

1-1-1974

# The Fair Credit Reporting Act - From the Regulators Vantage Point

Sheldon Feldman

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

---

## Recommended Citation

Sheldon Feldman, *The Fair Credit Reporting Act - From the Regulators Vantage Point*, 14 SANTA CLARA LAWYER 459 (1974).  
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol14/iss3/3>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

# THE FAIR CREDIT REPORTING ACT—FROM THE REGULATORS VANTAGE POINT

Sheldon Feldman\*

This article evaluates the impact of the Fair Credit Reporting Act<sup>1</sup> (FCRA) on the American consumer. It reviews the benefits and the inadequacies of this legislation from the viewpoint of a member of the staff of the Federal Trade Commission, the agency primarily charged with enforcing the Act. This article does not deal with the embryonic development of the legislation from the early days of congressional hearings involving the right of privacy up to passage of the Act in 1970, as other articles have already accomplished a thorough exposition in this area.<sup>2</sup>

The Act was passed after it became increasingly evident in congressional hearings that a law was needed to regulate the credit reporting industry. Testimony at the hearings was replete with cases of people who had been rendered virtually unemployable or who had been refused credit on the basis of inaccurate and damaging reports.<sup>3</sup> Since it is imperative that information for purposes of credit extension or employment be available, no one wished to abolish credit reporting. But the need for an accurate trade association reporting system that would not only protect consumers but would better serve the credit industry was apparent.<sup>4</sup> Eventually, even the industry's main Associated Credit Bureaus,

---

\* A.B., 1957, George Washington University; J.D. with Honors, 1961, George Washington University; Assistant Director for Special Statutes, Federal Trade Commission. The statements in this article represent only the views of a member of the Federal Trade Commission staff. They are not intended to be, and should not be construed as, representative of official Federal Trade Commission policy.

1. 15 U.S.C. §§ 1681-81t (1970) [hereinafter cited as either FCRA or the Act].

2. See, e.g., McNamara, *The Fair Credit Reporting Act: A Legislative Overview*, 22 J. OF PUBLIC L. 67 (1973); Redding, *Fair Credit Reporting Act and Non-Consumer Credit Information*, 54 J. OF BANK LENDING 24 (1971); Ward, *The Consumer Credit Protection Act: An Analysis of Public Policy Formulation*, 5 J. OF CONS. AFFAIRS 196 (1971).

3. *What to Do If Your Credit Goes Bad*, CONSUMER REPORTS, Apr., 1971 at 257.

4. *Id.*

Inc., ceased its opposition and, after numerous compromises in the committees of Congress, the Fair Credit Reporting Act became law.<sup>5</sup>

#### THE SIGNIFICANCE OF THE LEGISLATION

The Fair Credit Reporting Act is important consumer protection legislation for practical as well as theoretical or philosophical reasons. As a practical matter, the legislation is an attempt to regulate a vast network of consumer reporting agencies<sup>6</sup> that furnish approximately 100 million credit reports annually through 2,600 credit bureaus<sup>7</sup> and an additional thirty to forty million investigative reports annually through a handful of investigative consumer reporting agencies.<sup>8</sup> The needs of the consumer credit and insurance industries for these reports have not diminished over recent years<sup>9</sup> and there appears little likelihood that they will in the future. It is possible, however, that the nature of information sought may change depending upon the extent to which the investigative reporting industry modifies the nature of its reports due to future legislative or administrative disclosure

---

5. *Id.*

6. The term "consumer reporting agency" is used throughout this article to refer to all organizations regulated by the Act. It applies to,

any person which, for monetary fees, dues, or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

FCRA § 603(f), 15 U.S.C. § 1681a(f) (1970).

7. This figure is an estimate based upon testimony by John L. Spafford, President, Associated Credit Bureaus, Inc., testifying on S. 2360 before the Subcommittee on Consumer Credit, Committee on Banking, Housing and Urban Affairs, U.S. Senate, October 1, 1973. During a subsequent press conference in December 1973, W. Lee Burge, President, Retail Credit Company, stated that in the two and one-half years since enactment of the FCRA, Retail Credit completed approximately seventy million reports. Washington Star-News, Dec. 21, 1973, at A-2.

8. The majority of these reports (over thirty million) are furnished by the nation's largest consumer reporting company, Retail Credit Company of Atlanta, Georgia. An "investigative consumer report" is defined in section 603(e) of the Act, 15 U.S.C. § 1681(a)(e) (1970), as,

a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

9. Associated Credit Bureaus, Inc., estimates that reports were furnished by its approximately 2,600 member bureaus, as follows: 1969—101.9 million; 1970—92.8 million; 1971—93.3 million; 1972—99.4 million.

requirements.<sup>10</sup>

The importance of the consumer credit industry in today's marketplace needs no documentation. This 176 billion dollar industry depends to a large extent upon ready, inexpensive access to information concerning consumers from whom there is an ever-increasing demand for extension of credit. The insurance industry purchases millions of consumer reports each year in order to evaluate the risks involved in extending coverage in life, accident and health, automobile, homeowner and other types of insurance. To a lesser but significant degree, prospective employers purchase consumer reports to evaluate applicants, and even to evaluate current employees, although there is little reliable data to measure the extent to which consumer reports are purchased for employment purposes.<sup>11</sup> Without credit or insurance most consumers could not own or operate an automobile, purchase a dwelling, or protect it and its contents from destruction or theft. In today's society, it is clear that the need for accurate information in the realm of credit extension and insurance coverage is accorded highest priority by both applicants and businessmen.

In addition to recognition of the practical importance of the consumer reporting industry to users as well as subjects of these reports, there is a philosophical concern with unwarranted or excessive invasion of privacy and the right of an individual to exercise some control over the nature of the information collected, stored and disseminated about him. This latter issue often presents a basic conflict between rights of the consumer and those of the reporting industry and the recipients of consumer reports. The situation is aggravated by the fact that the vast majority of consumers know virtually nothing about the functions of the consumer reporting industry, and very little more about the decision-making process employed by creditors and insurers.

Until 1971 the consumer reporting industry operated almost entirely outside the scrutiny of state or federal regulators, and functioned without the need or desire to involve consumers in its operations.<sup>12</sup> A few consumers had heard of something called

---

10. See, e.g., text following notes 56 and 57 *infra*.

11. One measure of the quantity of consumer reports used by employers is Retail Credit Company's public statement to the effect that nine per cent of all reports it furnishes are for employment purposes. Testimony of W. Lee Burge, President, Retail Credit Company, *Hearings on S. 2360 Before the Subcomm. on Consumer Credit of the Senate Comm. on Banking, Housing and Urban Affairs*, 93rd Cong., 1st Sess. (1973).

12. The few substantive state statutes covering consumer reporting are as follows: ARIZ. REV. STAT. ANN. §§ 44-1601 to 44-1656 (West Supp. 1973); CAL. CIV. CODE §§ 1750-57 (West 1973); CONN. GEN. STAT. ANN. §§ 36-431 to 36-435 (West Supp. 1973); FLA. STAT. ANN. § 559.55 *et seq.* (West Supp. 1973);

a credit bureau, but only a very small minority had ever had occasion to visit one. Other segments of the industry, such as investigative reporting companies, loan exchanges<sup>13</sup> and medical information bureaus<sup>14</sup> enjoyed almost complete anonymity. The latter two agencies still essentially retain this status. It is not surprising then that since the industry's activities were rarely publicized by the media, virtually ignored during the consumer's educational process, and afforded a very low profile by the business community, there was little or no manifestation of consumer interest or concern until passage of the FCRA. Similarly, when abuses remain submerged, there is no demand for real reform. While occasionally novels such as George Orwell's *1984* stir citizens to express concern about their right to be left alone, most people are relatively disinterested until and unless they personally experience a denial of a benefit based upon a reporting agency's erroneous information. This combination of ignorance and apathy typified the general climate when the FCRA became law in April 1971, and to a large extent is the situation that prevails today.

Although few consumers vocalized concern for fair reporting practices during the early days of FCRA, there has been an increasing stream of protest and demands for vigilance both in literature and by the mass media relating to invasions of privacy. This concern emanates from a trend toward treating the individual like an automaton.<sup>15</sup> As awareness of the industry's practices

---

MASS. GEN. LAWS ANN. ch. 93, §§ 50-68 (Supp. 1972); N.H. STAT. ANN. ch. 359-B, §§ 1-21 (Supp. 1973); N.M. STAT. ANN. §§ 50-18-1 to 50-18-6 (Supp. 1973); N.Y. GEN. BUS. LAW §§ 371-76 (McKinney Supp. 1973). Of these statutes, only those in New Hampshire and Massachusetts are substantially the same as the FCRA.

13. Loan Exchanges are generally cooperative information gathering organizations, often owned by consumer finance companies (small loan companies). They report only to their "members" and generally confine their reports to identifying the subject's existing creditors (loan amount and lender, by code number) for prospective lenders. The FTC has ruled that loan exchanges are consumer reporting agencies. 38 Fed. Reg. 4945 (1973).

14. Like loan exchanges, these organizations are specialized and virtually unknown. The medical reporting industry was the subject of a full day of testimony on October 3, 1973. *Hearings on S. 2360 Before the Subcomm. on Consumer Credit of the Senate Comm. on Banking, Housing and Urban Affairs*, 93rd Cong., 1st Sess. (1973).

15. See A. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS* (1971); A. WESTIN, *PRIVACY AND FREEDOM* (1967); Miller, *Computers, Data Banks and Individual Privacy: A Review*, 4 COLUM. HUMAN RIGHTS L. REV. 1 (1972); Miller, *The Credit Networks, Detour to 1984*, NATION, Je. 1, 1971, at 669; Nader, *The Dossier Invades the Home*, SATURDAY REV., Apr. 17, 1971, at 18-21; Schrag, *Dossier Dictatorship*, SATURDAY REV., Apr. 17, 1971, at 25; Sesser, *Big Brother Keeps Tabs on Insurance Buyers*, NEW REPUBLIC, Apr. 27, 1968, at 11-12; Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L.J. 509 (1969); Comment, *Protection of the Consumer*

has gradually increased, the philosophical aspect of the FCRA has become more prominent. This Act is the first federal effort to protect the consumer's right to privacy. Its provisions limiting access to the reporting agency's files for legitimate "need to know" business reasons<sup>16</sup> and denying access to government investigators (except for identifying information such as name, address, and employer)<sup>17</sup> represent landmark steps by Congress to protect citizens from unwarranted intrusions into their personal lives. Many believed that a vehicle was thus created by which these early protections could be expanded into a full Bill of Rights, balancing the consumer's right of privacy with the businessman's right to know. In this writer's view, the Act falls far short of such an accomplishment. Before discussing these shortcomings, a review of the Act's protections is appropriate.

#### THE PROTECTIONS AFFORDED BY THE FCRA

The basic purpose of the law is to protect consumers from inaccurate or obsolete information contained in a report which is used as a factor in determining an individual's eligibility for credit, insurance or employment. It does not apply to reports utilized for business, commercial, or professional purposes.<sup>18</sup>

The Act was designed—in large part by the reporting industry itself—to impose a broad standard of accuracy in reporting. Therefore, it required the adoption of "reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."<sup>19</sup> While the word "relevancy" appears in the Findings and Purpose Section<sup>20</sup> of the Act, there are in fact no relevancy requirements or other restraints upon the type of information that can be collected by the reporting industry.

There are, however, several basic rights created by the law.

#### *Notification of Adverse Action*

Whenever a consumer is denied or charged more for credit

---

*Interests and the Credit Rating Industry*, 2 PAC. L.J. 635 (1971); Comment, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035 (1971).

16. FCRA § 604, 15 U.S.C. § 1681b (1970).

17. FCRA § 608, 15 U.S.C. § 1681f (1970).

18. The term "commercial reports" is used to apply to reports prepared concerning businesses or for purposes other than credit or insurance for personal, family or household purposes. While the Act does not expressly exclude commercial reports, the legislative history is replete with such references. See statement of Representative Sullivan, H. REP. NO. 15073, 91st Cong., 2nd Sess. (1970), reported in 116 CONG. REC. 10053 (1970).

19. FCRA § 607, 15 U.S.C. § 1681e (1970).

20. FCRA § 604, 15 U.S.C. § 1681b (1970).

or insurance, or denied employment because of information in a report from a consumer reporting agency, he has the right to be so informed. The name and address of the reporting agency must also be disclosed to the consumer.<sup>21</sup> In this manner, he is given the opportunity to discover the existence of any adverse information and thereby avail himself of the right to correct any erroneous information in his file. If credit is denied because of information from some third party source that is not a "consumer reporting agency" the Act gives the consumer the right to learn "the nature of the information" directly from the prospective creditor.<sup>22</sup>

### *Access to Information in a Credit File*

The consumer has the right of access to his file to learn "the nature and substance" of the information in the file at the consumer reporting agency, whether or not adverse action has been taken.<sup>23</sup> All information in the file is available to him, with the exception of medical information and the sources of investigative information, which can only be obtained through court ordered discovery procedures. The phrase "nature and substance of all information" has been interpreted to mean that the individual need not be permitted to physically handle or receive a copy of his file. However, the Act does not prohibit the reporting agency from doing either if it so desires. The consumer has the right to be accompanied by one other person of his choice when his file is discussed.<sup>24</sup>

### *Sources and Recipients of Information*

The consumer has the right to be told the sources of information in his file except that the sources of information acquired solely for use in preparing investigative reports need not be disclosed except under appropriate discovery procedures in court. The identity of recipients of reports pertaining to the consumer during the preceding six months for credit or insurance purposes, and the preceding two years for employment purposes must also be disclosed.<sup>25</sup>

### *Confidentiality*

The consumer has the right to have the information in his file kept confidential and reported only for credit, employment,

---

21. FCRA § 615(a), 15 U.S.C. § 1681m(a) (1970).

22. FCRA § 615(b), 15 U.S.C. § 1681m(b) (1970).

23. FCRA § 609(a)(1), 15 U.S.C. § 1681g(a)(1) (1970).

24. FCRA § 610(d), 15 U.S.C. § 1681h(d) (1970). Presumably the person accompanying the consumer could be an attorney.

25. FCRA § 609(a)(2), (3), 15 U.S.C. § 1681g(a)(2), (3), (1970).

insurance, government license or benefit, or other "legitimate business" purposes.<sup>26</sup> The only exception to this confidentiality is when disclosure is ordered by a court or is made in accordance with the written instructions of the consumer.

### *Reinvestigation of Disputed Entries*

The law requires that consumer reporting agencies reinvestigate, within a reasonable time, disputed items of information and correct these if they are found to be inaccurate.<sup>27</sup> Inaccurate or unverifiable information must be deleted from the file. If the dispute is not resolved, the reporting agency must note the existence of the dispute and if it is submitted enclose in the consumer's file a brief statement of the consumer's version of the dispute.<sup>28</sup>

### *Care and Accuracy*

In addition to the general requirement that consumer reporting agencies provide only reports requested for certain legitimate business purposes, and that procedures are maintained to assure maximum possible accuracy of all consumer reports, agencies must maintain reasonable procedures to assure that recipients of the reports certify that they are authorized to receive them. Moreover, agencies must make reasonable efforts to verify the identity of new prospective users as well as the intended uses of the consumer report prior to its release.<sup>29</sup>

### *Elimination of Obsolete Data; Adverse Public Record Information*

As a rule, adverse information may not be reported if older than seven years (there are a few exceptions, such as bankruptcy, which may be reported for fourteen years), unless the consumer's application involves credit or insurance amounting to \$50,000 or more.<sup>30</sup> As to public record information, reporting agencies have an option to follow one of two procedures: the agency either must notify the consumer when adverse public record in-

---

26. FCRA § 604, 15 U.S.C. § 1681b (1970).

27. FCRA § 611(a), 15 U.S.C. § 1681i(a) (1970).

28. The Act does *not* provide that the consumer reporting agency must disclose to the consumer his right to file a statement disputing the information in the file.

29. FCRA § 607(a), 15 U.S.C. § 1681e(a) (1970).

30. FCRA § 605, 15 U.S.C. § 1681c (1970). Although the provisions of this section are not applicable to credit transactions involving \$50,000 or more virtually all credit bureaus attempt to delete obsolete adverse information from their files after seven years because of the impracticality of maintaining two sets of files. Further, such agencies do not wish to undertake the risk of reporting obsolete information.



formation (such as suits, tax liens and arrests) is being reported to a potential employer, or it must maintain strict procedures to verify the current status of such public record items. In addition, adverse investigative information (except public record information) must be reverified after three months before it can be included in any report.

### *Advance Notification of Investigative Consumer Reports*

The law requires that those who procure or request investigative consumer reports<sup>31</sup> must inform the consumer in writing: (a) that such an investigation may be made, or if already ordered, will be made; and (b) that the consumer has the right to make a written request for disclosure of the nature and scope of the investigation, which can be accomplished by disclosure of the items or questions which the investigation will cover, the types and number of sources, and the name and address of the agency involved.<sup>32</sup> This advance notice does not apply if the report is for employment purposes and the subject has not specifically applied for a position.<sup>33</sup>

### *Obtaining Information in a File by False Pretenses*

The law provides criminal penalties for obtaining under false pretenses<sup>34</sup> information on a consumer from consumer reporting agencies and providing information to someone unauthorized to receive it.<sup>35</sup>

### *Legal Recourses*

The private enforcement provisions of the FCRA permit the consumer to bring a civil suit for willful noncompliance with the Act, with no ceiling placed on the amount of possible punitive damages.<sup>36</sup> The consumer may also sue for actual damages he sustained by reason of negligent non-compliance with the Act.<sup>37</sup> Attorney's fees, as determined by the court, may be recovered for both forms of action.

---

31. See note 8 *supra*.

32. FCRA § 606(a), (b), 15 U.S.C. § 1681d(a), (b) (1970).

33. FCRA § 606(a)(2), 15 U.S.C. § 1681d(a)(2) (1970).

34. FCRA § 619, 15 U.S.C. § 1681q (1970). In the unreported case of *United States v. Lindell*, CR 3-2553 (N.D. Tex., indictment filed Dec. 13, 1971) the defendants pleaded guilty to violating this section by conspiring to obtain consumer reports for impermissible purposes. Defendant Lindell was sentenced to eighteen months and defendant Zareff to two years, although both defendants were granted probation.

35. FCRA § 620, 15 U.S.C. § 1681r (1970).

36. FCRA § 616, 15 U.S.C. § 1681n (1970). The author knows of no such suit to date.

37. FCRA § 617, 15 U.S.C. § 1681o (1970).

A two year statute of limitations from the date liability arises is provided for civil suits. However, where the defendant has willfully misrepresented information required by law to be disclosed to a consumer, and that information is material to the establishment of the defendant's liability, the statute does not begin to run until discovery of such misrepresentation. Suit may be brought in any appropriate federal district court without regard to the amount in controversy, or in any other court of competent jurisdiction.<sup>38</sup>

A consumer reporting agency, any user of information, or any person who supplies information will not be subject to a consumer's civil action for defamation or invasion of privacy based upon information disclosed by a consumer reporting agency pursuant to the Act, unless the information is false and furnished with malice or willful intent to injure such consumer or furnished negligently in noncompliance with the Act.<sup>39</sup>

### *Administrative Enforcement*

Compliance with the Act is enforced by the Federal Trade Commission (FTC) with respect to consumer reporting agencies, users of reports, and all others involved who are not regulated by another federal agency. The Commission can use its cease-and-desist power and any other procedural, investigative and enforcement powers which it has under the Federal Trade Commission Act<sup>40</sup> to secure compliance, irrespective of commerce or any other jurisdictional tests in the FTC Act.<sup>41</sup> Enforcement of compliance on the part of financial institutions is delegated to those federal agencies that exercise existing enforcement jurisdiction over such businesses.<sup>42</sup>

In sum, the statutory scheme permits a reporting agency to collect any kind of information, store it in any manner desired and sell it to anyone with a commercial need for it. Further, the Act attaches virtually no civil liability to the occurrence of reporting erroneous information, and requires disclosure to the consumer but not complete access to his file. The basic approach requires that if adverse action is taken on the basis of the information, the user will so inform the consumer, who has the right to know and challenge that information without cost. There is no right to prevent an investigation or to know who maintain-

---

38. FCRA § 618, 15 U.S.C. § 1681p (1970).

39. FCRA § 610(e), 15 U.S.C. § 1681h(e) (1970).

40. 15 U.S.C. § 45-46 (1970).

41. FCRA § 621(a), 15 U.S.C. § 1681s(a) (1970); The Federal Trade Commission Act is found at 15 U.S.C. § 41 *et seq.* (1970).

42. FCRA § 621(b), 15 U.S.C. § 1681s(b) (1970).

ed or sold information on the subject, but the consumer has the right to be notified by a user if the user ordered a "personal" investigation, (that is, an "investigative consumer report") concerning the consumer. To furnish erroneous information is not considered in and of itself illegal, so long as the reporter "maintained reasonable procedures to assure maximum possible accuracy" of the information. In spite of numerous and obvious ambiguities in the statutory language, Congress chose to withhold substantive rulemaking authority from the Federal Trade Commission which was charged with enforcement responsibility.<sup>43</sup>

In this writer's view, the basic approach of this legislation is sound. That is, the consumer reporting agency must be free to collect information without having to try to apply the virtually impossible test of "relevancy" to each item collected. Businessmen should be free to purchase the information and use it for legitimate commercial purposes, so long as they notify the consumer when adverse action is taken wholly or partly because of the information obtained. Users' compliance with this notification appears to be high when there is an economic incentive to inform the subject of the reason for the adverse action, that is, when the user desires to extend credit or sell insurance. However, as will be explored in the next section, when there is no incentive to notify, as in the employment situation, the statutory scheme becomes inoperative. The rules on access by users, obsolescence and challenge, appear to be generally fair to consumers and realistic for reporter and user alike. It is in the realm of access by consumers, deterrence to noncompliance, personal investiga-

---

43. Congress specifically considered giving the Commission rulemaking authority under FCRA and, in the course of its compromise when the legislation was being finalized, deleted this provision. Representative Sullivan, the Chairwoman of the House conferees, made the following statement as part of the legislative history of the Fair Credit Reporting Act:

The provisions on credit reporting in the conference bill are not nearly as strong as I felt they should be—and as a majority of the House conferees attempted to make them—but they are, in my opinion, a major improvement on S. 823 as passed by the Senate.

The Senate conferees would not agree to two key proposals of the House conferees: one to require credit reporting companies to notify all consumers once of the existence of an active file containing personal data about them; and the other to give the Federal Trade Commission power to issue regulations to implement the Act and to meet changing circumstances as they develop. Neither omission is fatal to the effectiveness of the legislation, but both proposals would have been extremely useful in helping consumers to protect their good names. We agreed at the termination of the conference that if experience shows that these key provisions proposed by the House conferees are, in fact, as important to the purposes of the law as I believe them to be, we will, of course, reopen the legislation for those and any other improvements experience shows are necessary.

H.R. REP. NO. 15073, 91st Cong., 2nd Sess. (1970), reported in 116 CONG. REC. 10050 (1970).

tions, and notice by users, that demonstrable inadequacies have surfaced.

#### SHORTCOMINGS OF THE FCRA—SEEKING A LEGISLATIVE SOLUTION

As was stated at the outset, this article is primarily a subjective evaluation of the adequacy of the FCRA; it does not attempt to review the Commission's enforcement program. As a frame of reference, however, it is necessary to note that the Commission's enforcement efforts under the Act have included the wide dissemination of a forty-six page booklet explaining the industry's compliance obligations, with illustrative forms for certain disclosures;<sup>44</sup> production of a consumer education pamphlet<sup>45</sup> and buyer's guide on the Act<sup>46</sup> to aid consumers in understanding their rights; and the publication of six formal Interpretations after conducting public hearings and considering over 1,000 written comments.<sup>47</sup>

The staff's FCRA enforcement program included several surveys to ascertain compliance, one of which covered all major life insurance companies, the nation's primary users of investigative consumer reports. A program of credit bureau examination is maintained, on a sampling basis, in the Commission's twelve regional offices. The Commission concluded two FCRA investigations by issuing final orders covering a total of six credit bureaus for alleged violations of the FCRA.<sup>48</sup> Currently

---

44. FTC, DIVISION OF SPECIAL STATUTES, COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT (2d ed. May 7, 1973).

45. FTC, KNOW YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT (Consumer Bulletin No. 7, 1972).

46. FTC, FAIR CREDIT REPORTING ACT (Buyer's Guide No. 7).

47. These Interpretations, which are advisory in nature,

(1) prohibit publication and distribution by credit bureaus of books containing consumers' credit ratings, called "credit guides", unless encoded to insure consumers' anonymity;

(2) allow the use of certain kinds of "protective bulletins" which identify check forgers, swindlers and the like—provided no information in them is used in establishing the subject's eligibility for credit, insurance or employment;

(3) require that consumers be informed by prospective lenders when they are denied credit on the basis of information furnished by loan exchanges;

(4) require that when an insurance company uses a state motor vehicle report to deny or increase the cost of a consumer's insurance, it inform him of that fact and of the state agency's identity;

(5) permit consumer reporting agencies to pre-screen prospects' names for credit worthiness for direct mail solicitations provided the user certifies that every person on the list furnished by the credit bureau will receive the solicitation; and,

(6) conclude that reporting activities of federal agencies such as the Civil Service Commission are not currently included within the scope of the FCRA.

See FCRA Interpretations §§ 600.1-600.6, 38 Fed. Reg. 4945-47 (1973).

48. The Credit Bureau of Columbus, Docket No. C-2333 (F.T.C., final order

in adjudication is a case against the nation's largest consumer reporting agency.<sup>49</sup>

Informal surveys and investigations have proved extremely valuable in determining the impact of this new law and in providing a basis for the development of recommendations for legislative improvements in the Act. However, the Commission has completed no statistically reliable survey to document its conclusion that the Fair Credit Reporting Act is not an effective tool in achieving the goals desired by Congress. What the FTC has learned about the Act's shortcomings stems from observing attempts at compliance, and from complaint letters by consumers<sup>50</sup> who were confused and often bitter about the "protection" afforded them by this Act.

The House of Representatives, holding oversight hearings on the FCRA on July 24, 1973, heard the FTC call for a sweeping revision of the Act, including specific amending language.<sup>51</sup> Two weeks after these hearings, the FTC amendments were introduced by Senator William Proxmire in the form of Senate Bill 2360.<sup>52</sup>

The facts surrounding a typical (and actual) consumer complaint recently received by this writer were recounted during the congressional testimony. The consumer had applied for an oil company credit card and some time later received a form letter which stated:

Our decision was based on our own credit policies and on information (or lack of information) contained in a consumer credit report. The Fair Credit Reporting Act affords you the right to review this report at the office of Credit Bureau of [name and address].

This applicant had applied for the credit card after moving to a mid-western city from a large eastern city. The credit bureau used was, naturally, in the eastern city. No phone number was provided. Had it been, the long distance toll charges would

---

issued Dec. 15, 1972); Credit Bureau of Lorain, Docket No. C-2287 (F.T.C., final order issued Sept. 9, 1972).

49. Retail Credit Co., Docket No. 8954 (F.T.C., complaint issued Feb. 21, 1974).

50. While an exact count of consumer complaints received by the Commission staff is unavailable, a check of headquarters and regional office records reveals that approximately 3,000 written complaints were submitted by consumers to the Commission during the first two years of FCRA enforcement. This number excludes telephone inquiries and complaints, which were estimated at an additional 2,000 during the period mentioned.

51. Testimony of Sheldon Feldman before the Subcommittee on Consumer Affairs, Committee on Banking and Currency, House of Representatives, July 24, 1973.

52. See S. REP. NO. 2360, 93rd Cong., 1st Sess. (1973), reported in 119 CONG. REC. 15604 (1973).

have been substantial, not to mention the length of time it often takes to locate someone who can help. Had the applicant called the bureau he still would not have learned the reason for the adverse action. First, the credit bureau would not know the reason for the oil company's declination. Second, the credit bureau will not send a copy of the file or any part of it through the mail and will not read it over the telephone unless it first has a letter from the consumer requesting oral disclosure (in which case another toll charge would be involved).

Such consumer letters of frustration and confusion are received every day by the FTC. Each varies somewhat but the scenario has similarities. Sometimes the problem is the result of the consumer's move to another city; on other occasions it is the inability to travel to the site of the reporting company; or, the difficulty in finding someone at the reporting agency who can pinpoint the consumer's problem even after repeated calls. After receiving hundreds of letters during the past three years, it has become clear that the Act is not succeeding. It is unintelligible and frustrating to consumers, and those actions taken to comply by reporters or users have fallen short of what consumers consider reasonable under the circumstances. The entire procedure, from the beginning (the user's disclosure) to the end (the correction of erroneous information and renotification) has proven to be ineffective. The best documentation of this assertion is a description of what actually happens in the process of "compliance."

### *Disclosure by Users of Consumer Reports*

The Act requires disclosure to consumers by users of consumer reports if credit is refused.<sup>53</sup> The prospective creditor must either disclose the name of the credit bureau that provided the information or make direct disclosure if the information was received from some other source.<sup>54</sup> As the very first step in triggering the exercise of a consumer's right under the Act, the user's disclosure must be effective. It is not!

One major chain department store has indicated that twenty-five per cent of all applicants for credit are refused on the basis of consumer reports. That is, one out of every four applicants is now receiving a section 615(a) disclosure. Yet that same user estimated that only one out of ten recipients of its notification actually proceeded to obtain disclosure of what was in his file.<sup>55</sup>

---

53. FCRA § 615(a), 15 U.S.C. § 1681m(a) (1970).

54. FCRA § 615(b), 15 U.S.C. § 1681m(b) (1970).

55. Retail Credit Company's experience has been that six-tenths of one per cent of its reports issued from April 1971 to December 1973 resulted in subsequent interviews (430,000 interviews out of seventy million reports). Press Conference by W. Lee Burge, Washington Star-News Dec. 21, 1973, at A-2.

This discrepancy cannot be explained, as one user has suggested to the writer, because "those dead beats already know what's in their files." True, some consumers may have reason to know there is derogatory information in their files that will remain there after their visit. But that is not the full answer. The results of our own informal staff survey of section 615(a) recipients corroborated the fact that less than twenty-five per cent of those persons notified of an adverse credit report went to the credit bureaus identified, but the reasons given ran the gamut from distrust of the bureau, misunderstanding of their right to challenge information, to the inconvenience of making the visit in light of the benefit (another new credit account) being sought. Some consumers stated that they just thought it would not do any good to visit the bureau.

The section 615(a) disclosures are often unclear because the law has been interpreted by many users to require disclosure when the user orders a report even though the report simply reveals nothing. The identification of the credit bureau in such instances frustrates the consumer and credit bureau alike. Upon taking steps to get disclosure, which could involve taking a half day from work, the consumer is finally granted an "interview" only to learn that "there's nothing wrong with your file." What actually happened was either (a) an item of *non-adverse* information was used as a factor in denying the application (age, nature of occupation, length of residence) or (b) there was simply not enough information in the file. Neither of these factors can be discovered from the current section 615(a) disclosure, and neither factor is explained by the credit bureau during its interview.<sup>56</sup>

---

56. What the consumer reporting agency is required to disclose to the consumer is outlined in section 609 which provides:

(a) Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

(1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

(2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: *Provided*, That in the event an action is brought under this title, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3) The recipients of any consumer report on the consumer which it has furnished

(A) for employment purposes within the two-year period preceding the request, and

(B) for any other purpose within the six-month period preceding the request.

(b) The requirements of subsection (a) respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to

The remedy for this problem is clear. The user should be obligated to identify the item of information in the report used to take adverse action (this could be accomplished by simply circling the item(s) on a copy of the report) or, if no item of information is involved, to state the reason for the adverse action (such as "not enough information"). Further, the user should provide a copy of the actual document utilized. There is no other way for the consumer to be certain that the reasons given are in fact based upon the report and, more significantly, there is no other way to be certain that a subsequent interview at the consumer reporting agency will be worth pursuing. The only way to encourage consumers to seek an interview with the reporting agency is to arm the consumer, *at the outset*, with a copy of the consumer report. This may add a measure of cost and inconvenience to users, but some expense is inherent in complying with any consumer protection law. The cost can be minimized (or eliminated entirely for the user) by having the reporting agency provide a duplicate report. Since the section 615(a) disclosure is made in writing, modifying the user's current form letter and enclosing a copy of the report (or a copy of a summary taken from a telephoned report) are not unreasonable compliance obligations to impose upon users.

Extending the user's disclosure requirement *whenever any adverse action* is taken is necessary because consumer reports are used to deny many benefits beyond those of credit, insurance and employment. These reports are used in a wide variety of circumstances such as consideration of applicants for leases to rent apartments, check-cashing privileges, and qualification for disability payments. There is no valid reason to attempt to include within the Act a comprehensive list of consumer report uses that will require disclosure by the user. Nor is there a need to attempt to guess what future uses might arise. The section 615(a) disclosures requirement should be broad enough to cover adverse actions generally. Although the Act requires users of information from a consumer reporting agency to make disclosure whenever credit, insurance or employment is denied, information from a person *other than* a consumer reporting agency need only be disclosed whenever *credit* is denied.<sup>57</sup> However, the proposed FTC amendment to expand user disclosure requirements to information received from a source other than a consumer reporting agency is limited to insurance because of the practical diffi-

---

the effective date of this title except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

FCRA § 609, 15 U.S.C. § 1681g (1970).

57. FCRA § 615, 15 U.S.C. § 1681m (1970).



culty of seeking and enforcing compliance in other situations.<sup>58</sup> Nevertheless, extending the coverage of section 615(b) beyond credit applications to insurance underwriting would be a major improvement over the Act's current application.

Once the user's disclosure is extended and improved, the consumer will be armed with an explanation of the action, the actual document employed (along with some decoding device, if necessary, so that it will be comprehensible) and the full identity of the reporting company if one is involved. The next step in such cases is contact with the consumer reporting agency.

### *Consumer Reporting Agency Disclosure*

The most criticized feature of the Fair Credit Reporting Act is the lack of adequate disclosure by the consumer reporting agency. Improvement of agency disclosure, along with user's disclosure, should have the highest priority. Currently the consumer is not entitled to visually inspect, copy or physically handle his file when he seeks disclosure. In the realm of investigative reporting, where highly personal information abounds, the consumer often feels that he never learns the full content of his file.

For whatever reasons—perhaps a knowledge that the information is unconfirmed or a fear that a lengthy and expensive reinvestigation would ensue—reporting agencies can and do withhold information from consumers with impunity. Since the

---

58. Proposed section 615 of the FCRA reads as follows:

(a) Whenever any adverse action is taken either wholly or partly because of information contained in a consumer report from a consumer reporting agency, the user of the consumer report shall—

(1) disclose in writing to the consumer against whom such adverse action has been taken (A) the reason for taking such adverse action, including reference to the particular item or items of information contained in the consumer report upon which such adverse action has been wholly or partly based; (B) the name, street address, and telephone number of the consumer reporting agency making the report; and (C) a statement of the fact that the consumer is entitled (i) to receive a copy of his file from the consumer reporting agency at nominal charge, or (ii) to inspect his file at the consumer reporting agency free of charge if visited within 30 days of receipt of the user's notification; and

(2) furnish a copy of the consumer report if the consumer report was written, or furnish a copy of a summary if the consumer report was oral.

(b) Whenever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or the charge for such credit or insurance is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall disclose in writing to the consumer at the time such action is taken the reason for such adverse action, and the nature of the information.

S. REP. NO. 2360, 93rd Cong., 1st Sess. (1973), reported in 119 CONG. REC. 15605 (1973).

consumer does not have the right to examine his own file or receive a copy of the information, he is unable to question the completeness of the disclosure. The procedures of reinvestigation and correction of disputed information are similarly unsatisfactory. Corrected reports are not always sent to recipients. Follow-up reports often contain many of the inaccuracies found in the original, challenged reports. Again, under the statute as it is currently constituted, the consumer is helpless to protect himself against a consumer reporting agency bent on circumventing the law.

The current procedure of having a "trained interviewer" read the file is in direct derogation of a consumer's legitimate and fundamental right to know. By any reasonable standard of fairness, the consumer has a right to know *exactly* what information is being collected and sold about him. Moreover, with the exception of national security and law enforcement investigations, there is no reason to place credit, insurance and employment investigations on a level demanding anonymity of sources. If the investigative reporting industry is utilizing sources that cannot be revealed or if it is relying on personal opinions as information sources in deciding whether or not there should be a denial of credit, insurance or employment, then it may be that those sources are better not used at all. In a country where privacy is a right and due process is considered fundamental, the subject of a credit, insurance or employment investigation cannot reasonably be expected to protect himself unless he has the capability to learn who is saying what about him. If people become more reticent and consequently more careful about contributing to investigative consumer reports because it may be revealed that they are the source of the opinion expressed, there is reason to applaud that result rather than avoid it.

Another area of concern relates to medical information. The obligation to disclose the sources of such information has been uncertain. The additional disclosure of the *existence of medical information*, proposed in Senate Bill 2360,<sup>59</sup> corresponds with the FTC proposal to clarify the existing requirement that the *sources of medical information* should be disclosed.<sup>60</sup>

---

59. All the information in a consumer's credit file must be disclosed including the sources of information in investigative reports and medical information. Reporting agencies have the option of disclosing medical information to the consumer or to a physician of his choice. The current law does not require a reporting agency to divulge medical information or the source of investigative information. See S. REP. NO. 2360, 93rd Cong., 1st Sess. (1973), reported in 119 CONG. REC. 15604 (1973).

60. Such disclosure would be pursuant to FCRA section 609(c). See S. REP. NO. 2360, 93rd Cong., 1st Sess. (1973), reported in 119 CONG. REC. 15604 (1973).

With respect to the added burdens upon the reporter, since personal, visual inspection of the file would be permitted, a copy of the file will often not be deemed necessary. The right to request a copy of the file is essential in certain circumstances, for instance, when the reporting agency is in a distant locale.

Although the consumer is entitled to a free-of-cost in-person interview when adverse action is taken, he must pay the long distance toll charges when a consumer report is furnished by a consumer reporting agency that is geographically distant.<sup>61</sup> With increasing regularity, computerization permits companies to furnish consumer reports on a nationwide basis. This situation occurs hundreds of times a day. Thus, for a great many consumers, telephone toll charges are a major deterrent to receiving disclosure. Such charges are in the nature of normal operating business expenses and should be absorbed by the consumer reporting agency when the call is prompted by adverse action based upon that agency's report.

### *Notice of Investigative Consumer Reports*

The number of consumer complaints received which are based upon investigative reports is not a true measure of the problem because this type of reporting is still shrouded in secrecy. The user's disclosure, pursuant to section 606,<sup>62</sup> that an investigation "may be made" has proved to be one of the most inadequate of all Fair Credit Reporting Act provisions. If the intent of the provision is to inform consumers that a personal investigation, involving interviews with friends, neighbors and associates, will be conducted, all indications from complaints received by the FTC are that the disclosure is often neither noticed nor understood. Moreover, the fact that there would be an investigation has rarely been given by the consumer as the reason to "opt out" of a transaction.

Senate Bill 2360 proposes that there be authorization by the consumer prior to any personal investigation.<sup>63</sup> Admittedly,

---

61. FCRA § 610(b)(2), 15 U.S.C. § 1681h(b)(2) (1970).

62. The current provisions of section 606, especially those of 606(b), are complex and obscure. Explaining a consumer's rights under this section is very difficult, unless both parties are lawyers.

Any person who procures or causes to be prepared an investigative consumer report on any consumer shall, upon written request by the consumer within a reasonable period of time after the receipt by him of the disclosure required by subsection (a)(1), shall make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure shall be made in writing, mailed or otherwise delivered, to the consumer not later than five days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is later.

FCRA § 606(b), 15 U.S.C. § 1681d(b) (1970).

63. See note 52 *supra*.

it is not anticipated that any significant segment of the populace will decline to authorize an investigative consumer report once asked to do so. An authorization, however, will provide a more meaningful option, and some people will undoubtedly exercise their right to decline to apply for a benefit once they fully understand that the application will trigger such a personal inquiry. Those who authorize such an investigation will be doing so consciously, rather than by implication.

### *Reports for Employment Purposes*

Section 615 requires disclosure to the consumer if adverse action in regard to employment is taken as a result of information in an agency report. However, a provision in section 606 (a)(2) permits investigative reports for employment purposes without notice if the individual has not specifically applied for a job. The FTC did not originally propose amending this exception because it was unaware of the extent to which employers order investigative reports on persons who have *not* applied for a position or who are current employees being considered for promotion, transfer or retention. While there was no recommendation to delete section 606(a)(2) for this reason, it is clear that without the prior authorizing action proposed for section 606(a)(1), the unwitting subjects of those unauthorized investigations are much less likely to receive the user's notification when adverse action is taken on the basis of the reports.

In a matter of such highly personal sensitivity as employment, particularly when retention or reassignment is involved, the subject has no way of learning if the reason for some action was an investigative consumer report, except faith in the employer's integrity. Since neither the subject nor the regulator can invade the user's mind, fully enforcing section 615 will always be virtually impossible in the employment reporting area. With subjects such as credit and insurance, there is real incentive on the user's part to *make* the disclosure, because of the economic gain realized from granting credit or insurance. When there is some incentive *not* to make the section 615 disclosure, which is often true in the case of employment decisions, the probability of non-compliance is enhanced by the employer's freedom not to obtain a section 606 authorization. The FTC's experience with one particular consumer reporting agency, which makes reports *only* for employment purposes, indicates that of the thousands of reports furnished since enactment of the Fair Credit Reporting Act, less than ten interviews were requested by individuals whose applications had been rejected.<sup>64</sup> A major reason for the paucity of

---

64. This information is part of a pending non-public investigation currently being conducted by the staff of the Commission.

requests was non-disclosure by prospective employers.<sup>65</sup>

On balance, the proposal to extend the authorization requirement to all situations in which an employer orders an investigative consumer report is entirely appropriate. The employer would still be free to investigate applicants and current employees in secret by conducting his own inquiry. Only when he used the services of a consumer reporting agency would an authorization be required.

Although there may be no way to effectively enforce the Section 615 (a) notification requirement against users, there is a way to afford some measure of protection to job applicants. The only effective solution this writer can identify is to impose a requirement upon the consumer reporting agency to furnish the consumer with a copy of any report *before* it is released to a user for employment purposes. Once an application for employment is rejected, that position is usually gone forever. Subsequent correction of any erroneous information will not revive the lost opportunity, which of course is not usually the case with applications for credit or insurance. Unless erroneous information can be corrected before the prospective employer considers the report, the protections of the Act are illusory. A possible compromise, to substantially narrow the totality of reports that would have to be sent to applicants, would be to limit this requirement to (a) *investigative* consumer reports and (b) only those reports which contain "adverse" information. Because of the delay in processing employment applications that this requirement would entail, and the burden of furnishing the report to the applicant at least five days before the employer receives it, a reasonable balance would be achieved if this requirement were limited to adverse investigative reports.<sup>66</sup> This would, however, be the absolute minimum protection necessary to insure the effectiveness of the Fair Credit Reporting Act in employment situations.

---

65. *Id.*

66. On January 23, 1974, Senator Joseph R. Biden introduced S. 2883, which would amend section 606 to add this exact requirement. The proposal is as follows:

(c) If an investigative consumer report contains information which may be adverse to the consumer to whom it relates, a consumer reporting agency may not furnish that investigative consumer report to any third party for employment purposes unless, at least five business days prior thereto, such agency mails or otherwise delivers without charge a copy of such report to the consumer to whom it relates, except that any third-party medical information contained in the report shall be deleted and the consumer shall be advised of the existence of such information and of his right to have such information furnished to a licensed physician of his choice.

(2) By changing the present subsection (c) to subsection (d).

S. REP. NO. 2883, 93rd Cong., 1st Sess. (1973), reported in 119 CONG. REC. 253 (1974).

*Scope of the Act*

Application of the protections afforded by the Fair Credit Reporting Act depends entirely upon the triggering term "consumer reporting agency."<sup>67</sup> That is, unless the "person" collecting or reporting information comes within the narrow framework of the definition, the information furnished by that person cannot be construed as a "consumer report" and none of the objectives or concomitant benefits of the Act apply.

The question of whether the Civil Service Commission (CSC) and other agencies which prepare pre-employment reports are "consumer reporting agencies" subject to the Fair Credit Reporting Act arose in the spring of 1971 when an informal interpretation was requested from the FTC. A request for a formal interpretation subjecting the CSC to the provisions of the FCRA came in December 1971 from private counsel representing a government employee who had been refused access to his Civil Service employment file.

In early 1972 the FTC made informal responses to the parties requesting a statement of its position, stating that the CSC is not a "consumer reporting agency" within the meaning of section 603(f) of the FCRA. A formal interpretation to this effect was published in the Federal Register on October 7, 1972.<sup>68</sup>

The FTC reasoned that the definition of "consumer reporting agency" in section 603(f), which refers to "cooperative non-profit basis" and "third parties", could not reasonably be construed to apply to CSC reporting activity, especially in the absence of any legislative history to indicate that such a result was intended. It was suggested that, had Congress intended to subject Federal agencies to compliance with the FCRA, it would first have obtained testimony and other information concerning the probable effects on the agencies being considered for inclusion in the Act's coverage.

Prior to the effective date of the proposed formal interpretation, comments urging that it be withdrawn or amended to subject the CSC to the Act were received from several sources, among them Senator William Proxmire, the original author of the Act. The comments made the following contentions:

1. The information collected and disseminated to other agencies by the CSC is often exactly the same as that sought to be regulated under the FCRA. This data may include commentary on such matters as the subject's character, general reputation, personal characteristics, or mode of living, and the informa-

---

67. See note 6 *supra*.

68. FCRA Interpretation, 16 C.F.R. § 600.6 (1973).

tion is routinely transmitted to various branches of the government. Thus, the reasons for regulating CSC conduct in the collection and handling of data for pre-employment reports are the same as those which led to the passage of the Fair Credit Reporting Act.

2. The employee's need for privacy and accuracy is the same regardless of whether his employer is the federal government or a private business. If the Act is not amended to include the CSC in its coverage, millions of potential and present federal employees will be denied the same rights guaranteed to persons employed or seeking employment in the private sector.<sup>69</sup>

3. The federal government should set an example of fairness for the private sector, instead of being exempt from the constraints placed upon other employers.

4. The exclusion of the CSC is inconsistent with the purposes of the Act, one of which was the protection of citizens from investigations by the government. Section 608 of the Act prohibits governmental agencies from obtaining any information (except name and address and employer) from consumer reporting agencies for "nonpermissible" purposes, including law enforcement purposes. However, government agencies receiving CSC reports, which may include data obtained from consumer reporting agencies, can make whatever use of them they wish, without restraint.

In sum, the absence of legislative history and the apparent anomalous results lead one to conclude that the exclusion of the CSC from the FCRA was a Congressional oversight. There are no circumstances which could make application of the Act to the government unduly burdensome. The type of reports prepared by the Civil Service Commission, as well as certain other agencies, do not differ materially from investigative reports prepared by consumer reporting agencies; the need of present and potential federal employees for privacy and accurate reporting is no less than those in the public sector, and the number of individuals left unprotected is huge. In the absence of evidence that compliance with the FCRA would constitute a crippling burden for the federal government, there is no reason to maintain the defect in the Act which is caused by this exclusion.

#### *Administrative Enforcement*

The problem inherent in enforcing compliance with the Fair

---

69. The number of non-military federal employees is currently estimated at 2.7 to 2.8 million. The number of persons who fall into the category of "potential employees" may be estimated from the fact that in 1972 the Civil Service Commission processed 1.7 million applications.

Credit Reporting Act can be attributed to the tremendous number of consumer reports sold annually and the difficulty, if not impossibility, of establishing that the purchaser of the report in fact utilized the information as a factor in his decision to deny the consumer a benefit. We are often confronted with consumers who feel certain that their application for credit, insurance or employment was denied on the basis of a consumer report; yet we must inform them that there is no practical way to enforce the notification requirements of the law.

Moreover, while enforcement of compliance by consumer reporting agencies is always difficult, it has been made more so by the recent court decision in *FTC v. Retail Credit Co.*<sup>70</sup> The apparent inconsistency between sections 604 and 621 of the Act has been cited by some consumer reporting agencies to deny FTC investigators access to their files. Section 604 proscribes furnishing a consumer report unless there is either a court order, written instructions from the consumer whose file is involved, or a legitimate business transaction. Section 621(a) grants the FTC procedural, investigative and enforcement powers including the power to issue procedural rules and require the production of documents. *FTC v. Retail Credit Co.* involved an administrative subpoena enforcement action brought because of a company's refusal to grant access to or provide copies of consumer files except within the framework of the provision of section 604.<sup>71</sup> The District Court for the District of Columbia held that the Commission's authority under FCRA section 621 and FTC Act section 9<sup>72</sup> was inadequate to authorize FTC access to consumer reports. The court then utilized section 604 to make the files available by treating the Commission's request for the production of the documents as a request for a "court order", which was granted subject to certain notice and publishing procedures.

While the Commission maintains that section 621 does supersede or at least can be reconciled with section 604, and is appealing this decision, clarification of the Act would substantially facilitate the process of administrative enforcement. It was presumed that the restriction imposed in section 604 was designed to prevent furnishing "a consumer report" to users having no permissible purpose, rather than prevent the Commission from gaining access to consumer reporting agency files for investigatory purposes. Under section 621, the Federal Trade Commission is required to enforce compliance with the requirements imposed under the Act, and the Commission is specifically granted the

---

70. Civil No. 1508-72 (D.D.C. Apr. 23, 1973).

71. *Id.*

72. 15 U.S.C. § 49 (1973).



power to require the production of documents under the Federal Trade Commission Act. The Commission argued that under Section 621 respondent was required to comply fully with the administrative subpoena. The Commission contended that it must have access to consumer reports to fulfill the statutory requirement of enforcing compliance with the Act. The company would require the Commission to obtain a court order or the written instruction of every consumer before seeking to investigate compliance with the Act. A thorough investigation would involve inspection of the consumer reports of thousands of consumers—which would often effectively preclude obtaining the written instructions of each as a means of obtaining the consumer reports. Also, certain investigations involve random sampling of consumer files, or the production of all reports prepared by a certain employee of the consumer reporting agency as a means of determining if “reasonable procedures to assure maximum possible accuracy” (required by section 607(b)) were used by the reporting agency. The effect of the company’s reading of section 604 would be a requirement that the Commission must always obtain a court order to investigate compliance with the Act. This reasoning would nullify section 621 and would shift the burden of enforcing compliance with the Act from the Commission to the courts, cause intolerable delay and effectively negate enforcement of compliance with the statute.<sup>73</sup>

The Commission argued that section 604 should not be read in isolation, but rather in the context of the whole Act. In interpreting legislation, courts should not be guided by a single section of the statute but must look to provisions of the whole law and to its object and policy.<sup>74</sup> Using this principle of statutory construction, it is apparent that Congress intended that, without a court order, or written instructions from the consumer, the Commission should be provided reasonable access to consumer reports in order to determine compliance with the Fair Credit Reporting Act.

### *Civil Liability Under FCRA*

There is general agreement that sections 616 and 617 provide the injured consumer with more chance to be awarded damages than he had in most jurisdictions before the FCRA. Suits for defamation were generally thwarted by the doctrine of condi-

---

73. There is a proscription against construing a statute so as to give it a construction that would render it ineffective. *United States v. Blasius*, 397 F.2d 203, 206 (2d Cir. 1968), *cert. denied*, 396 U.S. 1008 (1970); *General Motors Acceptance Corp. v. Whisnutt*, 387 F.2d 774, 778 (5th Cir. 1968).

74. *Richards v. United States*, 396 U.S. 1, 11 (1962).

tional privilege, which allowed credit reporting agencies to publish defamatory information as a necessary part of their work. The injured consumer could succeed in a suit for damages only by showing that the agency had forfeited its conditional privilege by preparing a report in a malicious manner, or so recklessly as to constitute malice. Proof of negligence or of injury caused by a negligent misstatement on the part of the agency had generally been held to be insufficient grounds for recovery by the consumer.<sup>75</sup>

Under the FCRA, the consumer may succeed in a suit for damages by showing that the agency negligently failed to meet the standards of care imposed by the Act (that is, it did not follow "reasonable procedures to assure maximum possible accuracy of the information"<sup>76</sup>), and published an inaccurate report. Liability may also be imposed where the reporting agency negligently fails to assure that its reports are made to persons having proper authority to receive them, or negligently transmits obsolete information. Before passage of the FCRA, the reporting of an arrest ten years earlier, for example, would be privileged in a suit for defamation; under the FCRA, an agency that is negligent in not deleting that information would be technically liable.

However, placing the burden of proof of negligence on the consumer seriously weakens the provisions attaching liability to negligent noncompliance. While proving negligence should be less difficult than proving malice or its equivalent and should put less strain on courts that might look favorably upon a plaintiff's suit, there will still be substantial difficulties, if only because the requisite information is likely to be in the sole possession of the defendant. An additional problem is caused by the FCRA's requirement that no action "in the nature of defamation, invasion of privacy or negligence" may be brought based on information required to be disclosed under certain provisions of the statute except for those actions provided for in the statute.<sup>77</sup> It is unclear whether this means that actions for defamation, invasion of privacy and negligence *may* be brought under the FCRA or whether only actions for willful or negligent noncompliance may be brought under sections 616 and 617 of the FCRA and that other kinds of actions may be brought only if the information was not obtained under FCRA procedures.

In order to render the existing civil remedies more effective,

---

75. See Note, *Liability for Misstatements by Credit-Rating Agencies*, 43 VA. L. REV. 561, 563-67 (1957).

76. FCRA § 607(b), 15 U.S.C. § 1681e (1970).

77. FCRA § 610(e), 15 U.S.C. § 1681h(e) (1970).

it has been suggested that false reports should create a rebuttable presumption of negligence by the agency, to be overcome by demonstration of a reasonable effort to insure maximum possible accuracy of information.<sup>78</sup> Others have recommended that negligent or malicious publication of *misleading* information should also be acceptable grounds for recovery of damages, since such information can be as harmful as a false report.<sup>79</sup>

Clearly the type of civil actions allowed under the FCRA give consumer reporting agencies no real incentive to correct inaccuracies, since the amount of monetary damages suffered by the consumer (which will be roughly equivalent to the damages awarded in court) will generally be very small or nonexistent. In most cases the consumer will decide that he cannot afford to bring suit where his chances of recovery are slight and his anticipated damage award is small. Hence, a consumer reporting agency is seldom sued under the FCRA, and if brought to court is seldom forced to pay damages. In any event, under the present statutory scheme of liability, the reporting agency will end up paying less in actual damages than the cost required to effectively preserve accuracy and confidentiality. A more practical way to make consumer reporting agencies economically interested in following FCRA provisions is to establish a minimum recovery in all cases where the plaintiff establishes liability and hold reporting agencies liable for inaccuracies they reasonably should have discovered or for improper dissemination of information.

In sum, the current civil liability sections of the FCRA<sup>80</sup> do not appear to be an adequate deterrent to noncompliance. The chances of recovery of damages under the Act are sufficiently remote, and the amount of recovery so insignificant that private redress to date is virtually nonexistent. While awarding liquidated damages in a civil suit that seeks redress for violations of consumer protection statutes is often considered excessive by industry, the resultant degree of compliance is measureably enhanced when such damages are available. The obvious analogue is the Truth in Lending Act, where the minimum \$100 civil liability for noncompliance has, in this writer's view, been the primary impetus in promoting a relatively high degree of compliance and a substantial amount of private civil activity. Further, the threat of crippling class actions which have concerned creditors under the

---

78. Dart, *Arrest and Credit Records: Can the Right of Privacy Survive?*, 24 U. FLA. L. REV. 687, 689 (1972).

79. *Id.*; Comment, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035-45 (1971).

80. FCRA §§ 606(c), 610(e), 616, 617, 15 U.S.C. §§ 1681d(c), 1681h(e), 1681n, 1681o (1970).

Truth in Lending Act<sup>81</sup> cannot realistically be assumed to be present with the FCRA. As a rule, the nature of consumer reports and any resultant liability will differ substantially in the case of each consumer. If a class action could conceivably be maintained, the amount to be awarded, if any, would be determined by the court and any minimum damages provided for in the Act itself could not apply. However, for individual actions, the minimum liability approach is deemed essential by this writer to insure a high degree of compliance with the FCRA.

### *The Absence of Rulemaking*

The amendments first proposed by the FTC in July 1973 were designed to correct certain flaws in the FCRA which the Commission was able to identify to that date. Yet no one is in a position to know what additional improvements are necessary until consumers have had the full opportunity to avail themselves of the proposed improvements—that is, the right to know both the reason for a user's adverse action and exactly what is in a reporting agency's file. After a reasonable period of operating under an amended Act that adequately affords these basic protections, the enforcement agency will be better able to determine whether the obligations of reporters and users require further legislative action. For example, there have been no recommendations concerning a consumer reporting agency's obligations to keep its files reasonably current. Presently, no express requirement exists. There have been no recommendations on improving the provisions dealing with disputing, reinvestigating and correcting challenged information<sup>82</sup> because of an inadequate opportunity to observe the manner of compliance with those sections. For instance, the Act affords the consumer the opportunity to insert in his file his version of any dispute, but there is no express requirement that the consumer be *told* that he has that right.<sup>83</sup>

While additional improvements may be proposed, if enforcement experience dictates that the need exists, expressly delegating to the Commission implementing rulemaking authority would materially enhance the Commission's enforcement capability in the consumer reporting area.<sup>84</sup> Although the Commission main-

---

81. The threat of class actions may have been minimized by the recent decision in *Eisen v. Carlisle & Jacquelin*, 94 S. Ct. 2140 (1974).

82. FCRA §§ 611-14, 15 U.S.C. §§ 1681i-1681l (1970).

83. See FCRA § 611(b), (c), 15 U.S.C. § 1681i(b), (c) (1970).

84. Compare the rulemaking power of the Federal Reserve Board under the Truth in Lending Act (15 U.S.C. §§ 1601-65 (1970)) which gives the Board general authority to promulgate regulations. This authority of the Federal Reserve Board has been upheld in the courts. See, e.g., *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356 (1973).

tains that it has inherent rulemaking power to define unfair or deceptive trade practices generally,<sup>85</sup> in the specific area of consumer reporting, the issue is clouded by the legislative history referred to earlier.<sup>86</sup>

### *The Trend Toward Reform*

During the first two years of experience with the FCRA there was little or no public concern about the Act's shortcomings. A few law review articles appeared<sup>87</sup> but there were no congressional hearings, government reports<sup>88</sup> or significant state statutes.<sup>89</sup>

During 1973, however, several independent activities indicated a clear trend away from accepting the *status quo* in the regulation of consumer reporting. For the first time a state statute was enacted which expressly granted the subject of a consumer report the right to a copy of that report.<sup>90</sup> In Canada, a sweeping consumer reporting law was passed to afford residents of Ontario more comprehensive rights than those granted in the FCRA, including the right to a copy of the information on file.<sup>91</sup>

An advisory committee to the Secretary of the Department of Health, Education and Welfare released a report in July of 1973 commending the FCRA as constituting "a strong precedent" for the extensive Code of Fair Information Practice recommended by that committee.<sup>92</sup> However, to "achieve the objectives of the Fair Credit Reporting Act more fully," the committee recommended that the Act be amended to provide the consumer with the right

---

85. The Commission's rulemaking authority has recently been upheld by the District of Columbia Court of Appeals in *National Petroleum Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), *appeal denied*, 42 U.S.L.W. 3482 (U.S. Feb. 25, 1974).

86. See note 43 *supra*.

87. E.g., King, *The Impact of the Fair Credit Reporting Act*, 50 N.C. L. REV. 852, 872 (1972); Note, *The Fair Credit Reporting Act*, 23 ME. L. REV. 253, 256 (1971); Note, *The Fair Credit Reporting Act*, 56 MINN. L. REV. 819, 829 (1971); Note, *Protecting Privacy in Credit Reporting*, 24 STAN. L. REV. 550 (1972); Comment, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035 (1971).

88. THE REPORT OF THE NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES (Dec. 1972), mentioned the FCRA only in passing at pages 212-13. In connection with comments on EFTS (electronic funds transfer system) the NCCF concluded, "Any law or action or inaction by industry that impedes these flows [of adequate credit information] also lowers the availability of credit and raises its price to consumers." *Id.* at 213.

89. See note 12 *supra*.

90. N.H. STAT. ANN. ch. 359-B:9 III(a) (Supp. 1973). The New Hampshire law has gone largely unnoticed except by the consumer reporting industry.

91. The Consumer Reporting Act, enacted October 30, 1973.

92. Advisory Comm. on Automated Personal Data Systems, *Records, Computers and the Rights of Citizens* 69 (HEW Pub. No. (s)-73-94, July 1973).

to personally inspect his record, copy its contents, or have copies made. "The choice between inspecting and copying should be left to the individual, and any charge for having copies made should be minimal."<sup>93</sup> The report further recommended that the present FCRA exceptions from disclosure to the consumer of medical information and sources of investigative information should be omitted. Although the definition of "consumer reporting agency" found in section 603(f) of the FCRA is broad enough to include some organizations that customarily store medical information, "nothing in the Act should warrant the inference that every type of consumer reporting agency may, with impunity, conceal from an individual the fact that it is gathering, recording and reporting medical information about him."<sup>94</sup> The committee concluded its discussion of the FCRA with the general statement that it finds "no strong societal interest in having an individual routinely denied credit, insurance or employment on the basis of information provided by any source that must be kept secret from him."<sup>95</sup> Another notable event since enactment of FCRA was passage of the Crime Control Act of 1973 granting individuals full access to their criminal records, including the right to challenge any information deemed inaccurate or incomplete.<sup>96</sup>

Hearings on Senate Bill 2360 were conducted for one week during October 1973 by the Senate Consumer Credit Subcommittee. During these hearings virtually unanimous industry opposition was presented,<sup>97</sup> along with testimony supportive of the legislation by two government agencies and several other witnesses.<sup>98</sup> On November 27, 1973, by a vote of 4-2, the subcommittee decided to table the matter without further action. The reasons stated can be summarized as follows: (a) the FTC had not documented the alleged inadequacies to the satisfaction of certain members; (b) two years was an inadequate period of time within

---

93. *Id.* at 70.

94. *Id.*

95. *Id.* at 71.

96. Section 524(b) of the Crime Control Act of 1973, tit. I, 87 Stat. 197, amending 42 U.S.C. § 3701 *et seq.* (1970) (The Omnibus Crime Control and Safe Streets Act of 1968).

97. Testifying against S. 2360 were: American Bankers Assn.; American Life Insurance Assn.; American Petroleum Credit Assn.; American Retail Federation; Associated Credit Bureaus, Inc.; Commercial Services, Inc.; Consumers Bankers Assn.; Independent Credit Bureau Managers, Inc.; International Consumer Credit Assn.; National Consumer Finance Assn.; and, National Retail Merchants Assn.

98. Supporting the legislation were the American Civil Liberties Union; Federal Deposit Insurance Corporation; Federal Trade Commission; Senator Edward Kennedy; and, Professor Arthur R. Miller of Harvard University School of Law, among others.

which to fairly test the existing statute; (c) the number of consumer complaints received by the FTC was not a convincing outpouring of consumer dissatisfaction with the FCRA, and (d) the FTC proposed amendments were anti-consumer because, if adopted, they would substantially increase the cost of consumer reports and make credit and insurance less available, particularly to low income consumers.

During 1974 the trend of dissatisfaction with the current state of affairs in consumer reporting and related areas is expected to continue. A Senate committee is now considering introducing legislation which will open government personnel files to its employees,<sup>99</sup> several states are considering the adoption of expanded versions of the FCRA<sup>100</sup> because of the view of some legislators that more protection is needed for their constituents, and reconsideration of Senate Bill 2360 is a definite possibility. In the House of Representatives, Congresswoman Sullivan is at this writing considering the introduction of an omnibus bill which would substantially amend the Consumer Credit Protection Act of 1968 (Title I of which is the Truth in Lending Act and Title VI of which is the FCRA). It is possible that such a bill would incorporate many of the FTC-proposed amendments now found in Senate Bill 2360.

Finally, for the first time in this writer's memory, the President's annual State of the Union message made consumer reporting a specific matter of national priority. On January 30, 1974, the President told the nation:

One measure of a truly free society is the vigor with which it protects the liberties of its individual citizens. As technology has advanced in America, it has increasingly encroached on one of those liberties, what I term the right of personal privacy. Modern information systems, data, banks, credit records, mailing list abuses, electronic snooping, the collection of personal data for one purpose that may be used for another—all these have left millions of Americans deeply concerned by the privacy they cherish.

And the time has come, therefore, for a major initiative to define the nature and extent of the basic rights of privacy and to erect new safeguards to insure that those rights are respected.

I shall launch such an effort this year at the highest

---

99. See H.R. 10042 and H.R. 11275, 93rd Cong., 1st Sess. (1973), entitled *Code of Fair Information Practices of 1973*, introduced by Representative Barry M. Goldwater, Jr. (H.R. 10042 reported in 119 CONG. REC. 7582 (1973); H.R. 11275 reported in 119 CONG. REC. 9639 (1973)).

100. Florida and Washington are currently considering proposed legislation which would go beyond the FCRA and basically parallel S. 2360.

levels of the Administration, and I look forward again to working with this Congress and establishing a new set of standards that respect the legitimate needs of society but that also recognize personal privacy as a cardinal principle of American liberty.<sup>101</sup>

The President followed this statement with the announcement on February 23, 1974 of the establishment in the White House of a Domestic Council Committee on the Right of Privacy, chaired by Vice President Ford. One of the key areas the committee will examine is the procedure which permits citizens to inspect and correct information held by public or private organizations.

### CONCLUSION

The Fair Credit Reporting Act was enacted by Congress for the purpose of affording real protection to consumers about whom reports are made, while regulating the reporting industry with a minimum of disruption and increase in costs. The FCRA has not been effective in correcting certain abuses or changing certain practices largely because these problems were not considered or known at the time of enactment. The reporting activities of government were virtually excluded. The fundamental differences between credit or insurance users and employment uses were not explored. The many uses to which consumer reports are put, beyond those of credit, insurance and employment, were not carefully contemplated. In spite of these shortcomings, there is no need to scrap the Fair Credit Reporting Act, although the word "credit" in its name seems to perpetuate the unwarranted limited scope of the legislation. The Act can and should serve as the vehicle whereby Congress enunciates a comprehensive standard of public policy in the broad area of "consumer reporting."

Additionally, there is no valid basis for considering private consumer reporting in the FCRA and treating government reporting in a wholly separate bill. Does it matter to the consumer whether it is a private or public entity that is infringing upon his right to privacy or upon his legitimate right to know who is collecting and furnishing information, and what that information is? Certainly government should not be free to follow a lower standard of fairness and access than the private sector.

The framework for comprehensive legislation in the entire consumer reporting area already exists. The Fair Credit Reporting Act should be renamed the Fair Consumer Reporting Act and extended to insure that the following basic rights are accorded to every citizen:

---

101. Richard M. Nixon, *State of the Union Message*, N.Y. Times, Jan. 31, 1974, at 20, col. 4.



1. Full and complete access to and, if desired, a copy of any and all information collected by the private or public sector, with the exception of certain law enforcement and national security investigations;
2. Comprehensive notice, including a copy of the information, whenever any user takes any adverse action on the basis of consumer reporting information;
3. The obtaining of clear authorization from the subject before any personal investigation is undertaken;
4. Notification to the consumer before a personal report is furnished for employment purposes; and
5. Sufficient civil liability exposure for user and reporter so as to constitute a reasonable deterrent to noncompliance.

The Fair Credit Reporting Act is presently an ineffective and incomplete attempt at reform, but it represents a truly significant beginning in the development of legislation to insure to every citizen the fundamental protections to which he is entitled. If the Act's current provisions are modified to correct the inadequacies discussed above, and extended to afford protection in the area commonly referred to as "automated personal data systems"—whether or not operated or supported by government—real reform in consumer reporting will be achieved.