the existence of a tradeline violates the FCRA. Further, Trans Union's disclosure in its target marketing products of other information, such as the existence of a type of tradeline, open date of tradeline, home equity information, and income estimations, among other list criteria described above, also violates the Act.

Finally, the record in this case supports, with one exception, the lawful disclosure of most demographic information. The one exception, however, is age information which the record here shows is used in credit decisions, bears on credit capacity, and is accordingly a consumer report that cannot be disclosed in target marketing.⁵⁴

VI. CONSTITUTIONAL ANALYSIS

Trans Union raises two constitutional defenses in this matter. Trans Union first asserts that, by barring it from selling target marketing lists, the FCRA violates the First Amendment of the United States Constitution. Second, Trans Union claims that the FCRA's definition of consumer report is unconstitutionally vague under the Fifth Amendment. We disagree with both arguments.

A. The FCRA Is a Constitutionally Permissible Restriction on Speech

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech" The right to free speech, however, is not unfettered and it is well settled that different types of speech merit different levels of constitutional protection. Specifically, courts apply the highest degree of protection to speech related to issues of public concern such as political or social change or artistic or scientific expression. *See, e.g., Dun & Bradstreet, Inc. v.*

⁵⁴ We note here that our conclusions are consistent with the Commission's Statements of General Policy or Interpretations under the Fair Credit Reporting Act, 16 C.F.R. Part 600, *et seq.*, which offer general guidance on the FCRA and are not regulations and do not have the force of statutory provisions. 16 C.F.R. § 600.2(a) Further, the Statements appear to be of marginal relevance to the issues here, as neither the parties nor the ALJ based their arguments, conclusions or findings on these Statements.

Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985) (plurality opinion). Such fully protected speech may be called “pure” speech. *American Future Systems, Inc. v. Pennsylvania State Univ.*, 752 F.2d 854, 861 (3rd

consumers' credit history and other confidential, personal financial data. Because the lists do not possess the type of public component that compels full First Amendment protection, we conclude that Trans Union's lists are not pure speech and, consequently, we do not apply the strict scrutiny analysis to the FCRA's restriction on the dissemination of these lists.

b. Nonspeech

We also reject Complaint Counsel's position that the lists are not speech at all and thus fall outside the scope of First Amendment protection. Complaint Counsel argues that Trans Union's lists are not expression but, rather, are simply "commercial products" that Trans Union sells to its customers. **CCAB at 58-61.**⁵⁵ Although Trans Union's lists are products, we find that they do possess a quality of speech because they communicate substantial consumer information to Trans Union'

⁵⁵ Of course, both Trans Union and Complaint Counsel also assert in the alternative that the target marketing lists are commercial speech and that we should therefore apply intermediate level scrutiny to the FCRA. We analyze commercial speech *infra*.

⁵⁶ See *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 762 (1985) (credit report "was speech solely in the individual interest of the speaker and its specific business audience"); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976) (treating consumer credit reports as commercial speech); *U.D. Registry, Inc. v. State*, 40 Cal.Rptr.2d 228, 233 (Cal. 1995) (much of the information contained in the credit reports is "highly protected noncommercial speech"); *Equifax v. Cohen*, 420 A.2d 189 (Me. 1980) (rejecting appeal of lower court determination that credit reports are commercial speech), *cert. denied*, 450 U.S. 916 (1981).

that does no more than propose a commercial transaction. *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 66 (1983) citing *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 762 (1976). Recognizing that the line between commercial and other types of speech is not always distinct, the Court expanded upon the concept by identifying three factors relevant to the determination of whether speech is “commercial”: (1) whether the speech is an advertisement; (2) whether it mentions a specific product by name; and (3) whether it is economically motivated. *Bolger*, 463 U.S. at 66-67.

Trans Union’s lists do not fall neatly into this core notion of commercial speech as articulated by the Court in *Bolger*. The lists are not advertisements but instead are antecedent to advertisements - - *i.e.*, the solicitations that Trans Union’s target marketing customers send to the consumers identified in the target marketing lists. Trans Union’s lists also do not mention a product by name; instead, as asserted by Complaint Counsel, they *are* the actual product. Finally, although Trans Union’s marketing list business is certainly motivated by economic considerations, that fact alone does not confer commercial speech status. See *Bolger*, 463 U.S. at 67 (fact that party had an economic motivation for mailing pamphlets at issue was insufficient by itself to turn materials into commercial speech).

Still, *Bolger* does not establish a bright line test for commercial speech and the Supreme Court has also regarded “expression related solely to the economic interests of the speaker and its audience” as commercial speech. *Central Hudson*, 447 U.S. at 561. Similarly, Trans Union creates and sells its lists for its own economic benefit as well as the benefit of its target marketing customers. In other words, while the ultimate consumers who are the subject of Trans Union’s lists have an interest in protecting their credit and financial privacy, Trans Union’s sale of its target marketing lists is a commercial transaction motivated by the economic interests of the list seller and the list purchaser.

Moreover, in *Dun & Bradstreet*, which concerned a consumer report containing false information, a plurality of Justices found that the consumer report at issue deserved reduced First Amendment protection. The plurality opinion explained that speech related strictly to private concerns has less First Amendment value and merits less stringent protection than speech on matters of public concern. Thus, the level of protection the Court should give to a consumer report turned on whether the report concerned *public* or *private* matters. The plurality concluded that, based upon an examination of the content, form and context of the report, it involved “speech solely in the individual interest of the speaker and its specific business audience” and deserved reduced First Amendment protection. *Dun & Bradstreet*, 472 U.S. at 762 (plurality).⁵⁷

⁵⁷ Although Trans Union correctly notes that *Dun & Bradstreet*, unlike the instant matter, concerned the distribution of a false credit report that injured the reputation of the report’s subject, the falsity of the credit report was only one of the several considerations that led the Court to conclude that its distribution was not entitled to full First Amendment protection. The fact that the consumer report was of limited distribution and, like advertising, was hardy and unlikely to be deterred by incidental state regulation supported this conclusion. *Id.* at 762.

⁵⁸ Our conclusion is supported by a recent ruling of the U.S. Court of Appeals for the Ninth Circuit in which the court held that a private party's sale of the names and addresses of arrestees was a "pure economic transaction" that constituted commercial speech entitled to intermediate First Amendment protection.

CRA's dissemination of consumer reports is to protect consumers' privacy of their personal credit information. Congress expressly found that:

“[t]here is a need to insure that consumer reporting agencies exercise their grave

⁶⁰ During his testimony at Congressional hearings on the bill that became the FCRA, Professor Westin provided various examples of non-credit grantors easily obtaining consumer credit files. These examples include Professor Westin's own success in securing, without any credit-related purpose, a co-worker's consumer report as well as the ability of police agencies and federal investigators to obtain and use consumer reports in connection with non-credit related investigations. *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 73-97, pp. 92-93 (1969) (testimony of Alan Westin).

⁶¹ Statement of Senator Proxmire, Committee on Banking and Currency, Subcommittee on Financial Institutions, S. REP. No. 91-517 (November 5, 1969). Further, “[a] fourth problem is that the information in a person's credit file is not always kept strictly confidential.” S. REP. No. 91-517, at 4 (1969).

⁶² *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 2 (1969) (statement of Senator Proxmire). In addition to the interest in protecting the confidentiality and privacy of personal credit information, the FCRA's legislative history also makes clear the importance - - to consumers and CRA's alike - - of the free flow of accurate and reliable consumer credit information between consumers and credit grantors. The Committee Report cites the “vital role” of CRA's in our economy and states that credit grantors have the right to the facts necessary to make sound decisions on whether to grant credit. S. REP. No. 91-517, at 2 (1969). The report also stresses that consumers have the right to correct erroneous information in their credit files. *Id.* Professor Westin also referenced the importance of accurate credit information, stating that

concerns, Congress drafted the Act to limit CRAs' disclosure of credit reports to people with a "permissible purpose."

Congressional interest in protecting consumers' privacy is further illustrated by the 1996 amendments to the FCRA, in which Congress added to the permissible purposes of consumer reports prescreening for certain defined firm offers of credit and insurance. The Committee Report to the amendments notes an effort "to balance any privacy concerns created by prescreening with the benefit of a firm offer of credit or insurance for all consumers who meet the criteria for the credit or insurance being offered."⁶³ In striking this balance, however, Congress ensured significant privacy protections for consumers, requiring that they receive notice that their personal credit information is being used for such purposes, and that they have the right to "opt out" of such use. See 15 U.S.C. § § 1681b(c), (e) and 1681m(d)(1). Trans Union's practices at issue here do not provide for such safeguards.

Courts have also recognized that privacy protection of credit-related data is among the important purposes of the FCRA. The court of appeals in this matter found that "a major purpose of the Act is the privacy of a consumer's credit-related data." *Trans Union*, 81 F.3d at 234. See also *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 884 (5th Cir. 1989); *Zamora v. Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1370 (10th Cir. 1987); *Heath v. Credit Bureau of Sheridan Inc.*, 618 F.2d 693, 696 (10th Cir. 1980).

Although enacted congressional policy does not necessarily constitute substantial governmental interest for purposes of the *Central Hudson* analysis, *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 119 S. Ct. 1923, 1932 (1999), we are satisfied that the interest here is sufficient. First, the FCRA's legislative history is consistent with other congressional enactments related to personal privacy and the concerns raised by compilations of personal information in large databases. In *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762-67 (1989), the Supreme Court reviewed in detail the terms and history of the Privacy Act, 5 U.S.C. § 552a, as well as the privacy exemptions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The Court recognized, for example, that "[t]he Privacy Act was passed largely out of concern over 'the impact of computer data banks on individual privacy.'" *Id.* at 766 (quoting H.R. REP. No. 93-1416, at p. 7 (1974)). Additionally, the Court concluded that the essence of the "privacy" interest Congress sought to protect under the FOIA was the individual's "control of information concerning his or

CRAs exist to help credit grantors avoid loss through fraud or misuse of credit and to keep the costs of such losses from falling on the average consumer. *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 73-97, p.91 (1969) (testimony of Alan Westin). Consumers benefit from strong credit markets, which in turn require accurate, current and reliable data.

⁶³ Economic Growth and Regulatory Paperwork Reduction Act of 1995 (12/14/95), S. REP. No. 104-185, at 36 (1995).

her person,” by deciding for him or herself the “degree of dissemination” of personal information. *Id.* Such Congressional consistency supports our conclusion that the government’s interest is substantial.

Furthermore, case law indicates well-settled privacy interests in personal information generally,⁶⁴ and financial and credit information in particular. *See, e.g., Barry v. City of New York*, 712 F.2d 1554, 1561 (2d Cir.) (“[w]e recognize that public disclosure of financial information may be personally embarrassing and highly intrusive.”) *cert. denied*, 464 U.S. 1017 (1983); *Millstone*, 528 F.2d at 833 (recognizing, in a FCRA case, that the right to privacy is “a significant personal right”). *But see U.S. West, Inc. v. Federal Communication Commission*, 182 F.3d 1224, 1228 (10th Cir. 1999) (vacating a Federal Communication Commission (“FCC”) regulation on First Amendment grounds).⁶⁵

Trans Union argues that any privacy interest in the existence of a consumer’s credit relationship is *de minimis* because only 1% of consumer files in CRONUS do not have a tradeline. **TUAB 39--40, 72. (Stockdale 906/1-8, 21-23, 904/15-18; CX-358-G).** This argument is not compelling. First, the mere fact that 99% of the consumer records in CRONUS have at least one tradeline is not indicative of whether there is a privacy interest worthy of FCRA protection.⁶⁶ Section 603(d) of the Act focuses on the nature of the information disclosed and not the amount of information worthy of protection. Second, Trans Union itself asserts that CRONUS data relate

⁶⁴ *See Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (for purposes of *Central Hudson* analysis, state has substantial interest in protecting privacy of potential clients of certified public accountants); *Whalen v. Roe*, 429 U.S. 589, 599 (1976) (although the Supreme Court upheld a statute authorizing New York state to record names and addresses of consumers receiving prescriptions for certain drugs, the Court acknowledged that individuals have a protectable “interest in avoiding disclosure of personal matters”).

⁶⁵ *U.S. West* involved review of an FCC regulation implementing a section of the Telecommunications Act of 1996. The petitioner argued that the regulation violated the First Amendment by restricting its ability to engage in commercial speech with its customers. A majority of the panel applied a *Central Hudson* analysis and expressed “reservations” about whether the FCC had “asserted a substantial state interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information.” *U.S. West*, 182 F.3d at 1235-36. The majority’s skepticism was based upon its concern about the lack of evidence that carriers such as U.S. West would actually disclose the regulated information to outside parties and thereby breach consumers’ privacy. The case before us is distinguishable from *U.S. West* as the facts here differ significantly. It is undisputed that Trans Union discloses consumer information to third party target marketers; indeed, the record demonstrates that Trans Union actively promotes the value of its lists to third party purchasers.

⁶⁶ Moreover, as a practical matter, *see supra* p. 24, Trans Union’s customers do not purchase lists of people with one tradeline.

to a subset of people. The fact that this number is clearly less than the total number of adults in the United States, demonstrates just how effective tradeline information is in restricting to credit worthy individuals the pool of consumers eligible to be included in Trans Union

We rely upon substantial record evidence rather than mere conjecture or speculation to conclude that the FCRA, by limiting CRAs' disclosure of personal credit information, directly and materially advances the substantial government interest in protecting the privacy of personal credit information. Indeed, it is almost tautological - - because the unauthorized disclosure of personal credit information causes the privacy harm, restricting the unauthorized disclosure of the information directly limits the infringement on privacy.

In attacking the FCRA, Trans Union argues that the statute is underinclusive because it elsewhere allows practices that undermine the consumer privacy interest in the information that Trans Union's target marketing lists communicate.⁶⁷ **TUAB at 76--82.** The court of appeals expressed an underinclusiveness concern as well, remarking on the apparent freedom of Trans Union's non-CRA competitors to gather and distribute the same information that Trans Union discloses in its marketing list business.⁶⁸

As a general rule, however, a regulation's underinclusiveness is fatal only where it is material, substantial or significant. *Bad Frog Brewery v. New York State Liquor Auth.*, 134 F.3d 87, 98-99 (2d Cir. 1998). The Supreme Court has offered the following guidance:

“Nor do we require that the Government make progress on every front before it can make

⁶⁷ Trans Union cites *United Reporting*, 146 F.3d at 1135, as an example of a statute struck down on First Amendment grounds. As noted, *supra* n.58, the Supreme Court recently reversed this decision. Furthermore, the FCRA is factually different. The statute at issue in *United Reporting* prohibited the release of arrest information for commercial purposes, but permitted it for “journalistic, scholarly, political, governmental, or investigative purposes.” Prior to reversal, the Ninth Circuit had found that the governmental interest in protecting the privacy of arrestees was substantial but that the exceptions to the statute - - which include the right to broadly publish this information - - precluded it from advancing the privacy interest in a direct and material way. Unlike the regulation at issue in *United Reporting*, however, in this case none of the FCRA's permissible purposes allows broad public disclosure of consumer report information.

⁶⁸ In particular, the court criticized the position that Trans Union could “separately obtain” and distribute consumer information - - *i.e.*, gather the information at issue from sources other than its credit reporting database - - without violating the FCRA. Such a requirement, the court suggested, would result in a waste of time and resources. Although it did not rule on the issue, the court indicated that the “disparity” between Trans Union (as a CRA) and its competitors raised constitutional concerns. *Trans Union*, 81 F. 3d at 235. The court of appeals' concern presupposed that Trans Union, wholly independent of its status as a CRA, could gather for target marketing purposes the same type of rich consumer information that it gathers by way of its consumer reporting business. As explained *infra*, the record now before us clearly establishes that this is not the case; rather, the high quality and comprehensiveness of the underlying data in Trans Union's target marketing products stem from its special position as a CRA.

progress on any front . . . [T]he Government may be said to advance its purpose by substantially reducing [the proscribed conduct], even where it is not wholly eradicated.”

Edge Broadcasting, 509 U.S. at 434; *See also R.A.V.*, 505 U.S. at 387, *Moser v. F.C.C.*, 46 F.3d 970, 974 (9th Cir. 1995). Based on the full record developed on remand from the court of appeals, peapeap€he Ü

⁶⁹ Section 623 of the FCRA, 15 U.S.C. § 1681s-2.

information from third parties, its information is also less biased and thus more reliable than the self-reported information many non-CRA information brokers receive. Trans Union’s own credit scoring witness testified that data from CRAs are objective and better predictors of future credit performance than information provided by a consumer filling out an application. (**Coffman 3806/2-14, 3857/24--3858/4, 3858/17--3859/3; CX-122-P**).⁷⁰ Finally, because Trans Union’s information is reported and updated on an ongoing basis,⁷¹ it is far more current than reports by, for example, census bureaus and state DMVs.

By virtue of its status as a CRA, Trans Union also has the advantage of being able to provide an instant compilation of nearly all relevant information. Moreover, some of the more specialized information that Trans Union has access to and discloses in target marketing lists simply may not be available to other information brokers. Examples include the existence of 30/60/90 day finance trade; an upscale retail card; a student loan; a premium bank card; and the open dates of bank cards. (*See e.g.*, **TU-130-4; CCPF at 76; TU-117-2; TU-120-2; Schultea 3928/2-4; CX-310-D**). Although other types of information that Trans Union discloses may be separately available from a range of sources, only CRAs have instant access to them all.

Recent legislation and case law have recognized and, indeed, expanded the disparity between Trans Union and its non-CRA competitors. As noted, Polk, Donnelly, and First Data use DMV data as a primary source of information and First Data also offers automobile data from state DMVs. However, the 1994 enactment of the Federal Drivers Privacy Protection Act (“DPPA”), 18 U.S.C. § 2721, generally restricts state DMVs from disclosing, without the licensee’s permission, personal identifying information contained in state DMV records. Reversing the holding of the U.S. Court of Appeals for the Fourth Circuit, the Supreme Court in *Reno v. Condon*, 2000 WL 16317 (January 12, 2000), unanimously upheld the constitutionality of the DPPA. Thus, there is no question that the DPPA drastically limits the personal data that these information brokers can obtain.⁷² Moreover, the DPPA aside, information brokers have never been able to obtain driver data on a nationwide basis. By contrast, Trans Union’s coverage

⁷⁰ Trans Union’s competitors’ modeled products are not as “predictive” as Trans Union’s own CRONUS-derived products. (**Hinman 2270/13--2271/11**).

⁷¹ Trans Union receives information regarding 1.8 billion tradelines per month. (**Stockdale 908/1-19**). Some customers report information on a daily basis to TU; the majority report on a monthly basis or according to their billing cycles. (**Stockdale 904/8-14; Frank CX-186 at 19/3-7**).

⁷² The Court’s holding in *Condon v. Reno*, that Congress may regulate the sale or release of personal identifying information, implicitly supports the notion that individuals have a right to personal data privacy. The same notion is presented here through our determination that the government, through the FCRA, has a substantial interest in protecting the privacy of consumers’ personal credit information. *See supra* pp. 37-41.

provides continual access to current information on consumers' auto loans in all 50 states.⁷³

Trans Union enjoys profound advantages with respect to other types of data as well. For instance, information brokers obtain consumer mortgage information from county records. (**Litz 2972/6-9, 2975/5--2976/7; M. Smith 3373/18-23, 3390/18--3392/9; Nusbaum 2889/1-8, 2914/22--2915/3, 2933/22--2934/15; Cleary 3099/16-23; Hinman 2250/5-14**). Such information gathering can be quite burdensome; in Texas alone, for example, information brokers may need to consult over 240 counties to fully cover the state's mortgages.⁷⁴

⁷³ Trans Union understands its superiority as a source for consumer automobile data and has used this fact as a selling point. One of Trans Union's promotional letters notes that its coverage for automobile loan information encompasses all states and is not limited by the commercial restrictions that some states have imposed upon access to similar information. (**CX-66-A**).

⁷⁴ Mr. Kenneth Scott, witness for Trans Union, described the difficulty in obtaining such data, noting that information brokers send their employees with laptop computers to county courthouses to input public data and modem it to the front office. (**Scott 2659/10-14**).

⁷⁵ Even the legislative history reveals a concern that public information may not be as current as consumer reporting information. "Unfortunately, the [public record] information cannot always be kept up to date either because it is costly or because the correct information is simply not available." Report of the Committee on Banking and Currency, S. REP. 91-517, at 4 (1969).

⁷⁶ Elizabeth Dixon, Account Manager at Performance Data, and Patricia Porretto, Senior Account Executive at Performance Data, testified to the fact that the non-self-reported aspect of the Master File is a distinct advantage over other target marketers. (**Dixon 292/16--**

cards are also weak with respect to coverage. The record shows that 20-40 million consumers respond to surveys or provide warranty cards. **(Nusbaum 2879/6-23; Cleary 3088/20--3089/6)**. By contrast, Trans Union provides information on over 140 million people. Additionally, several information brokers use census data to estimate income. **(CX-119-Z-7; Cleary 3123)**. These data are significantly less timely because they are only reported every ten years whereas Trans Union's income estimator, TIE, is updated every 7 days. **(Wiermanski 1723/10-24; CX-120-B)**.

In light of the full record here, we find that Trans Union's status as a CRA allows it to collect a much wider array of consumer information that is richer, more detailed and more current than the information available to its non-CRA competitors. Trans Union could not obtain the same type and quality of information outside the scope of its consumer reporting business. Accordingly, we are not persuaded that the FCRA is unconstitutionally underinclusive because it treats CRAs and non-CRAs differently.⁷⁷

Our conclusion is consistent with relevant case law. The Supreme Court has recognized the special threats to privacy that *compilations* of information pose, even though each constituent bit of information may be publicly available elsewhere. In *D.O.J. v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989), the court considered whether a privacy-related Freedom of Information Act exemption applied to a request for a "rap sheet" (a compiled database of publicly available information "bits"). The Court found:

[T]he issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

Id. at 764. The Court acknowledged the ". . . power of compilations to affect personal privacy

293/4; Porretto 1621/16-20).

⁷⁷ Trans Union also differs from other CRAs in terms of the type of information it discloses. Although Experian and Equifax disclose credit information to target marketers - - either directly or through third parties - - they do so only on an aggregated, zip-plus-four basis. Such aggregated credit information relates to the *typical* consumer in a geographic area. By contrast, Trans Union's information concerns specific, identifiable individuals. Thus, it intrudes more acutely on individuals' privacy. In any event, the lawfulness of zip-plus-four aggregation is not an issue in this proceeding and we decline to rule on it here.

that outstrips the combined power of the bits of information contained within.”⁷⁸ *Id.* at 765.

(ii) Credit Grantors Do Not Disclose the Same Information As CRAs

To further support its underinclusiveness argument, Trans Union points to the “transactions or experiences” exception in Section 603(d)(2)(A)(i) and asserts that this provision undermines privacy protection under the Act because it allows credit grantors to disclose, for target marketing purposes, substantial information about their own customers.⁷⁹ We disagree. Trans Union introduced evidence demonstrating that Wachovia, First Card, Discover, First USA Bank, and American Express provide credit information on their credit card customers for target marketing. (**Eulie 2376–78, 2381; Koppin 588–589; Stormoen 3165–66; Scott 2614--2622, 2628--2630**). The information available to a single credit grantor, however, is far more limited than Trans Union’s CRONUS database, which compiles information from hundreds of creditors. Also, the record shows that credit grantors generally do not disclose particulars about credit accounts beyond the name and address of account holders. They do not, for example, disclose open dates or credit limits. (**Pendleton 405/15–406/3; Koppin 588/6–589/6, 596/24–597/18; Stormoen 3165/3–3168/4; Eulie 2376/7–2377/23, 2380/4-10**). Further, the ability of creditors and other merchants to collect customer information and disclose it may be limited by state law. New Jersey, Pennsylvania and Massachusetts, for example, prohibit merchants from *collecting* personal identification information that is not required for the transaction.⁸⁰ Other states prohibit the *disclosure* of information by merchants and financial institutions.⁸¹ Because it is a CRA,

⁷⁸ Trans Union argues that its witness, Kenneth Scott, testified that all of the selects available from Trans Union were also available from others in the marketplace. (**Scott 2711--2730**). We are unpersuaded. In reaching his conclusion, we find that Mr. Scott performed only a superficial analysis. Mr. Scott examined only what is currently available - - not Trans Union’s past practices. Importantly, Mr. Scott did not examine the difference in the source of the information for each select. Thus, he did not take into account that Trans Union, using CRONUS as its primary source of information, uniquely and instantly has a full range of richer and more comprehensive information available to it.

⁷⁹ Under this provision, information related solely “to transactions or experiences between the consumer and the person making the report” is not a consumer report. Section 603(d)(2)(A)(i) of the FCRA, 15 U.S.C. § 1681a.

⁸⁰ *See*, N.J. STAT. ANN. § 56:11-17; PA. STAT. ANN. tit. 69, § 2602; MASS. ANN. LAWS ch. 93, § 105.

⁸¹ California and Virginia prohibit credit card issuers and merchants respectively from selling personal information to third parties without notifying the individual and providing him/her with the ability to opt out; New Jersey prohibits the disclosure of electronic fund transfer transactions for marketing purposes without consent. *See* CAL. CIV. CODE § 1748.12; N.J. STAT. ANN. § 17:16K-3; VA. CODE ANN. § 59.1-442. Connecticut prohibits financial

Trans Union is not subject to these restrictions.

Trans Union also cites the National Marketing File (“NMF”) created by Business Development Inc. - - a target marketing list provider - - as additional evidence that the FCRA’s “credit grantor” exception can be used to intrude upon a consumer’s financial privacy. This argument fails because NMF information is far less complete, detailed or timely than the data in CRONUS.⁸²

Similarly, the existence of cooperatives that share data and reveal consumer credit information also fails to support Trans Union’s underinclusiveness argument. One such cooperative, Abacus, collects information regarding consumers’ mail order buying behavior from 700 catalogers and shares the information among its members. Abacus discloses how many credit transactions a consumer has had over his/her lifetime, how much money a consumer has spent using credit cards over the last 12 months, and other information about a person’s history of buying by credit card. **(TU-206)**. Like NMF’s information, however, this type of data also does not share the same level of comprehensiveness as the Trans Union information. Moreover, several of the state laws previously described may limit the disclosure of personal credit information to such cooperatives.⁸³

institutions from selling the names of card holders or disclosing financial records without written consent. *See* CONN. GEN. STAT. Ann. § 42-133gg; CONN. GEN. STAT. § 36a-42 (1997).

⁸² The NMF discloses two types of information in two “fields”: (1) a counter field that shows the number of credit cards a consumer has up to nine, and (2) a bank card field that indicates whether there is one bank card or not. **(Schultea 3911/3–3913/7, 3943/6-23)**. The NMF is not kept current and a record is deleted only when the person moves or dies. **(Schultea 3912/4-12, 3918/24--3919/7, 3920/2-11)**. The NMF does not reveal whether the person has obtained or used credit within a specified time period; instead, it reveals only whether a consumer has *ever* had a bank card and how many, up to nine, accounts the consumer has *ever* had. Mr. Schultea, President of Business Development, testified that in all likelihood, the NMF contains references to credit card accounts that have been closed and/or are currently inactive. **(Schultea 3922/3-14)**. The NMF also does not indicate open dates of any of the accounts, or the type of credit a consumer has obtained (other than the existence of a bank card). **(TU-130 p. 4; TU-117 p. 2; TU-120 p. 2; Schultea 3928/2-4; CX-310-D)**. Finally, as for coverage, the information in the NMF comes from only 20-25 retail companies and bank clients with credit card customers. **(Schultea 3915/2–3916/21)**.

⁸³ We understand that substantial development of broad-based information-sharing agreements, in the presence of an ever-growing electronic information-handling medium, may advance the quality of information that such cooperatives offer. It is possible that over time, the disparity between CRAs and non-CRAs may narrow. If so, Congress may find it appropriate to respond to new threats to financial privacy with new legislation as they arise. *Cf.* Gramm-Leach-Bliley Act of 1999, Pub. L. 106-102 (limiting, *inter alia*, disclosure of nonpublic personal

(iii) Prescreening

Finally, Trans Union argues that the FCRA is underinclusive because the Act, as amended in 1996, allows the practice of prescreening for so-called “firm offers” of credit and insurance. We find that Congress’ decision to allow prescreening does not constitutionally undermine the FCRA. Any privacy intrusions that result from prescreening are significantly less harmful than the privacy intrusion at issue in Trans Union’s target marketing business. In prescreening, the types of consumer report information that can be used are restricted - - Section 604(c)(2) - - and prescreening itself may provide a concrete benefit to consumers, *i.e.*, a “firm offer of credit,” that they might not otherwise have. Equally important is the FCRA’s requirement that those seeking to use the prescreening mechanisms notify consumers that they may opt-out of future, prescreened solicitations. 15 U.S.C. §§ 1681b(c) and 1681m(d).

information to nonaffiliates). But that does not change the legal obligations the Act imposes upon CRAs like Trans Union as a result of their unique status and the benefits they receive. At this time, the range and detail of information provided by CRAs far surpasses that of other information brokers and supports the legislative scheme.

⁸⁴ Statement of Senator Proxmire, *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 92 (1969). He also stated that “[a] second aspect to the problem of confidentiality is the use of information inconsistent with the purposes indicated when the information was collected.” 115 CONG. REC. S2340, 2410-16 (1969).

⁸⁵ *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 73-97, at 92 (1969) (testimony of Alan Westin).

⁸⁶ *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 224, 228 (1969) (statement of Harry C. Jordan, Chairman of the Board, Credit Data Corp., “[Credit Data’s] rules can be stated as follows: . . . Credit information is available to credit grantors only for credit

Congress’s approach to prescreening, in particular its requirement of notice and opt out rights for the consumer, is consistent with the twin goals of protecting the privacy of consumers’ personal credit information and ensuring that consumer credit information not be used for inappropriate purposes. Permitting the disclosure of certain consumer credit information for prescreening, as tailored by statutory limitations, does not undermine the FCRA.

Consequently we find that the FCRA is not underinclusive. Congress recognized that CRAs like Trans Union, *by virtue of their credit reporting business*, are uniquely positioned to obtain the most up to date, detailed and comprehensive set of personal credit information on an individual, observed basis. Mishandling such information poses a special threat to consumer privacy. Therefore, by limiting the disclosure of this information, the FCRA directly and materially advances the government’s interest in protecting the privacy of personal credit-related information. To find otherwise would allow Trans Union to have it both ways - - *i.e.*, to enjoy unique access to the widest array of the best consumer credit information available, without following the restrictions Congress imposed in order to protect consumer privacy. Further, the fact that the FCRA allows credit grantors to disclose limited information and permits prescreening does not make the Act underinclusive.

c. The Restriction Is Narrowly Tailored

The final prong of the *Central Hudson* test requires a reasonable fit between the goals of the statute and the statute itself. The proper fit “is not necessarily perfect, but reasonable”; it must “represent[] not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served.’” *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989). With these words in mind, it is appropriate to consider whether there are alternative means of accomplishing the government’s stated interest with a lesser intrusion into speech. In doing so, we recognize that a commercial speech restriction may be unconstitutional if there is a “far less restrictive” alternative. *Pearson v. Shalala*, 164 F.3d 650, 658 (D.C. Cir. 1999).

We believe that the FCRA’s restriction on the disclosure of consumer reports, including Trans Union’s target marketing lists, is narrowly tailored to protect the privacy of consumers’ personal credit and other financial information. Moreover, we do not believe that alternative restrictions proposed by Trans Union are “far less restrictive,” nor would they afford sufficient privacy protection.

Congress established a three-tiered system for disclosure and privacy protection:⁸⁷

purposes. . . Credit Data, as a matter of policy sells information only to credit grantors.”).

⁸⁷ Congress has used a “tiered” privacy-protecting approach in other areas as well. In the Cable Communications Policy Act of 1984, 47 U.S.C. § 551, the Electronic Communications Privacy Act of 1986, 47 U.S.C. § 222(c), and the Video Privacy Protection Act

C No Consumer Permission Required. Where a consumer has initiated a transaction

of 1988, 18 U.S.C. § 2710, Congress afforded different levels of privacy protection - - from disclosure without consumer's permission, to notice and opt out, to opt in - - as the uses of such information become less related to the purposes for which the information was collected.

⁸⁸ Survey evidence introduced by Complaint Counsel indicates that consumers view credit relationships as private and that they experience a privacy invasion from the disclosure of the existence of types of credit accounts. (*See CX-274; Mazis 1109/20-25*). The survey, conducted by Dr. Michael Mazis, assessed the attitudes of 1,002 consumers regarding the use of information derived from CRONUS and from credit reports to compile marketing lists. (**Mazis 1080/10-18; CX-354-A; Waldeck 1060/12-16**). A total of 68.1% of the respondents found the use of credit report information for the compilation of marketing lists to be unacceptable. (**Mazis 1105/13-20; CX-354-B**). Based on these results, Complaint Counsel's expert opined that

consumers have a strong privacy interest in the use of information from their credit reports. **(Mazis 1107/23-25).**

⁸⁹ Indeed, although the Direct Marketing Association offers consumers the right to opt out of appearing on its members' marketing lists, most consumers are unaware that they can opt out of such lists. **(Beales 3669/13--3670/10; Westin 3639/8-19; TU-88-2-58).** It is also significant that, when faced with a question at oral argument about whether Trans Union would agree to a *notice* and opt out system in the target marketing area, counsel for Trans Union evinced a strong reluctance to do so unless non-CRA competitors were similarly asked to abide by a notice and opt out system. **(Oral Arg. 54/3-7).** Trans Union's pursuit of equal treatment

discussed, the definition of consumer report in the FCRA is designed to protect personal credit-related information that is “used, 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 credit.” 15 U.S.C. § 1681a. Trans Union argues that defining consumer reports based on the ultimate purpose to which information is put makes it impossible to know what information is covered and what is not. In this case, we disagree for the following reasons.

A statute is void for vagueness if its prohibitions are not clearly defined so as (1) to give regulated parties adequate notice and (2) to prohibit arbitrary and discriminatory law enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *United States v. Thomas*, 864 F.2d 188, 194 (D.C. Cir. 1988). The level of vagueness that the Constitution will tolerate depends upon the type of regulation at issue.

Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law’s vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.

Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interfered with the right of free speech or of association, a more stringent vagueness test should apply.

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-499 (1982).⁹¹

⁹¹ Trans Union contends that the level of scrutiny should be especially demanding because the FCRA is a content-based (as opposed to content-neutral) regulation of speech. We disagree. Stringent scrutiny of a content-based regulation, assuming this is a content-based regulation, is necessary only where the regulation will impose an “obvious chilling effect on free speech.” *See Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). Here, any “chilling” impact of the regulation is mitigated by the fact that the regulation is a civil regulation, and it affects the conduct of sophisticated businesses who have a substantial incentive, and the ability, to determine the reach of the statute. Indeed, the D.C. Circuit has indicated that in the context of an administratively enforced regulation of commercial speech, all the Fifth Amendment requires is that “it must be possible for the regulated class to perceive the principles which are guiding agency action.” *Pearson*, 164 F.3d at 661. An agency can meet this requirement by “case by case” adjudication rather than through “a comprehensive definition all at once.” *Id.* That standard is met here.

Trans Union also claims that stricter scrutiny is appropriate because Section 620 of the FCRA provides criminal sanctions in certain situations. However, this action is civil (indeed, the Commission lacks the authority to enforce the criminal provision of the FCRA) and the only issue here is whether the FCRA is sufficiently precise to support the Commission's civil enforcement action, not whether the FCRA would be unduly vague when enforced criminally. Nonetheless, even if judged as a criminal statute, the scienter requirement - - Section 620 covers a

⁹² Trans Union asserts that this case is analogous to the recent Supreme Court case *Reno v. A.C.L.U.*, 521 U.S. 844, which struck down portions of the Communications Decency Act (“CDA”). The regulation in *Reno* defined prohibited speech “by contemporary community standards” and the Court held the speech restriction unconstitutional. *Id.* Here, Trans Union argues that the Commission’s application of the FCRA is similarly dependent upon the views of the community receiving the message, in meCRDA56 Tc 0s ccen56 0.122